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A Look Down the Road Taken by the Supreme Court of Canada in *R v Mills*

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Case Commented On: *R v Mills*, 2019 SCC 22

Perhaps we, in the legal world, should not have been surprised by *R v Mills*, 2019 SCC 22, the most recent decision on privacy and the application of that concept in the s. 8 *Charter* regime. When it comes to Supreme Court decisions, we tend to dispense with the facts in favour of the principles, but *Mills* reminds us, facts do still matter in our highest court. Factually, pragmatically, and contextually, we understand that the investigative technique used in *Mills* simply needs to work. But in the name of principle, precedence, and visionary reach, *Mills* leaves us wondering. To throw even more dust into the eyes, overlaid on the decision is confusion. The seven-panel decision is fractured, leaving us to count on our fingers who agrees with who to manage some sort of majority decision. In the end, the numeric tally does not really matter. This is a new kind of Supreme Court where everyone agrees in the outcome but how they get there leads us onto the road "less travelled" or to update the metaphor, leads us through the web of internet connections less surfed. Or does it? *Mills* may be surprising but not unpredictable. It may also be just another decision exploring the reach of privacy in our everyday world and therefore part of the narrative, not the last word.

I have already suggested the facts matter and they do. Mills was charged with offences, colloquially described as internet child luring offences. Through the medium of social network, luring does become decidedly lurid as sexually explicit messages and pictures are sent to entice children. In *Mills*, the contact with fourteen-year old "Leann" led to the "in person" meeting, which ended in the arrest. All seemingly run of the mill, so to speak. But what "made all the difference" in this case is the reality of "Leann" as a false identity for a police officer. In many ways, this investigative technique is no different than many other undercover operations such as police posing as sex workers or drug dealers. But what makes this technique unique is the manner in which the investigation was done. By filtering the technique through internet wires, the relationship possibly becomes a "private communication" attracting s. 8 *Charter* interest. At the core of this argument lies the "ghost in the wires" and whether there is a reasonable expectation of privacy in this type of internet communications.

I say "this type" of "communication" because of the decision in *R v Marakah*, 2017 SCC 59. There, the majority viewed text messaging between potential drug dealers as a private communication. Stripped of the bad personhood attached to that messaging, the majority called out the relationship engendered by such communication as attracting a reasonable expectation of privacy. Like the "reasonable hypothetical offender" (See e.g. *R v Morrisey*, 2000 SCC 39 at para 2) or, to use the new age term, "reasonably foreseeable applications" (See *R v Morrison*, 2019 SCC 15 at para 170) used in s. 12 analysis, the messages become a statement of content neutrality (See *Mills* at paras 25, 110, 117–122). There is no value judgment placed on

Marakah's bad choice of friends or even worse, his bad judgment to deal drugs. Instead, the focus is on fostering relationships, as in the law of privilege, and what it takes to protect and maintain private relationships in the context of law enforcement. In this way, the concept of communication as relationship-building is further explored in s. 8 through the relationships we see ourselves having with the state.

Interestingly, the dissent in *Marakah* held onto the hard focus of hardware by emphasizing the container in which the communications were residing (at para 151). This view is an easy extension from previous s. 8 case law including the majority in *R v Fearon*, 2014 SCC 77, viewing the search and seizure or rather, as in the case of digital devices, the seizure and search of the device as the key to the analysis. However, this perspective failed to recognize the pervasiveness of the privacy issue throughout all aspects of s. 8. From standing to s. 24(2) exclusion, reasonable expectation of privacy creates the *Charter* space for the s. 8 discussion. Unsurprisingly, *Mills* does not step back into the container as the analytical driver of the decision. Instead, it is the meaning of relationships, which creates the patchwork of decisions in *Mills*.

Yet *Mills* does not just define relationships worthy of s. 8 protection. Nor does the decision define relationships in a vacuum. Rather it defines relationships in the context of the normative standard embedded into the reasonable expectation of privacy analysis. In *R v Reeves*, 2018 SCC 56, Justice Karakatsanis, at paragraph 41, touted the "normative, not descriptive" standard as the overarching theme of s. 8 to acknowledge what we in the cyberworld already knew – that electronic conversations are human not machine directed. Instead of this free-floating concept of human relations, the majority in *Mills* takes this chimerical-like quality of normativeness and pins it squarely onto the *Criminal Code*. Just as the criminal law reflects our fundamental values by underlining those acts worthy of moral approbation through just sanctioning, so too does the normative quality of s. 8 reflect the morally based vision of a safe law-abiding society.

In *Mills*, the Supreme Court is not navel gazing or conducting blue sky visioning. In *Mills*, the majority looks directly at the conduct in question, no neutrality here, and sees the so-called relationship between a child "stranger" and a criminally-minded adult as unworthy of protection. Section 8 is not a shield; it is not the "happy place" where we are free from state intervention, and it is certainly not the private place where we can propagate illegal conduct to our hearts' content. Yet, this normative view does not take away from the shades of privacy previously recognized by the Supreme Court. As in *R v Jarvis*, 2019 SCC 10, privacy has a universal meaning. In this way, a relationship stylized by the manner of communication or defined by a space where privacy ebbs and flows, what will be protected through s. 8 is deeply contextualized. This is vertical contextualization, in which the Court drills down deeply through the stakeholders' strata. The "totality of the circumstances" is viewed not just through the accused's lens, not just through the perspective of the victims, but also through the community's sense of justice. As in other Supreme Court decisions, where the public interest shares space with individual rights (See e.g. *R v Jordan*, 2016 SCC 27 at para 25) normativeness involves collectiveness.

Nevertheless, rejecting the *Mills* scenario as *Charter* worthy still keeps the s. 8 conversation alive. True, in essentials, *Mills* is about what is not a privacy right under s. 8. Yet, the decision

also provides the contours for what is or possibly still could be engaged by s. 8. For instance, the intersection of electronic communications and Part VI interceptions of that communication is still very much in issue. From the pseudo-majority of Justice Brown to the pseudo-majority of Justice Karakatsanis (I say "pseudo" as Justice Moldaver concurs with both decisions making both majority judgments worthy) including the minority view of Justice Martin, the presence of surveillance becomes the indicator of interception. For the majority, surveillance is decidedly old-school involving state authorities who are outside of but looking *into* the private lives of citizens, whilst Justice Martin flattens out surveillance as the state, no matter where placed, looking *at* citizens, no matter where located. Certainly, Justice Martin's description is more attune with the Internet of Things and the connectivity we all now experience in which no-one knows who is watching whom. To distill the differing viewpoints on the issue, this is "watching" versus "intruding." Of course, since *Hunter v Southam*, [1984] 2 SCR 145 and the s. 8 textual conventions since that decision speak of state intrusion. Watching, on the other hand, is much more insidious, much more powerful, and of much more concern to the community sense of justice.

Another issue unresolved by *Mills* is the *Charter* applicability in the transitional grey area between state intrusion to state participation. If s. 8 of the *Charter* is not concerned with investigatory techniques in which the state initiates a conduit for enforcement, then when does s. 8 become relevant? This is where previous case decisions provide no clear answer. To see this obfuscation, we need to look the intersection of two scenarios. One scenario focuses on third party consent while the other engages the *Mills* situation emphasizes when state intrusion is used, without prior judicial authorization, for the purpose of implementing an investigative technique.

Third party consent is not novel. Like reasonable expectation of privacy, third party consent can impact all stages of the s. 8 analysis. It impacts standing issues through the measurement of control. It impacts whether state authorities have lawful authority to seize and access an electronic device belonging to the accused or a third party. Just as privacy is not an "all or nothing" concept (*R v Jarvis*, 2019 SCC 10 at para 61), neither is third party consent (See *R v Cole*, 2012 SCC 53). People share ideas, homes and hearts. People can too share control and authority over an object or a conversation. *Mills* distinguishes the state as initiator of the private communication from the state as intervenor into a private communication despite consent from a third party. There is still *Charter* room in the shared conversational space where a third party is involved be it the concerned family member who hands over a device or the individual participating in the communication.

Mills permits the state actor to be whomsoever they need to be for investigative purposes but also as the initiator of the ruse. The decision leaves open the scenario where the concerned or involved third party hands over a device and the state authorities continue the conversation under the cover of the true participant of the communication. Here, there is still an intervention or a looking into a communication albeit through the eyes of the known recipient. There is a relationship, however the majority or minority defines it. Even if the original participant consents, *Mills* does not pronounce on the efficacy of that unauthorized intervention. This means, in Supreme Court terms, that we can expect more decisions on the issue.
You may have noticed that I referenced in my opening paragraph a much-loved poem by Robert Frost, "The Road Not Taken." The poem is famous for symbolizing life's choices and where

they may or may not take us. In fact, that is not what the poem is about despite our ubiquitous reference to it as a life changing or even life affirming metaphor. When read carefully, the poem suggests we misread our life decisions. "Ages and ages hence" we will tell a tale of how we stood on the brink and choose a more challenging life journey. Yet, in actual fact, there was no such life altering choice to be made at the time as the roads "equally lay" "just as fair." Perhaps the same can be said of the *Mills* decision. The decision does not take us down a road that makes "all the difference" but through the same interconnectivity of privacy ideas we already have before us. 'Same but different' may be an apt description of this decision and other recent Supreme Court rulings. Indeed, the fractured decision best mirrors who we are as a society, which is far from cohesive or uniform.

We are presently very much at the crossroads of privacy and in the criss-crossing wires of the Internet of Things. There is an element of uncertainty as we stand at that intersection. But uncertainty may not be such a bad or scary prospect. Looked at with eyes wide open we can assess the potentialities of s. 8 and see perhaps through the differing perspectives of *Mills* a way forward taking with us a vision of who we want to be.

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