File Number: 39215

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

B E T W E E N:

AKASH GHOTRA

Appellant
(Appellant)

and

HER MAJESTY THE QUEEN

Respondent
(Respondent)

and

CANADIAN CIVIL LIBERTIES ASSOCIATION, BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION and CRIMINAL LAWYERS' ASSOCIATION OF ONTARIO

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PART I - OVERVIEW

1. Now more than ever, individuals maintain and build relationships in the virtual world. Social media networks, chatrooms, and message boards are how we find communities and congregate with those who share our views, interests, identities, religions, and cultures. This appeal raises the issue of how deeply we are willing to allow the state to surreptitiously intrude into these spaces.

2. The doctrine of entrapment acts as a check on undercover police conduct. Two specific questions arise on this appeal regarding entrapment as it relates to *online* police investigations: (1) when do the police cross the line from merely taking an investigative step to offering a suspect the opportunity to commit an offence; and (2) when do the police have reasonable suspicion about a specific location (*e.g.*, website), such that they are engaged in a *bona fide* inquiry (which is one of the ways in which the police can lawfully offer a suspect the opportunity to commit an offence).

3. This Court's answers to these questions will have profound consequences for privacy and expressive freedom, as protected by ss. 8 and 2(b) of the *Canadian Charter of Rights and Freedoms*. These rights are impacted on a wide scale when the police target online forums given the large number of innocent people who resort to virtual platforms for self-expression. This Court should take a purposive approach to defining the limits of acceptable police conduct in this context — one that properly safeguards the *Charter* rights at stake.

4. With respect to the first question, this Court should avoid an overly technical approach to determining when the police have offered the target an opportunity to commit a crime. The act of entering an online forum with an illicit persona is communicative — in certain cases, it is an invitation to others in the forum to engage in illicit activity. That is precisely what the entrapment doctrine is intended to regulate. Therefore, the Court should clarify that such an act constitutes the offering of an opportunity to commit a crime so as to engage the entrapment analysis.

5. Assuming the police did not have reasonable suspicion about the *individual* before they offered that person the opportunity to commit a crime, the next question is whether they had reasonable suspicion about the online *location* they targeted so as to be engaged in a *bona fide* inquiry. As this Court has already stated (in *Ahmad*), the police can only have reasonable suspicion

with respect to a virtual space when that "space" is tightly circumscribed and narrowly defined. Otherwise, the reasonable suspicion requirement becomes meaningless and the police would be free to engage in random virtue testing on a large scale. Such investigations could reach hundreds (if not thousands) of innocent people.

6. In this appeal, which involves a website (unlike the telephone number at issue in *Ahmad*), this Court should clarify that the degree of scrutiny will be heightened when the virtual space is one used by large numbers of individuals to exchange ideas — such as in the case of a high-traffic website — and especially where the virtual space is designed for or frequented by members of a particular racial, ethnic, cultural, or religious group. In the latter circumstance, the courts must be especially careful to ensure that the police have not been overbroad in their approach. They must also ensure that the police were not motivated by an improper purpose (*e.g.,* racial profiling), which can itself be fatal to the *bona fide* inquiry analysis.

PART II - POSITION ON QUESTIONS IN ISSUE

7. The Appellant has identified two questions with respect to entrapment: (1) when do the police cross the line into providing an opportunity for someone to commit an offence so as to engage the entrapment analysis; and (2) assuming the police have no individualized reasonable suspicion, when do they have reasonable suspicion concerning the (online) location being targeted such that they are engaged in a *bona fide* inquiry.

8. The British Columbia Civil Liberties Association (the "BCCLA") submits that, in answering both of these questions, this Court should take a purposive approach to defining the limits of police conduct when they are conducting investigations online — one that bears in mind the need to preserve expressive freedom and privacy on the internet.

PART III - STATEMENT OF ARGUMENT

A. Online Undercover Investigations Impact Privacy and Expressive Freedom

9. Undercover police investigations targeting virtual spaces designed to facilitate communication — such as chatrooms or social media sites — engage the *Charter*-protected interests of privacy and expressive freedom to a significant degree.

10. The doctrine of entrapment has always been about balancing important interests: the state's interest in repressing crime is balanced against the private individual's interest in being left alone. From the start, *Charter* interests have informed the development of entrapment under Canadian law. In one of the first cases in which this Court considered the entrapment doctrine, Lamer J. (as he then was) recognized that the doctrine shares its philosophical underpinnings with the *Charter*, specifically the "Legal Rights" under ss. 7-14. In particular, he explained that both these *Charter* rights and the entrapment doctrine "draw[] on the notion that the state is limited in the way it may deal with its citizens".[1]

11. Two *Charter* interests are particularly important here: privacy and expressive freedom.

12. The right to privacy is in essence the right to be "left alone" — the right to go about one's daily business without courting the risk of being subject to the clandestine investigatory techniques of the state.[2] This right is central to concepts of liberty and democracy.[3] It is especially significant in the virtual world, where individuals have come to expect a degree of anonymity as they gather online in large numbers unconstrained by geography and physical capacity.[4]

13. The right to be left alone is articulated most often in the s. 8 context. But it has also found repeated expression in this Court's entrapment jurisprudence.[5] In *Ahmad*, a majority of this Court explained that the entrapment framework "balances and reconciles" important public interests, such as "the need to protect privacy interests and personal freedom from state overreach", and cited the right to privacy and the right to be left alone as important rights engaged in the entrapment context.[6] In *Mack*, Lamer J. highlighted that one of the rationales behind entrapment is

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[1] *R. v. Mack*, [1988] 2 S.C.R. 903, at 939-40.
[2] *R. v. Wong*, [1990] 3 S.C.R. 36, at 45-48; *R. v. Barnes*, [1991] 1 S.C.R. 449, at 481, per McLachlin J. (dissenting).
[3] *R. v. Dyment*, [1988] 2 S.C.R. 417, at para. 17.
[4] *R. v. Spencer*, 2014 SCC 43, at paras. 43-48.
[5] In the specific context of this case, Norheimer J.A. (dissenting below) explained how undercover online police investigations impact privacy interests. He wrote that "the actions of the police in a chat room engage privacy concerns" because "[p]eople who participate in private conversations on the Internet are entitled to expect that the police will not be surveilling their conversations, including instigating or participating in them for investigative purposes not based on a reasonable suspicion of criminal activity": *R. v. Ghotra*, 2020 ONCA 373, at para. 68.
[6] *R. v. Ahmad*, 2020 SCC 11, at paras. 22, 57.

the belief that "the state does not have unlimited power to intrude into our personal lives."[7] And, in her dissenting decision in *Barnes*, McLachlin J. (as she then was) warned that the police conduct at issue would "represent endorsing a measure of state intrusion into the private affairs of citizens greater than any heretofore sanctioned by this court under the [*Charter*]."[8]

14. Beyond the right to privacy, entrapment also engages the *Charter* right of expressive freedom, especially when the police investigation is targeted at a virtual space intended to facilitate communication. Virtual spaces such as chatrooms, message boards, and social networking sites are essential for the free exchange of ideas in our modern society. These spaces are often used for the expression of important, contentious, and controversial ideas that may be excluded from other (physical) spaces. They are also increasingly becoming places where people go to find a sense of community — places where they can find and confide in others who share similar worldviews, religious beliefs, cultural practices, or life experiences, regardless of geographic location.[9]

15. The need to preserve expressive freedom was discussed in *Ahmad.* There, the Court listed "the importance of the virtual space to freedom of expression" as one of the factors to consider in order to ensure that the space at issue is defined with sufficient precision under a *bona fide* inquiry.[10]

16. The danger of permitting unconstrained leeway to the police in conducting undercover online operations is that individuals will censor themselves if they believe that a police officer could be sitting behind every username on their screen. Justice Martin highlighted this danger in her dissenting opinion in *Mills*, with reference to a number of empirical studies confirming the "chilling effect" of government surveillance on online expression. [11] These studies confirmed what Harlan J. observed as a matter of common sense in *United States v. White*: "words would be measured a good deal more carefully and communication inhibited if one suspected his conversations were being transmitted and transcribed".[12]

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[7] *Mack*, at 941.
[8] *Barnes*, at 479.
[9] See: *Douez v. Facebook, Inc.*, 2017 SCC 33, at para. 56; *R. v. Marakah*, 2017 SCC 59, at para. 28.
[10] *Ahmad*, at para. 41.
[11] *R. v. Mills*, 2019 SCC 22, at paras. 98-99.
[12] *United States v. White*, 401 U.S. 745 (1971), at 787-89, cited in *Mills*, at para. 98.

17. By targeting even a single website or a single chatroom, the police can come into contact with potentially thousands of innocent people. Further, a single police officer can be engaged in multiple undercover operations online simultaneously in ways they could not in person.[13] In these respects, undercover police investigations can have a far greater impact on privacy and expressive freedom in the virtual world than they ever could in the physical world.

18. A proper approach to entrapment in the virtual context must therefore consider these *Charter* interests, and the unique way in which they are implicated online, in determining the answer to both of the questions posed by this appeal.

B. The Courts Should Avoid Overly Technical Approaches to Determining When the Police Provide an Opportunity to Commit an Offence

19. With respect to the threshold question of whether the police have offered the target an opportunity to commit a crime, the Court should avoid a technical approach that does not adequately protect the *Charter* interests at stake. This threshold question is merely the gateway into the entrapment analysis; it should not be constructed too narrowly. Otherwise, the core of the analysis — the search for reasonable suspicion (either about the targeted individual or targeted location) — will rarely if ever be reached.

20. A majority of this Court explained the test in *Ahmad* as follows: "an officer's action — to constitute an offer of an opportunity to commit a crime — must therefore be sufficiently proximate to conduct that would satisfy the elements of the offence".[14]

21. Where the police enter a place disguised with an illicit persona (*e.g.*, an apparently under-age girl with a sexually suggestive screen name or an adult sex worker), they are inviting others in that place to communicate about that illicit activity. Where the communication itself is a crime (such as child luring), the threshold has been crossed: the police have offered an opportunity to commit a crime. Their actions are sufficiently proximate to conduct that would satisfy the elements of the offence.

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[13] *Mills*, at para. 105.
[14] *Ahmad*, at para. 64.

C. The Virtual Space Targeted Must be Narrowly Circumscribed

22. The next question is whether the police had a reasonable suspicion about either the *individual* suspect they targeted or the *location* they targeted before offering the opportunity to commit an offence. This appeal raises only the latter scenario, which is otherwise known as the "*bona fide*" inquiry prong of the entrapment analysis.

23. In *Ahmad*, this Court concluded that the *bona fide* inquiry prong could extend beyond physical geographic locations (such as neighbourhoods) to virtual spaces (such as telephone numbers or online spaces). However, this expansion comes with unique concerns. For this reason, the majority explained that such spaces must be "defined narrowly and with precision".[15]

24. The larger the location targeted, the more innocent people the investigation will affect, and the more seriously it will intrude upon the *Charter* rights of privacy and expressive freedom. This is especially true of the virtual world where large numbers of people come together, unconstrained by geography and capacity. As the majority explained in *Ahmad*, "[v]irtual spaces raise unique concerns for the intrusion of the state into individuals' private lives, because of the breadth of some virtual places (for example, social media websites), the ease of remote access to a potentially large number of targets that technology provides law enforcement, and the increasing prominence of technology as a means by which individuals conduct their personal lives.[16]

25. Beyond the size of the location, there are other factors that the courts should consider:

(a) is the virtual place accessible to the general public or does it require membership in a site or the creation of a user profile (with a username and password)?

(b) is the virtual place a communications forum, such as an internet chatroom, a message board, or a social networking site?

(c) is the virtual place one that is used by people in a particular racial, ethnic, cultural, or religious group?[17]

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[15] *Ahmad*, at para. 43.
[16] *Ahmad*, at para. 36. See also: *R. v. C.D.R.*, 2020 ONSC 5030, at para. 19.
[17] See: S. Penney, "Entrapment Minimalism: Shedding the 'No Reasonable Suspicion or Bona Fide Inquiry' Test" (2019), 44 *Queen's L.J.* 356, at 382-83, BCCLA Book of Authorities ("BOA"), Tab 1.

26. Where these factors are present, concerns relating to the *Charter*-protected interests of privacy and expressive freedom — as well as the related freedoms of religion and association — are particularly acute.[18] If the police are given free rein to patrol these virtual spaces with disguised identities, anyone who signs in to one of these websites — regardless of where they are in the world — may be communicating with an undercover officer. The chilling effect on privacy rights and fundamental freedoms would be dramatic.

27. In the leading case on entrapment from the House of Lords, Lord Nicholls of Birkenhead observed that the police investigatory technique of offering opportunities to commit crimes is always intrusive but "[t]he greater the degree of intrusiveness, the closer will the court scrutinise the reason for using it".[19] For that reason, where some or all of the abovementioned factors are present, the courts must exercise heightened scrutiny to ensure that the police have reasonable suspicion of the space being targeted.

28. In this appeal, the BCCLA asks this Court to build on previously recognized principles to establish a framework for scrutinizing the type of police conduct at issue, in order to ensure that the constitutionally protected rights of privacy and expressive freedom are adequately protected.

29. *First*, the courts should carefully consider whether the police investigation was truly targeting a particular space or whether, in reality, the police conduct was more directly aimed at a specific individual, albeit through electronic means of communication. Where the investigation is plainly targeted at an individual, the reasonable suspicion must attach to the individual and not merely to the location.[20]

30. *Second*, the targeted location should be no larger than reasonably necessary given the objectives of the police investigation.[21] Where the size of the area is overly broad, that in itself may indicate that the investigation is not *bona fide*.[22] As the majority wrote in *Ahmad*, "entire websites or social media platforms will rarely, if ever, be sufficiently particularized to support reasonable

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[18] See: K. Roach, "Entrapment and Equality in Terrorism Prosecutions: A Comparative Examination of North American and European Approaches" (2011), 80 *Miss. L.J.* 1455, at 1487, BOA, Tab 2.
[19] *R. v. Looseley*, [2001] UKHL 53, at para. 24.
[20] *R. v. Leskosky*, 2020 ABQB 517, at para. 55.
[21] *Ahmad*, at para. 39.
[22] *Barnes*, at 462-63.

suspicion."[23] Courts have found virtual spaces to be sufficiently particularized where the police target carefully defined subsections of classifieds websites rather than the entire site.[24] Further, the mere fact that the internet as a whole is generally used as a medium to facilitate certain criminal activity is insufficient to ground reasonable suspicion of any particular subset of the internet.[25]

31. *Third*, the police must have cogent evidence of a minimum level of criminal activity within the virtual space they targeted.[26] As the court held in *Schieman* in the context of a physical world investigation, "[b]efore an entire neighbourhood...is characterized as falling within the purview of the *Mack* decision, some fairly detailed, cogent evidence must be presented".[27] One way to satisfy this requirement would be for the Crown to present statistical evidence of the number and frequency of crimes occurring recently in the targeted location.

32. *Fourth*, the criminal activity for which the police have reasonable suspicion must be the same as (and closely related to) the activity for which the police provide an opportunity. This criteria has formed a part of the entrapment doctrine since *Mack*, where the Court held that "there must be some rational connection and proportionality between the crime for which police have this reasonable suspicion and the crime which the police provide the accused with the opportunity to commit."[28] For example, "the sole fact that a person is suspected of being frequently in possession of marijuana does not alone justify the police providing him or her with the opportunity to commit a much more serious offence, such as importing narcotics".[29] To give an example that might arise in the online context, evidence that a specific message board was used for the crime of communicating for the purchase of *adult* sexual services would not justify the police targeting that same message board to provide its members with the opportunity to commit the offence of *child* luring.[30] There must be a clear legal nexus between the criminal activity for which there is reasonable suspicion and the criminal activity targeted in the investigation.

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[23] *Ahmad*, at para. 43.
[24] *R. v. M.A.C.*, 2020 ONSC 7630, at para. 56; *R. v. Duplessis*, 2018 ONCJ 911, at para. 40.
[25] *R. v. Chiang*, 2010 BCSC 1770, at para. 40.
[26] *Leskosky*, at para. 54; *R. v. Franc*, 2016 SKCA 129, at paras. 38-39 (substantial evidence of many instances of drug dealing occurring at targeted bar); *R. v. Seymour*, 2016 MBCA 118, at paras. 13-25.
[27] *R. v. Schieman*, [1990] O.J. No. 2700 (O.C.J.), BOA, Tab 3.
[28] *Mack*, at 958. See also: *R. v. Brown*, [1999] 3 S.C.R. 660.
[29] *Mack*, at 958.
[30] See, for e.g., *C.D.R.*, at para. 24.

33. *Fifth*, special considerations apply to online spaces dedicated to particular communities. In the context of s. 9 of the *Charter*, this Court noted that "a detention based on racial profiling is one that is, by definition, not based on reasonable suspicion".[31] Similarly, the police cannot have reasonable suspicion where they target a specific online space *because* it is frequented by members of particular racial or religious groups. Reasonable suspicion cannot be based on the immutable characteristics of individuals.[32]

34. Professor Roach has written about this danger in the context of terrorism investigations in the physical world:

> Canadian … courts should be cautious when applying the bona fide inquiry arm of their entrapment defenses because of concerns about condoning discriminatory forms of profiling and targeting of political or religious radicalism. A bona fide inquiry aimed at a mosque or a group that meets for political or religious purposes implicates the values of freedom of association, expression and religion as well as freedom from discrimination. Although these values do not make a person immune from a terrorism investigation, they should be considered in assessing whether the State has acted improperly in a manner that triggers the court's concern about abuse of process.[33]

35. These concerns are even greater in the virtual world where the police can do much more with far fewer resources. Just as innocent people can gather in large numbers in online forums unconstrained by geography or capacity, so too can police officers target myriad online communities unconstrained by government budgets on how many undercover officers can be sent into a particular neighbourhood at any given time.

36. Where the choice to target a particular virtual space is motivated by racial profiling, or other improper purposes, the inquiry will not be *bona fide*, regardless of whether reasonable suspicion of the space could otherwise exist.[34]

37. Going forward, the courts will have to be vigilant to consider both the discriminatory *intent* and *effect* of undercover police investigations — especially with the arrival of artificial

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[31] *R. v. Le*, 2019 SCC 34, at para. 78.
[32] *R. v. Chehil*, 2013 SCC 49, at paras. 42-43.
[33] Roach, at 1474, BOA, Tab 2.
[34] *Mack*, at 956-57; *Le*, at para. 78 ("Racial profiling is also relevant under s. 24(2) when assessing whether the police conduct was so serious and lacking in good faith" (emphasis added)). See also *Peart v. Peel Regional Police Services* (2006), 217 O.A.C. 269 (C.A.), at para. 91.

intelligence ("AI"). Commentators have warned that emerging methods of AI-driven "predictive policing" can have discriminatory impacts, as the police focus their investigations on certain identified "high crime areas" that are predominantly frequented by individuals of particular demographic groups.[35] The computer algorithms that predict high crime areas are often driven by existing datasets in which the high crime areas are precisely those that have been disproportionately policed in previous years (*e.g.*, racialized communities). In this way, AI-driven predictive policing can perpetuate, rather than eradicate, systemic racism. The courts must be alive to this danger when the police attempt to ground reasonable suspicion on the basis of such generalized predictive modelling, whether in the real or virtual world

38. Ultimately, the courts must carefully scrutinize the reasonable suspicion analysis under the *bona fide* inquiry branch of the entrapment doctrine where police investigations target online spaces. Our cherished *Charter* rights of privacy and expressive freedom demand no less.

PART IV - COSTS

39. The BCCLA does not seek costs, and asks that no costs be awarded against it.

PART V - ORDER SOUGHT

40. The BCCLA takes no position with respect to the disposition of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, THIS 24th DAY OF FEBRUARY, 2021

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[35] See: Matthew Zaia, "Forecasting Crime? Algorithmic Prediction and the Doctrine of Police Entrapment" (2020) 18 Can. J. L. & Tech. 255, at 280, BOA, Tab 4; Andrew Selbst, "Disparate Impact in Big Data Policing" (2017) *52 1 Georgia L. R. 109*, at paras. 119-23, BOA, Tab 5, (explaining how the predictive models can perpetuate bias since the inputted data used to build the models reflect historical decisions to target particular communities for law enforcement activities); Carmen Cheung, "Making Sense of the Black Box: Algorithms and Accountability" (2017) *64 Criminal Law Quarterly 540*, BOA, Tab 6.

PART VI - TABLE OF AUTHORITIES

		Para(s) in factum
Case Law		
1	*R. v. Mack*, [1988] 2 S.C.R. 903	10, 13, 32, 36
2	*R. v. Wong*, [1990] 3 S.C.R. 36	12
3	*R. v. Barnes*, [1991] 1 S.C.R. 449	12, 13, 30
4	*R. v. Dyment*, [1988] 2 S.C.R. 417	12
5	*R. v. Spencer*, 2014 SCC 43	12
6	*R. v. Ghotra*, 2020 ONCA 373	13
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8	*Douez v. Facebook, Inc.*, 2017 SCC 33	14
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12	*R. v. C.D.R.*, 2020 ONSC 5030	24, 32
13	*R. v. Looseley*, [2001] UKHL 53	27
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20	*R. v. Schieman*, [1990] O.J. No. 2700 (O.C.J.)	31
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24	*Peart v. Peel Regional Police Services* (2006), 217 O.A.C. 269 (C.A.)	36

		Para(s) in factum
Secondary Sources		
25	S. Penney, "Entrapment Minimalism: Shedding the 'No Reasonable Suspicion or Bona Fide Inquiry' Test" (2019), 44 *Queen's L.J.* 356	25
26	K. Roach, "Entrapment and Equality in Terrorism Prosecutions: A Comparative Examination of North American and European Approaches" (2011), 80 *Miss. L.J.* 1455	26, 34
27	Matthew Zaia, “Forecasting Crime? Algorithmic Prediction and the Doctrine of Police Entrapment” (2020) 18 Can. J. L. & Tech. 255	37
28	Andrew Selbst, “Disparate Impact in Big Data Policing” (2017) *52 1 Georgia L. R. 109*	37
29	Carmen Cheung, “Making Sense of the Black Box: Algorithms and Accountability” (2017) *64 Criminal Law Quarterly 540*	37

PART VII - STATUTES CITED

***Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c 11**

FUNDAMENTAL FREEDOMS

Fundamental freedoms

2. Everyone has the following fundamental freedoms:

(*a*) freedom of conscience and religion;
(*b*) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
(*c*) freedom of peaceful assembly; and
(*d*) freedom of association.

LIBERTÉS FONDAMENTALES

Libertés fondamentales

2. Chacun a les libertés fondamentales suivantes :

(a) liberté de conscience et de religion;
(b) liberté de pensée, de croyance, d'opinion et d'expression, y compris la liberté de la presse et des autres moyens de communication;
(c) liberté de réunion pacifique;
(d) liberté d'association.

LEGAL RIGHTS

Search or seizure

8. Everyone has the right to be secure against unreasonable search or seizure.

GARANTIES JURIDIQUES

Fouilles, perquisitions ou saisies

8. Chacun a droit à la protection contre les fouilles, les perquisitions ou les saisies abusives.