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From Legare to Morelli: the prioritization of privacy

By Orlagh O'Kelly

Cases Considered:

R. v. Legare, 2009 SCC 56;
R. v. Morelli, 2010 SCC 8

A few months ago, the Supreme Court of Canada ordered the retrial of an Alberta man acquitted on the criminal offence of luring a child contrary to s.172.1(1)(c) of the *Criminal Code*, R.S.C. 1985, c. C-46 in *R. v. Legare*, 2009 SCC 56. Writing for a unanimous Court, Justice Morris Fish rejected the trial judge's unduly restrictive construction of the offence. Instead, the offence was classified as "inchoate" (at para. 25), making it unnecessary to recast the elements into the traditional compartments of *mens rea* and *actus reus*. The Court held that the offence of luring requires proof that the accused had the subjective intention to facilitate (not to commit) a secondary offence and that intention need not be objectively capable of facilitating the offence. The judgment gave teeth to the remedial provision designed to combat the risks of sexual exploitation of children through the Internet. Engaging in two sexually explicit chats with a 12 year old girl may be enough to establish that the accused communicated by computer for the purpose of facilitating sexual touching.

Conversely, on March 19, 2010, in *R. v. Morelli*, 2010 SCC 8, the Court took an unduly restrictive approach to the *Code*'s child pornography provisions. Justice Fish, writing for the majority, acquitted a man who was charged with possession of child pornography contrary to s. 163.1(4) of the *Code* when a *Charter* violation was found to warrant the exclusion of evidence key to proving the offence. In a blog post on thecourt.ca, James Yap speculated about the reasons for this about-face approach to another offence – like the luring provision – intended for the protection of children. Yap suggested that the Court was attempting to give effect to the legislative intention behind the luring provision in *Legare*, whereas this factor was not in play in *Morelli*. He further speculated that "perhaps this is all explained simply by our current Court's penchant for swinging one way before swinging the other."

In my opinion, there was one distinguishing feature in the *Morelli* case: the fact that the privacy interest in one's home was at issue. A reasonable expectation of privacy is embodied in section 8 of the *Charter*, which provides the "right to be secure against unreasonable search and seizure" (see *Hunter et al v. Southam Inc.*, [1984] 2 S.C.R. 145). Privacy is, in my view, ranked unduly high in the hierarchy of Canadian *Charter* rights by the courts (see e.g. *R. v. Harrison*, 2009 SCC

34). And in *Morelli,* society's interest in privacy came head to head with society's interest in the protection of children.

Background

There are countless legal issues surrounding the sexual exploitation of children through the Internet. In the United States, *The Economist* recently reported that a man in possession of "manga" – animated Japanese child porn – was sentenced to six months in prison. In Canada, such pornography is also illegal because it falls outside an exception read in by the Supreme Court in *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2, which holds that imaginary child pornography is constitutionally protected only if it is self created and for private use. The *New York Times* recently reported that a young woman who had been the victim in the child pornography "Misty series" is seeking $3.4 million dollars in damages. Such monetary compensation, although incapable of providing restitution for the harm done, may also be available in Canada if precedents dealing with damages for child sexual abuse are seen as analogous (see e.g. *M.(K.)* v. *M.(H.),* [1992] 3 S.C.R.).

However, legal remedies have failed to halt the use of the Internet to harm children. As Justice Fish stated in *Legare*, "(t)he Internet is an open door to knowledge, entertainment, communication -- *and exploitation*" (at para.1, emphasis in original). Child pornography is a particularly open door. It is virtually impossible to obtain anywhere other than the Internet, where it is available in abundance. According to a paper prepared by Statistics Canada on the problem of child luring, pornographic images are shared by pedophiles via the Internet every day.

These Internet exchanges allow offenders to remain anonymous and the victims to become ubiquitous, amplifying the power imbalance and making the potential effects of exploitation in the digital age limitless. The child's rights to privacy, security of the person and human dignity are indefinitely taken away through viewing, producing and disseminating online child pornography. Considering this situation, Parliament enacted section 163.1 under the *Code's* obscenity laws to reduce the risk of harm to children. Section 163.1 criminalizes the making, distribution, possession, and accessing of child pornography.

The *Morelli* case

In *Morelli*, the enforcement of section 163.1 and, in particular, the constitutionality of a search warrant were at issue. The warrant was primarily based on a computer technician's visit to the accused's home to install a high-speed internet connection. On September 5, 2002, he saw child pornography links to sites labeled "Lolita Porn" and "Lolita XXX" in the "favourites" list on the accused's web browser. These links, along with the surprised look on the accused's face when he arrived on the scene, a webcam attached to a VCR pointing at a children's play area, and the reformatting of the hard drive by the accused the following day, caused the technician to contact a social worker and eventually the police on November 18, 2002. A search warrant was granted and the search took place on January 10, 2003. The accused was subsequently charged with

possession of child pornography after authorities found pornographic images of children stored on digital media in his possession.

The appeal at the Supreme Court turned on whether the accused's right to privacy was violated by an invalid search warrant. McLachlin C.J. and Binnie, Abella and Fish JJ. found a violation of section 8 of the *Charter* because in their view, the police did not have reasonable and probable grounds to conduct a search of the accused's computer. In particular, the majority found that the police did not have reasonable grounds to believe that evidence of possession of child pornography would in fact be found on the computer. They further held that the evidence should be excluded under section 24(2) of the *Charter*. Justices Deschamps, Charron, and Rothstein wrote a strong dissent, which found that there had been reasonable grounds for the search and that there was no violation of section 8 of the *Charter*. It was therefore unnecessary to consider the exclusion of evidence under section 24 (2) of the *Charter*.

Analysis

If nothing else, the 4-3 split of the Court indicates that reasonable people could disagree on the interpretation of the constitutionality of the warrant in the circumstances of the case.

The determinative factor for the majority was that the information to obtain the search warrant (ITO) did not contain reasonable and probable grounds to search for the offence of *possessing* child pornography. According to the test outlined by the majority, one must "*knowingly acquire the underlying data files and store them in a place under one's control*" in order to meet the definition of possession (at para. 66, emphasis in original). Without an image file, a visual display is not enough (at para. 24). The listing of websites in "favourites" on the accused's computer was not found to be sufficient to establish the requisite control for possession in *Morelli*. Had the ITO been drafted in relation to the offence of *accessing* under section 163.1(4.2) of the *Code*, the search warrant would have been legal under the *Code* and the *Charter* (at para. 64).

There are two major concerns with this interpretation, as noted by the dissenting judges. First, the majority seemed to require that the standard of proof for *guilt* of possession (namely beyond a reasonable doubt), which is a distinct issue from requiring the *reasonable and probable grounds* for a search warrant for the offence of possession. Justice Deschamps noted at para. 132:

> We are not asked to determine whether the evidence is sufficient to establish guilt. What is at issue is "whether there was any basis upon which the authorizing judge could be satisfied that the relevant statutory preconditions existed": *R. v. Pires*, 2005 SCC 66, [2005] 3 S.C.R. 343, at para. 30.

Second, the implications of this interpretation render the concept of *constructive* possession virtually inapplicable in cases involving the Internet (at para. 145 per Justice Deschamps).

Admittedly, if there was not enough information to establish reasonable grounds for possession, it is a sensible proposition that the courts should not bend the *Code*'s provisions where there was another offence that clearly could have been used to obtain a warrant. However, the majority went a few steps further in affirming the paramountcy of privacy under the *Charter*.

First, Justice Fish's interpretation of the ITO implied that the privacy interest in the home and one's personal computer is so great, that the reasonable and probable grounds to obtain a search warrant must be *very* reasonable and *very* probable (at para. 40). For instance, in order to establish reasonable grounds for a search warrant, the leading authority requires that there must be a probability that evidence may be uncovered by the search (*Hunter v. Southam*, *supra* at p. 167). *Morelli* required something more. The majority required that evidence of possession would be found, whereas the dissent required that the evidence could be found (at para.128). From my understanding of the majority judgment, the reformatting of the hard drive by the accused negated the grounds for the ITO because the evidence would not in fact be found inside the computer (at para. 68). Neither the police officers' statements about these types of offenders, nor the technical capabilities of retrieving information on computers was enough to alter this finding.

Second, the majority judgment took a very restrictive interpretation of the ITO. Justice Fish examined each component of the ITO in exclusion to the others. For instance, the warrant was considered misleading because it failed to mention the fact that the child was the accused's daughter and that he lived with his wife (perpetuating a myth that child pornography cannot be made within the privacy of a family). From this fact, Justice Fish inferred that the accused could have been taping his "young daughter at play for posterity's sake" (at para 56). The determination about the significance of the presence of the camera made by the technician, the justice of the peace and three Supreme Court judges was thus impermissible (at para 118).

This example demonstrates that the majority's interpretation failed to acknowledge the hazards in drawing factual conclusions through inferences. The interpretation of reasonable and probable grounds, in particular, depends on context and context varies depending on the interpreter and his or her perspective (see e.g. *R. v. Seaboyer; R. v. Gayme*, [1991] 2 S.C.R. 577). Here, Justice Fish stripped the ITO "of defects and deficiencies"(such as the mention of the webcam) and found that the only reasonable and probable grounds left were two Internet links (at para. 5).

On the other hand, while the information provided was not perfect, the dissent highlighted the overall circumstances beyond the two links. In particular, Justice Deschamps took a contextual analysis of the information provided by the technician. Upon arriving at the accused's home, the technician took note of two child pornography links in the accused's "favourites" taskbar, a graphic pornographic image on the accused's browser, the accused's behaviour of acting surprised, the accused's deliberate act of reformatting the hard drive the following day, the presence of a webcam pointing at a child's play area and linked to a videotape recorder, and the presence of unlabelled and labeled videotapes. Any one factor taken separately would not be enough for the ITO, but taken together the dissent found that the information provided reasonable grounds to believe that evidence of the crime could be found on the accused's computer. The dissent also found that the police officers' statements on the propensity of child

pornographers to store images had probative value and were relevant to the issuance of a warrant even 4 months after the technician's visit (at paras. 157- 167). It was not necessary to qualify the police officers as expert witnesses because "the positions the officers held in their respective forces was sufficient to support a conclusion that their statements had sufficient probative value" (at para. 163). Interpreted in this manner, it seems reasonable to conclude that the authorizing judge did not err in issuing the warrant on this information.

Third, the majority approach unduly prioritized the privacy interests of the accused. Justice Fish stated, "it is difficult to imagine a search more intrusive, extensive, or invasive of one's privacy than the search and seizure of a personal computer" (at para 2). Upon simple reflection, it is easy to imagine a more intrusive search - a public search of one's anal cavity (see *R. v. Golden*, 2001 SCC 83, [2001] 3 S.C.R. 679). Further, the above statement seems to ignore jurisprudence holding that the concept of privacy cuts two ways in child pornography cases:

> We recognize that privacy is an important value underlying the right to be free from unreasonable search and seizure and the right to liberty. However, the privacy of those who possess child pornography is not the only interest at stake in this appeal. The privacy interests of those children who pose for child pornography are engaged by the fact that a permanent record of their sexual exploitation is produced. (*R. v. Sharpe*, *supra* at para 189)

It is difficult to imagine a more intrusive violation of a right to privacy than having dehumanizing images of one's self on the World Wide Web. Further, the jurisprudence notes that rights in addition to privacy are at stake in such cases:

> The very existence of child pornography, as it is defined by s. 163.1(1) of the *Criminal Code*, is inherently harmful to children and to society. This harm exists independently of dissemination or any risk of dissemination and flows directly from the existence of the pornographic representations, which on their own violate the dignity and equality rights of children. (*Sharpe*, *supra* at para. 158)

However, the majority in *Morelli* seemed to undermine the other interests at stake by suggesting they drew a "strong emotional response" rather than acknowledging them as legal rights deserving of protection (at para 8). In doing so, the Court implied that they are irrelevant considerations to the legal analysis.

By unduly prioritizing the privacy of accused persons, the majority in *Morelli* also shifted the emphasis in the analysis required to exclude evidence under section 24(2) of the *Charter*. The majority applied last summer's decision in *R. v. Grant,* 2009 SCC 32, to determine whether evidence obtained through the illegal search would be excluded. The test requires the court to assess and balance the effect of admitting the evidence on society's confidence in the justice system, with regard to three factors: (1) the seriousness of the *Charter*-infringing state conduct, (2) the impact of the breach on the *Charter*-protected interests of the accused and (3) society's interest in the adjudication of the case on its merits (*Grant* at para. 71).

Although the majority reluctantly accepted the trial judge's determination that there was no deliberate misconduct on the part of the police officer drafting the ITO (at para. 103), the evidence was excluded because of the impact on the accused's *Charter*-protected rights. Justice Fish found that the privacy interest in a personal computer was paramount, containing, among other information, our specific hobbies and personal correspondences. He noted – again – that it is "difficult to conceive a section 8 breach with greater impact" (at para. 105).

The majority failed to acknowledge that just as "admission may send the message that individual rights count for little" (*Grant* at para 71), there is a message sent by exclusion. Even though *Grant* required that the court consider the impact of "*failing to admit* the evidence" (at para. 79), the majority in *Morelli* at no point considered the impact on the child's right to privacy by *failing to admit* evidence. The majority only considered the effect on the long term repute of the administration of justice in relation to the public's interest in privacy (at para.111). The *Charter* is not meant to be an instrument that furthers the interests of better situated individuals (see *R v. Edwards Books and Art Ltd*., [1986] 2 S.C.R. 713, at p. 779). However, the majority seems to have created a hierarchy whereby the individual rights of the accused, protected in sections 8 and 24(2) of the *Charter*, are given interpretive favour over the rights delineated in *Sharpe*, *supra*. The majority in *Morelli* wrote: "(j)ustice is blind in the sense that it pays no heed to the social status or personal characteristics of the litigants"(at para 110). If this is indeed true, justice, the *Charter* and the wording of section 24(2) should also be alive to the delicate balancing and nuance of interests required in a free and democratic society.

Conclusion

Privacy is a laudable goal, but it has also been the justification for the state's failure to protect those most vulnerable in society. Privacy in the family has left many women without legal recourse in domestic violence situations. Today, in some distinct cases, the state has business in the nation's bedrooms. Child pornography is one of these cases. Yet in *Morelli*, a majority of the Supreme Court favoured an approach where privacy trumps security of the person. The right of a child to be free of sexual exploitation is subsumed to the privacy and liberty interests of the accused (in this case the accused would have been subject to eighteen months of house arrest).

The majority judgment did not explain why the rights of the accused were given interpretive favour, although one can speculate. The violation of the child's right to security of the person is no longer temporally relevant in law because it occurred in the near or distant past (although the violation of their privacy rights continues). The child's liberty is only *vis a vis* a powerful adult, as opposed to the accused's liberty *vis a vis* the state. The accused is not the real culprit because he merely viewed the child pornography, with no mention of his role in the creation of the market necessary for the production of child pornography.

To be sure, the right of every individual in a free and democratic society to be free from unreasonable search and seizure is important. However, the protection of children's rights should be an inherent part of our legal system as well. The most vulnerable members of our

society need the law to speak on their behalf when their voices are unheard. If our highest Court leaves police officers with such a stringent standard and the courts with such a mechanistic interpretation, who will protect our children?

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