S.C.C. FILE NO. 38304

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF ONTARIO)

BETWEEN:

LANDON WILLIAMS

APPELLANT
(Respondent/Appellant in cross appeal)

- and -

HER MAJESTY THE QUEEN

RESPONDENT
(Appellant/Respondent in cross-appeal)

S.C.C. FILE NO. 38165

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF ONTARIO)

BETWEEN:

JAVID AHMAD

APPELLANT
(Appellant)

- and -

HER MAJESTY THE QUEEN

RESPONDENT
(Respondent)

FACTUM OF THE INTERVENER BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

(Rule 42 of the *Rules of the Supreme Court of Canada)*

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PART I – OVERVIEW

1. The two appeals herein engage with the *bona fide* inquiry exception of entrapment as it applies to "dial-a-dope" investigations by police. The question on which the BCCLA intervenes is posed by each of the Appellants: what grounds are required with respect to a particular phone number before police can offer the person answering the phone an opportunity to commit a crime?

2. BCCLA first engages in an inquiry into the nature of one of the rationales for the doctrine of entrapment: the interest in being left alone. BCCLA submits that a richer understanding of this protected interest is warranted, and suggests a more fulsome analysis of the way in which the interest is engaged, especially in light of the advances in technology that have occurred since *Mack* and *Barnes*.[1] With a more nuanced grasp on the importance of this protected interest, BCCLA hopes to assist the Court in assessing the need for a stringent grounds requirement in the *bona fide* inquiry analysis.

3. BCCLA then focuses on the practical application of the *bona fide* inquiry outside of the dial-a-dope context, looking to cases where expansive geographical and virtual "locations" have been identified as the subject of *bona fide* investigations. These cases suggest an overemphasis on the state's interest in repressing crime, where location-based reasonable suspicion has been relied on to grant the police broad powers to approach vast numbers of people and offer them the opportunity to commit a crime. BCCLA submits that given this concern with the *bona fide* inquiry exception, and the importance of the protected interest, a heightened standard of reasonable and probable grounds is appropriate. At minimum, a rigorous assessment of reasonable suspicion is required.

PART II – INTERVENER'S POSITION ON THE QUESTION IN ISSUE

4. BCCLA submits that given the importance of the protected interest, and problems with the expansive application of the *bona fide* inquiry exception, a heightened standard of reasonable and probable grounds, as argued by Mr. Ahmad, is an appropriate way to recalibrate the balance

[1] *R. v. Mack*, [1988] 2 S.C.R. 903 [*Mack*]; *R. v. Barnes*, [1991] 1 S.C.R. 449 [*Barnes*].

between competing interests. At bare minimum, a rigorous assessment of reasonable suspicion must be required, as argued by Mr. Williams.

PART III – STATEMENT OF ARGUMENT

I. The Importance of the Interest in Being Left Alone

5. As held by Lamer CJC in *Mack*, "it is essential to identify why we do not accept police strategy that amounts to entrapment."[2] Concerns about random virtue testing and the "manufacturing" of crime are most frequently cited as the rationales for the doctrine of entrapment. However, an even more fundamental interest is protected by the doctrine: the interest in being left alone. At its most basic level, the doctrine of entrapment serves to guard against an overextension of the state's ability to intrude into private lives:

> One reason is that the state does not have unlimited power to intrude into our personal lives or to randomly test the virtue of individuals. Another is the concern that entrapment techniques may result in the commission of crimes by people who would not otherwise have become involved in criminal conduct.[3]

6. This rationale was expanded upon by McLachlin J. (as she then was) in her dissent in *Barnes*. She framed the issue of entrapment as a "balancing between the individual interest in being left alone and the state's interest in the repression of crime."[4] In her view, the interest in being left alone was not to be infringed upon without considerable justification:

> The significance of the individual interest at stake here must not be underestimated, nor should the adverse effect that police investigatory techniques can have on this interest be overlooked. This court has frequently emphasized that limits must be placed on the state's ability to intrude into the daily lives of its citizens. As La Forest J. stated in *R. v. Dyment*, supra, in a passage adopted by Sopinka J. for the majority in *R. v. Kokesch*, supra, "The restraints imposed on government to pry into the lives of the citizen go to the essence of a democratic state" (at pp. 427- 28). Furthermore, in *R. v. Wong*, supra, La Forest J., for the majority, acknowledged that our society is one which "sets a premium on being left alone" (at p. 53).
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> To paraphrase La Forest J. in *Wong*, supra, the notion is that individuals should be free to go about their daily business — to go shopping, to visit the theatre, to travel to and

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[2] *Mack*, at para. 75
[3] *Ibid*.
[4] *Barnes*, at para. 74

> from work, to name but three examples — without courting the risk that they will be subjected to the clandestine investigatory techniques of agents of the state. A further risk inherent in overbroad undercover operations is that of discriminatory police work, where people are interfered with not because of reasonable suspicion but because of the colour of their skin or, as in this case, the quality of their clothing and their age.[5]

7. The interest in being left alone, as protected by principles of law related to entrapment, is echoed in the protections guaranteed by s. 8 of the *Charter*, where the right to privacy has been described as "the right to be let alone by other people."[6] In *R. v. Simpson*, the Ontario Court of Appeal compared the framework for entrapment with that of s. 8, noting that the two doctrines addressed "the same fundamental concern […] the need to balance society's interest in the detection of crime and the punishment of criminals with society's interest in maintaining the freedom of its individual members."[7] Indeed, the competing interests that are balanced in a s. 8 analysis are the same as those that are balanced in the case of entrapment:

> […] an assessment must be made as to whether in a particular situation the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy in order to advance its goals, notably those of law enforcement.[8]

8. An undercover officer's offer to commit a crime may engage an accused's interest in being left alone, without engaging their reasonable expectation of privacy, at least insofar as that concept is defined in s. 8 jurisprudence. How do we understand this interest in being left alone, which is broader than – or distinct from – the parameters of a reasonable expectation of privacy? Over the last thirty years, s. 8 jurisprudence has shown rich developments in concepts of privacy, whereas the law of entrapment has been left virtually untouched by this Court since *Mack* and *Barnes*.

9. When seeking a more fulsome understanding of the interest in being left alone as protected by entrapment, BCCLA submits that developments in s. 8 jurisprudence can provide useful guideposts. For example, s. 8 analysis involves a highly nuanced, case-specific examination of

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[5] *Ibid*. at paras. 75-76.
[6] *Canada (Director of Investigation & Research, Combines Investigation Branch) v. Southam Inc,* [1984] 2.S.C.R. 145, at para. 24 [*Hunter v. Southam*].
[7] *R. v. Simpson,* [1993] O.J. No. 308 (C.A.) at paras. 64-5.
[8] *Hunter v. Southam*, *supra* note 6 at para. 24.

the degree to which a particular accused's interest in privacy is engaged. Confronted with rapid developments in modern technology, this Court has found cell phones and computers to attract special privacy interests because they differ from physical receptacles or locations, due to the sheer size of information they can contain, and because of the unique ways in which that information is accessed, collected and stored.[9] In the entrapment context, however, no such nuance has developed in evaluating the interest in being left alone.

10. BCCLA submits that the interest in being left alone may manifest differently in the context of the technological "location" of a phone number. A phone number may be narrowly-focused in the sense that it is controlled by few people, and often only one person. As such, police targeting a phone number will usually run less of a risk of intruding into the private domain of large numbers of people. However, it is submitted that a personal phone number is different from a purely public space: cell phone owners choose whether to list their numbers publicly, can choose whether to answer a call, have the ability to block callers, and enjoy a great degree of anonymity by not revealing their appearance, physical location, or other personal information to callers.

11. BCCLA agrees with Mr. Ahmad that the entrapment doctrine must be modernized in order to adapt to the radical advances in technology since *Mack* and *Barnes*.[10] A more nuanced and fulsome approach to the interest in being left alone would further this goal, as well as respond to the important question of *why* we do not tolerate entrapment.

12. What is clear is that the interest in being left alone by the state is vital to a free and democratic society. As highlighted by Justice McLachlin's dissent in *Barnes*, the interest of people in moving about society without fear of clandestine interference by the state is an important one, and grounded in broad concepts of privacy, liberty, and autonomy. In *R. v. Spencer*, Justice Cromwell framed the protection of privacy as "a prerequisite to individual security, self-fulfilment and autonomy as well as to the maintenance of a thriving democratic

[9] See, for example, *R. v. Fearon*, 2014 SCC 77, at paras. 51; 127-134, and *R. v. Vu*, 2013 SCC 60, at para. 24.
[10] Appellant Ahmad's Factum at para. 47.

society."[11] The importance of this protected interest should inform this Court's assessment of the appropriate grounds requirement for the *bona fide* inquiry exception.

II. An Imbalance between Private and State Interests: Concerns with the *Bona Fide* Inquiry Exception

13. The balance struck by Lamer CJC in *Mack* between private and state interests was the standard of reasonable suspicion. Ordinarily, police are required to obtain individualized reasonable suspicion before offering someone an opportunity to commit a crime. The *bona fide* inquiry exception, however, presents an alternative: so long as police have reasonable suspicion that criminal activity is occurring in a specific location defined with "sufficient precision," they may randomly approach any person associated with that area and offer them the opportunity to commit a crime.[12]

14. In the cases at bar, a majority of the Ontario Court of Appeal found that the *bona fide* inquiry exception was made out. BCCLA takes no position on the outcome of either case, but wishes to highlight a concern with the *bona fide* inquiry exception outside of the dial-a-dope context, offering additional support for the arguments of the Appellants for either 1) a heightened standard of reasonable and probable grounds, or 2) at minimum, a rigorous application of reasonable suspicion in all cases involving the *bona fide* inquiry analysis.

15. A review of lower court decisions in which the *bona fide* inquiry exception has been considered reveals a wide variety of types of "locations" that have been recognized as the target of police suspicion. The following cases illustrate various large-sized geographical locations that have been successfully identified as the target of *bona fide* investigations:

- In *R. v. Thompson*,[13] the Ontario Court of Justice found that there was a *bona fide* investigation with respect to a Toronto neighbourhood within the boundaries of Sherbourne, Jarvis, Dundas and Gerrard Streets. The investigation was *bona fide*

[11] *R. v. Spencer*, 2014 SCC 43 at para. 15.
[12] *Barnes*, *supra* note 1, at para. 23.
[13] *R. v. Thompson*, [1998] O.J. No. 2462, at para. 12.

despite the fact that the arrest of the accused took place "marginally" outside those boundaries;

- In *R. v. Sigurdson*,[14] a prosecution under the *Wildlife Act*, the B.C. Provincial Court found that several large rural areas were subject to a *bona fide* investigation, after considering factors such as the type of offence, the information available to police, and the nature of the geographic area;

- *R. v. MacLeod*,[15] in which the B.C. Supreme Court found police had engaged in a *bona fide* investigation into an outdoor music festival in Ucluelet, attended by 3,000-4,000 people;

- *R. v. Anderson*,[16] in which the Alberta Provincial Court found that, in addition to individualized reasonable suspicion vis-à-vis the accused, a *bona fide* investigation had been established with respect to eight specific locations in downtown Calgary. The three undercover drug purchases made in the case were all made "within a block or two" of the Cecil Hotel, one of the eight locations identified;

- *R. v. Virgo*,[17] in which the Ontario Court of Appeal reversed a finding of entrapment, holding that police had engaged in a *bona fide* investigation into the Teesdale Place housing complex in Scarborough;

- *R. v. White*,[18] in which the Ontario Court of Justice found that a *bona fide* investigation was established with respect to the main business area of Smiths Falls;

- *R. v. Louis*,[19] in which an area of 40 square blocks in downtown Ottawa was found to be the subject of a *bona fide* investigation.

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[14] *R. v. Sigurdson*, 2002 BCPC 19, *aff'd* 2002 BCSC 1613, at paras. 32-37.
[15] *R. v. McLeod*, 2011 BCSC 1812, at paras. 4; 55-60.
[16] *R. v. Anderson*, 2017 ABPC 210, at paras. 84-86.
[17] *R. v. Virgo*, [1993] O.J. No. 2618 (C.A.), at paras. 6-9.
[18] *R. v. White*, 1997 CarswellOnt 3958, 40 O.T.C. 66, at para. 6.
[19] *R. v. Louis*, 2017 ONCJ 59, at paras. 39-40.

16. As seen in the case at bar, trial courts have likened phone numbers to "locations" for the purposes of the *bona fide* inquiry exception. The following cases illustrate other types of technological locations identified by trial courts in dismissing claims of entrapment:

- *R. v. Duplessis*,[20] in which the Ontario Court of Justice found police engaged in a *bona fide* investigation into the "casual encounters" section of the Craigslist website;

- *R. v. Haniffa*,[21] in which the Ontario Court of Justice found a *bona fide* inquiry into underage prostitution on the Backpage website;

- *R. v. Chiang*,[22] in which the Craigslist website as a whole was found by the B.C. Supreme Court to be a "sufficiently defined location" for the purposes of a *bona fide* inquiry;

- *R. v. Argent*,[23] in which the Court found that, through the child luring provisions of the *Criminal Code*, the internet had been deemed "the equivalent of a bad neighbourhood."

17. If individualized reasonable suspicion was the standard established in *Mack* and *Barnes* to maintain the appropriate balance between individual and state interests, it is difficult to see how that standard – which requires only the reasonable *possibility* of criminal activity[24] – preserves that same balance vis-à-vis a location that may capture thousands of people. BCCLA submits that the *bona fide* inquiry exception risks a dramatic watering-down – if not a total dissolution – of the grounds required for police to offer individuals the opportunity to commit a crime.

18. The unfortunate result of the *bona fide* inquiry exception is that everyone associated with a location where criminal activity is suspected suffers a decreased protection of their interest in being left alone. Moreover, when applied to expansive geographical and virtual locations, this echoes an approach to entrapment in the U.S. courts that was deliberately avoided in Canada:

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[20] *R. v. Duplessis*, 2018 ONCJ 911, at paras. 39-40.
[21] *R. v. Haniffa*, 2017 ONCJ 780, at para. 18.
[22] *R. v. Chiang*, 2010 BCSC 1770, at para. 36.
[23] *R. v. Argent*, 2014 ONSC 4270, at para. 18.
[24] *R. v. Chehil*, 2013 SCC 49, at para. 27.

the so-called "subjective" approach by which those who have a predisposition to crime are not protected by the entrapment doctrine.[25] The expansive application of the *bona fide* inquiry exception means that members of certain groups enjoy a lower level of protection from state interference, simply by virtue of their association with a "bad" neighbourhood, website, or phone number.

19. In the context of virtual "locations," the *bona fide* inquiry exception risks an even more drastic imbalance between individual and state interests given the potentially vast number of people associated with a single website or webpage. In an extreme example, if we imagine a scenario where police had reasonable suspicion that a website (such as Craigslist) was being used to buy and sell stolen goods, police would arguably be entitled to send a message to every person with a posting on the website in an attempt to test their willingness to deal in stolen property. BCCLA submits that this tips the balance too far away from the private interest in being left alone.

III. Solutions: Reasonable and Probable Grounds or a Rigorous Application of Reasonable Suspicion

20. Given the importance of the interest in being left alone, and concerns with the way it is balanced against state interests in the *bona fide* inquiry analysis, a recalibration is required. Mr. Ahmad's proposal for an increase in grounds required in the *bona fide* inquiry exception - to reasonable and probable grounds - is a sensible solution to the problem, and would provide an effective antidote to the overemphasis on the state's interest in repressing crime.

21. Reasonable suspicion is a standard that has been accepted as appropriate in certain circumstances where the impact on individual rights is low, and the importance of the law enforcement objective high.[26] For example, in *R. v. M.(A.)*, *individualized* reasonable suspicion prevailed as the appropriate standard required for sniffer dog searches given, the minimally intrusive nature of the sniffer dog search, the fact that only odours associated with illegal drugs are identified and no additional innocent information is gathered, and the high degree of

[25] *Mack*, *supra* note 1, at para. 40.
[26] *R. v. Chehil*, *supra* note 25 at para. 23.

accuracy.[27] By way of contrast, *location-based* reasonable suspicion would have permitted police to conduct systematic sniffer dog searches of every student, on only the reasonable possibility that criminal activity was occurring in the school. This hypothetical helps to illustrate how the two versions of the standard are drastically different, and shows how even very minimal state interference can become offensive when it is employed broadly over large numbers of people, on scant grounds. [28]

22. In the absence of more drastic reform to the *bona fide* inquiry exception, a heightened standard of reasonable and probable grounds with respect to location would provide an effective safeguard against widespread state interference within certain locations. This would require a level of *probability*, rather than *possibility*, of a specific crime occurring within the defined area, with both subjective and objective components.[29]

23. In the alternative, it is crucial that the reasonable suspicion standard be rigorously applied when conducting an analysis under the *bona fide* inquiry exception. As set out more fully by Mr. Williams, reasonable suspicion must allow for an objective assessment by a reviewing court, be based on "a constellation of objectively discernible facts" and be assessed against the "totality of the circumstances."[30] At a bare minimum, a rigorous analysis of reasonable suspicion as it relates to the location will provide some measure of protection of individual interests against the state.

24. Finally, an inherent challenge exists in applying either standard – reasonable and probable grounds, or reasonable suspicion – to a location, as opposed to an individual. What does it mean to have reasonable suspicion, or reasonable and probable grounds, vis-à-vis criminal activity at a location? How does that analysis differ when the "location" is technological? BCCLA invites this Court to provide some guidance on these questions, and suggests the following as

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[27] *R. v. M.(A.),* 2008 SCC 19, at paras. 9-12. See also *R. v. Chehil*, *supra* note 25 at para. 6.
[28] See, for example, the description of U.S. case in which police raided a school and subjected 2,780 students to sniff searches, without any information about drugs or drug suppliers on the premises, at para. 69 of *M.(A.), supra.*
[29] *R. v. Chehil*, *supra* note 25 at para. 27; *Hunter v. Southam*, *supra* note 6 at para. 43.
[30] Appellant Williams' Factum, at paras. 53-54.

considerations that could be taken into account in determining whether police have sufficient location-based grounds for the purposes of a *bona fide* inquiry:

- The prevalence of the targeted criminal activity at the location and the proportion of persons thought to be involved;
- The reasons for which police did not obtain individualized grounds;
- Whether discrimination, stereotyping or reliance on any known vulnerabilities played any part in the police's selection of the location or particular individual within that location;
- For websites, the degree to which individuals communicating through the website take part in role-playing or pretense, including role-playing of criminality.

PARTS IV & V: COSTS AND ORDER SOUGHT

25. The BCCLA does not seek costs, and asks that no costs be awarded against it. No order is sought.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: May 10, 2019

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Marilyn Sandford, Q.C.
Kate Oja
Counsel for the Intervener,
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PART VI: TABLE OF AUTHORITIES

PART VII: STATUTES CITED

Canadian Charter of Rights and Freedoms	
8. Everyone has the right to be secure against unreasonable search or seizure.	Chacun a droit à la protection contre les fouilles, les perquisitions ou les saisies abusives.