SCC File Nos. 39664 / 39803 / 39871 / 39676

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

B E T W E E N:

COREY DANIEL RAMELSON

Appellant (Appellant)

- and -

HER MAJESTY THE QUEEN

Respondent (Respondent)

- and -

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

Interveners

(**Style of cause continued on next page)*

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SCC File No. 39803

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

B E T W E E N:

ERHARD HANIFFA

Appellant (Appellant)

- and -

HER MAJESTY THE QUEEN

Respondent (Respondent)

- and -

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Interveners

SCC File No. 39871

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

B E T W E E N:

TEMITOPE DARE

Appellant (Appellant)

- and -

HER MAJESTY THE QUEEN

Respondent (Respondent)

- and -

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

Interveners

(**Style of cause continued on next page)*

*(*Style of cause continued)*

SCC File No. 39676

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

B E T W E E N:

MUHAMMAD ABBAS JAFFER

Appellant (Appellant)

- and -

HER MAJESTY THE QUEEN

Respondent (Respondent)

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TABLE OF CONTENTS

PART I - OVERVIEW

1. Everyday, people connect with those who they do not know in the virtual world. Social media networks, chatrooms, and message boards are how many find communities and congregate with those who share their views, interests, identities, religions, and cultures. These appeals raise 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. This Court's decision will have profound consequences for privacy and expressive freedom, as protected by ss. 8 and 2(b) of the *Charter*. These rights are impacted on a wide scale when the police target online spaces 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.

3. Privacy and expressive freedom go hand in hand, particularly online. Where individuals fear that there is an undercover officer hiding behind every username, surveilling their virtual activities, they will be much more guarded in sharing their thoughts with their digital community.

4. In these appeals, which involve 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, and especially where the virtual space is designed for or frequented by members of a particular racial, ethnic, cultural, or religious group. In these circumstances, the mutually reinforcing rights of privacy and expressive freedom are deeply engaged. Therefore, the courts must be careful to ensure that the police have not been overbroad in their approach. They must ensure that the police have targeted a narrowly circumscribed space and were not motivated by an improper purpose (*e.g.*, racial profiling), which can itself be fatal to the *bona fide* inquiry analysis.

5. Further, in assessing whether the targeted virtual space is sufficiently narrowed, the courts must not inappropriately discount the value of the space through qualitative assessments of the non-targeted activity taking place there. Nor should they permit the police to build reasonable suspicion by relying on the existence of unrelated criminal activity. Only in taking a rigorous approach to scrutinizing the police conduct can the *Charter* rights of privacy and expressive freedom be adequately protected.

PART II - ISSUES

6. The British Columbia Civil Liberties Association (the "BCCLA") submits that, in answering the question in these appeals about whether the police had sufficient reasonable suspicion regarding backpage.com, 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

7. Undercover police investigations targeting virtual spaces engage the *Charter*-protected interests of privacy and expressive freedom to a significant degree.

8. From the start, *Charter* rights 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 "draw[] on the notion that the state is limited in the way it may deal with its citizens".[1]

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

10. 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]

11. 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. In *Ahmad*, a majority of this Court explained that the entrapment framework "balances and reconciles" important public interests,

[1] *R v Mack*, [1988] 2 SCR 903, at 939-40 [*Mack*].
[2] *R v Wong*, [1990] 3 SCR 36, at 45-48; *R v Barnes*, [1991] 1 SCR 449, at 481 [*Barnes*], per McLachlin J. (dissenting).
[3] *R v Dyment*, [1988] 2 SCR 417, at para 17.
[4] *R v Spencer*, 2014 SCC 43, at paras 43-48 [*Spencer*].

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.[5] In *Mack*, Lamer J. highlighted that one of the rationales behind entrapment is the belief that "the state does not have unlimited power to intrude into our personal lives."[6] 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*]."[7]

12. 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. Online 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.[8]

13. 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.[9]

14. 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. [10] These studies confirmed what Harlan J. observed as a matter of common sense in *United States v. White*: "words would be

[5] *R v Ahmad*, 2020 SCC 11, at paras 22, 57 [*Ahmad*].
[6] *Mack*, at 941.
[7] *Barnes*, at 471.
[8] *Douez v Facebook, Inc.*, 2017 SCC 33, at para 56; *R v Marakah*, 2017 SCC 59, at para 28.
[9] *Ahmad*, at para 41.
[10] *R v Mills*, 2019 SCC 22, at paras 98-99 [*Mills*].

measured a good deal more carefully and communication inhibited if one suspected his conversations were being transmitted and transcribed".[11]

15. By targeting even a single website — or a particular section of an online classifieds website, as in these appeals — 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 never in person.[12] 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.

16. Moreover, the privacy and expressive freedom are mutually reinforcing.[13] As this Court explained in *Sharpe*, the private nature of targeted material or activities "may heighten the seriousness of a limit on free expression" and privacy can "enhance freedom of expression claims".[14] The "connection between s. 2(b) and privacy is … not to be rashly dismissed".[15] For example, greater privacy in the digital world — which often manifests itself in anonymity[16] — fosters the ability to freely express oneself in ways that may not be possible in person.

17. The Court below disregarded this connection by simultaneously concluding that Project Raphael "intruded upon an intensely personal privacy interest" and that it impacted activities that had "little importance to freedom of expression".[17] In doing so, it did not properly appreciate the reinforcing nature of the *Charter* interests at stake.

18. The Court of Appeal's failure to appreciate the link between privacy and expressive freedom also led it to unduly focus on the qualitative nature of the online activities that were impacted by Project Raphael and discount their value to an individual's sense of identity and self.

[11] *United States v White*, 401 US 745 (1971), at 787-89, cited in *Mills*, at para 98.
[12] *Mills*, at para 105.
[13] D. M. Tortell, "Surfing the Surveillance Wave: Online Privacy, Freedom of Expression and the Threat of National Security" (2017) 22:2 Rev. Const. Stud. 211.
[14] *R v Sharpe*, 2001 SCC 2, at para 26 [*Sharpe*]. See also: *Harper v Canada (Attorney General)*, 2001 ABQB 558, at paras 184-185.
[15] *Canada (Human Rights Commission) v Taylor*, [1990] 3 SCR 892, at 936.
[16] *Spencer*, at paras 42-50.
[17] *R v Ramelson*, 2021 ONCA 328, at paras 135, 138 [*Ramelson*].

B. The Virtual Space Targeted Must be Narrowly Circumscribed

19. In *Ahmad*, this Court concluded that the *bona fide* inquiry prong of the entrapment doctrine could extend beyond physical geographic locations 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".[18]

20. 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".[19]

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

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

(b) is the virtual place one that is used by people in a particular racial, ethnic, cultural, or religious group?[20]

22. 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.[21] 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.

[18] *Ahmad*, at para 43.
[19] *Ahmad*, at para 36.
[20] S. Penney, "Entrapment Minimalism: Shedding the 'No Reasonable Suspicion or Bona Fide Inquiry' Test" (2019), 44 Queen's L.J. 356, at 382-83.
[21] 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 [Roach].

23. 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".[22] 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.

24. 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.

25. *First*, the courts should carefully consider whether the investigation was truly targeting a particular space or whether, in reality, the police conduct was directly aimed at a specific person, albeit through electronic communications. Where the investigation is plainly targeted at an individual, the reasonable suspicion must attach to the individual and not merely to the location.[23] For example, in *Leskowsky*, the Court found that the investigation was in fact targeted at the individual accused because the police contacted him directly through Facebook because of a prior tip about him personally and not because he was present in a certain virtual space.

26. *Second*, the targeted location should be no larger than reasonably necessary given the objectives of the police investigation.[24] Where the size of the area is overly broad, that in itself may indicate that the investigation is not *bona fide*.[25] As the majority wrote in *Ahmad*, "entire websites or social media platforms will rarely, if ever, be sufficiently particularized to support reasonable suspicion."[26]

27. This inquiry must ensure that the investigative techniques are not overly broad by disproportionately impacting innocent people — that is, people who are innocent *of the offence investigated*. In these appeals, it is significant that "a considerable majority" of the people who

[22] *R v Looseley*, [2001] UKHL 53, at para 24.
[23] *R v Leskosky*, 2020 ABQB 517, at para 55 [*Leskosky*].
[24] *Ahmad*, at para 39.
[25] *Barnes*, at 462-63.
[26] *Ahmad*, at para 43. See also: *R v Chiang*, 2010 BCSC 1770, at para 40.

were impacted by the police investigative technique had no interest or involvement in seeking the services of an underage sex worker.[27]

28. *Third*, the police must have cogent evidence of a minimum level of criminal activity within the virtual space they targeted.[28] 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".[29] 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.

29. Moreover, the Court must be wary of allowing the police to rely on the fruits of prior proactive police investigations as evidence justifying the targeting of a virtual space. Relying on such evidence enables the police to manufacture their own reasonable suspicion. This allows them to potentially use previous instances of random-virtue testing to excuse future instances.[30] Such an analysis could gut the reasonable suspicion standard in the entrapment analysis.

30. *Fourth*, the criminal activity for which the police have reasonable suspicion must be the same as (or 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."[31] 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. For example, the fact that the police may have reasonable suspicion that communication for the purchase of adult sexual services is occurring does not give them a license to offer opportunities for the much more serious offences of child luring or communicating for the purposes of purchasing underage sexual services.

[27] *Ramelson*, at para 142.
[28] *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; *R v Kainth*, 2021 ONSC 1941, at paras 24, 34.
[29] *R v Schieman*, [1990] OJ 2700 (OCJ) (emphasis added).
[30] This appears to be what occurred in *R v Brown*, 2021 NLCA 27, at paras 18-19.
[31] *Mack*, at 958. See also: *R v Brown*, [1999] 3 SCR 660 [*Brown*].

31. *Fifth*, special considerations apply to online spaces dedicated to particular communities. In the context of s. 9, this Court noted that "a detention based on racial profiling is one that is, by definition, not based on reasonable suspicion".[32] 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. The same considerations would apply where the police target online spaces dedicated to groups with particular sexual orientations or other marginalized sexual communities. Reasonable suspicion cannot be based on people's immutable characteristics.[33]

32. Professor Roach has written about this danger in the context of terrorism investigations in the physical world: "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."[34] These concerns are even greater in the virtual world where the police can do much more with far fewer resources.

C. The Court of Appeal Improperly Discounted the Value of the Virtual Space

33. In this case, the Court of Appeal unduly and improperly discounted the value of the non-targeted activity taking place on the escorts section of Backpage in order to find that the police tactics were sufficiently narrowed to constitute a *bona fide* inquiry. In doing so, the Court below inappropriately modified the factors from *Ahmad* and did not give suitable weight to the privacy and expressive freedom value of the activities impacted by the police's conduct.

34. In applying the entrapment doctrine to online spaces, the courts should not unduly discount the value to expressive freedom of the activity impacted by the police investigative techniques. The Court below unreasonably dismissed the negative impacts of the police investigative tactics on expressive freedom. Specifically, the Court held that the non-targeted activity impacted by Project Raphael had "little importance to freedom of expression" because it involved communicating to obtain for consideration the sexual services of an (adult) person, which is a criminal offence under s. 286.1.[35]

[32] *R v Le*, 2019 SCC 34, at para 78.
[33] *R v Chehil*, 2013 SCC 49, at paras 42-43.
[34] Roach, at 1474.
[35] *Ramelson*, at paras 128, 136-138.

35. However, even online activities that may be unlawful or distasteful to some have value to an individual's expressive freedom.[36] This Court has held that communications for the purposes of advertising and selling sexual services are covered by the *Charter*'s guarantee of freedom of expression.[37] There is inherent value to the individual in being able to express oneself freely and openly about one's sexual preferences and desires, whether those communications occur with sex workers or otherwise. In many ways, such conversations are fostered by the privacy offered by virtual spaces and electronic means of communication. The Court below improperly disregarded the importance of such activities to expressive freedom wholesale, in order to excuse the negative impact of police tactics such as those involved in these appeals on such activity.

36. Further, the Court below gave insufficient weight to the disproportionate impact of Project Raphael on innocent people and inappropriately inserted value judgments concerning the nature of the activities being affected in order to discount the negative effects of the police conduct.

37. There is a disconnect between the factors that the Court of Appeal considered and what the majority actually said in *Ahmad*. *Ahmad* directed courts to consider "the time of day and the number of activities and persons who might be affected" in order to assess whether the police have sufficiently narrowed the scope of the virtual space being targeted.[38] This factor was self-evidently focussed on the *quantity* of impact on people not involved in the crime being investigated.

38. However, in the analysis of the Court below, this factor instead morphed into an assessment of the nature and perceived "value" — or "quality" — of the activities that might be affected. Specifically, instead of relying on the wording from *Ahmad*, the Court of Appeal described this factor as "The activities affected by the investigation". It went on to conclude that there was little value to the affected activities because they were nevertheless criminal.[39] This conclusion was used to support the existence of reasonable suspicion.

39. Transforming the inquiry into an assessment of the quality of the impacted activity — rather than the amount of innocent individuals affected — risks making the entrapment analysis

[36] *Sharpe*, at para 27.
[37] *Reference re ss 193 and 195.1(1)(C) of the Criminal Code (Man.)*, [1990] 1 SCR 1123, at 1134. See also: *R v Anwar*, 2020 ONCJ 103, at paras 6, 128; *R v Boodhoo*, 2018 ONSC 7205, at para 46.
[38] *Ahmad*, at para 41.
[39] *Ramelson*, at paras 127-129.

dependent on the subjective value judgments of police or judges. Thus, random virtue testing becomes more acceptable where the police tactic only impacts those engaging in activities that some deem to be less valuable, even where that activity has no connection to the particular criminal conduct targeted. The perceived "low value" of impacted activities should not affect whether a virtual location is defined with sufficient precision to support reasonable suspicion.

40. Finally, by discounting the privacy and expressive value of the location through focusing on the criminality of the activities affected, the Court below has provided the police with a manner of circumventing the requirement from *Mack* that reasonable suspicion must attach to the *same type of criminality* as the opportunity being offered. As noted above, this Court in *Mack* held that there must be a rational connection and proportionality between the crime for which police have reasonable suspicion and the crime which the police provide the accused with the opportunity to commit.[40] However, the analysis of the Court below permits the police to support reasonable suspicion by relying on other, unrelated criminality. Specifically, in this case, the Court effectively relied on the fact that users of Backpage were engaged in one type of criminal activity — communicating for the purposes of adult prostitution — in order to support their reasonable suspicion to offer an opportunity to commit a much more serious offence. In essence, the Court below permitted the police to do indirectly what *Mack* precluded them from doing directly.

41. The Court of Appeal's approach of relying on the criminal nature of the impacted activity as a basis for reasonable suspicion — where that activity is not rationally or proportionally connected to the offence being targeted — risks undermining the purposes of the entrapment doctrine. It should be rejected.

PART IV - COSTS AND ORDERS SOUGHT

42. The BCCLA does not seek costs, and asks that no costs be awarded against it. The BCCLA takes no position with respect to the disposition of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 3rd day of May, 2022.

for **Gerald Chan / Spencer Bass**
Counsel for the Intervener, BCCLA

[40] *Mack*, at 958. See also: *Brown*.

PART V – TABLE OF AUTHORITIES

	Para(s) in Factum
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