SCC File No.: 39664

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

BETWEEN:

COREY DANIEL RAMELSON

Appellant
(Respondent)

and

HER MAJESTY THE QUEEN

Respondent
(Appellant)

FACTUM OF THE APPELLANT

COREY DANIEL RAMELSON, APPELLANT
(Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I – OVERVIEW OF POSITION AND STATEMENT OF FACTS

Overview

1. The Appellant was arrested by the York Regional Police ("YRP") as part of "Project Raphael", an online police investigation conducted through electronic communications on a website, Backpage.com, by undercover officers pretending to be underage sex trade workers. This operation was aimed at the "buyer side" of juvenile prostitution. The Appellant was convicted after a judge alone trial, but the trial judge stayed the charges after a reconsideration of the subsequent entrapment application as a result of this Court's decision in *R. v. Ahamad*.[1] The Crown appealed the trial judge's decision.

2. The Court of Appeal for Ontario dealt with four cases in a joint hearing in January of 2021, including the Appellant's. Unlike the Appellant, the other three had failed to persuade their respective trial judges that they were entrapped, although those three applications were decided prior to the release of this Court's decision in *Ahmad.* The four cases not only shared a common legal issue arising from the very same police investigation, but three of the four also shared similar factual records on entrapment.

3. The Court of Appeal held that the police investigation in Project Raphael did not constitute entrapment.[2] As a result, the Crown appeal in *Ramelson* was allowed, and the Appellant was left with an appeal as of right to this Court. The companion defence appeals were dismissed.

4. The Appellant submits that the Court of Appeal for Ontario erred in overturning the Appellant's stay of proceedings, especially in light of this Court's decision in *Ahmad*.

5. The Appellant submits that the decision from this Court in *Ahmad* clarifies and expands upon the nature of the analysis of what constitutes reasonable suspicion in the context of an investigation based on a "virtual space" versus a "physical place". The decision reinforces the recognized need for police officers to have reasonable suspicion over a person or location prior to providing an opportunity to commit an offence and, more importantly, heightens the scrutiny

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[1] *R. v. Ahmad*, 2020 SCC 11; *R. v. C.D.R.,* 2020 ONSC 5030
[2] *R. v. Ramelson*, 2021 ONCA 328

applied to investigations of virtual spaces. Virtual spaces raise special concerns that do not exist with physical places, and therefore "state surveillance over virtual spaces is of an entirely different qualitative order than surveillance over a public space".[3]

6. In this light, this Court in *Ahmad* asserted a presumption that "entire websites or social media platforms will rarely, if ever, be sufficiently particularized to support reasonable suspicion".[4] This is not a surprising development; it is consistent with this Court's repeated emphasis that normative assessments of reasonable expectations of privacy must keep pace with technological advancements to ensure the citizens are protected against unauthorized intrusions upon our privacy.

7. The Appellant submits that the trial judge made no legal errors in his reasons concluding that the police entrapped the Appellant, and, therefore, a stay of proceedings was properly entered. The trial judge's factual findings en route to his legal conclusion are entitled to substantial deference and, absent palpable and overriding error, the facts as found by the judge cannot be disturbed. Finally, entrapment rulings are fact specific inquiries. As evidenced by the decisions in *Ahmad* and *Williams*, the application of the same legal test can yield different results, depending on the circumstances of each case and on nature of the police conduct in the particular case. Justice de Sa, in the post-*Ahmad* application, properly reassessed his original approach and reasoning to take into account this Court's clarification and guidance as to how to apply the entrapment framework to virtual spaces, an area that this Court had not previously addressed in its entrapment jurisprudence.

8. To the extent that Justice de Sa revised his reasoning in the post-*Ahmad* application, this was largely based on his understanding of how this Court directed trial judges to apply entrapment principles in the context of virtual spaces. In this case, Justice de Sa had originally accepted the view asserted by the Crown, and supported to some extent by the Court of Appeal for Ontario decision in *Ahmad*, that the police should be given more flexibility in the assessment of the reasonableness of their conduct when they are dealing with virtual spaces because of the inherent difficulties of detecting criminality in virtual space. In fact, this Court in *Ahmad* expressly rejected

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[3] *R. v. Ahmad*, 2020 SCC 11 at paragraph 37
[4] *R. v. Ahmad*, 2020 SCC 11 at paragraph 43

a similar argument advanced by the Crown in that case, observing that while detecting crime in virtual space may pose difficulties, "the risks posed to individual interests, although different, are not ameliorated where police investigate virtual communications as opposed to a physical space."[5]

9. In the post-*Ahmad* application, Justice de Sa noted this Court's emphasis on the qualitative difference between police surveillance over virtual spaces and public spaces, and the heightened risk of police targeting innocent persons in virtual spaces as opposed to physical spaces. This drove Justice de Sa to reassess his original interpretation of how the police implemented Project Raphael in this particular case. He also acknowledged, as did the Crown at trial, that this Court focused on closely scrutinizing the particular wording of the conversations that took place in *Ahmad* and *Williams*, and that correspondingly that same scrutiny had to apply to the text conversation in case. The trial judge's approach, therefore, was laudatory and completely consistent with a proper reassessment of his original decision, insofar as he accepted that his original approach and views were not in accordance with more recent direction from this Court.

10. The Crown alleged below that the trial judge erred in the manner that he dealt with the *bona fide* inquiry prong of the entrapment doctrine and the reasonable suspicion standard. The Appellant disagrees. The trial judge followed the framework outlined and applied by this Court in *Ahmad*. The trial judge, as evidenced by the colloquy with counsel during submissions and in his ruling, took note of this Court's comments on the relationship between the *bona fide* inquiry prong and the reasonable suspicion standard. He specifically picked up on this Court's observation that reasonable suspicion can attach to a specific phone number because it is precisely and narrowly defined, but that some virtual spaces may be too broad to support a sufficiently particularized reasonable suspicion. Even though Justice de Sa held that it was permissible for police to investigate Backpage.com as a potential location where some persons sought the services of underage girls, he found that the website was simply too broad in scope to satisfy the particularized and individualized reasonable suspicion standard required by *Ahmad*.

11. The trial judge then proceeded to apply this framework to the Project Raphael context and the specific text conversation between the undercover officer and the Appellant. A close

[5] *R. v. Ahmad*, 2020 SCC 11 at paragraph 40

examination of the specific conversation was inevitable, because as this Court noted in *Ahmad* the reasonable suspicion standard operates prospectively, not retroactively.

12. The trial judge then did exactly what this Court did in *Ahmad*, namely closely examined the particular text conversation before him to determine if the police had formed reasonable suspicion of the Appellant before offering him the opportunity to commit the crime. This requires the application of the legal standard to a specific factual record, an analysis that will inevitably lead to different results depending on the case, as evidenced by what occurred in *Ahmad* and *Williams*, respectively.

13. In the course of his analysis of the facts before him, the trial judge made a number of factual findings that distinguish this case from those in which entrapment was not found to exist: (i) the Appellant was not known or even reasonably suspected to be looking for an underage girl before he responded to the ad; (ii) the photograph in the ad expressly portrayed someone who was said to be over 18 years old and who, the trial judge found, looked "much older than 18 years old"; (iii) nothing in the original texts from the Appellant indicated that he was looking for an escort who was under 18; (iv) all of the initial texts supported the conclusion that the Appellant was bargaining for sexual service from a person over the age of 18; (v) the undercover officer introduced the issue of age 27 minutes into the text conversation, and only after all the arrangements regarding sexual services and price had been finalized; (vi) none of the so-called "coded" phrases in the ad rose to the level of targeting the narrow group of persons that Project Raphael was designed to capture; (vii) the undercover officer took no steps in the text conversation to assist in establishing a reasonable suspicion that the Appellant was looking for an underage girl; and (vi) the method used in this particular case amounted to a "bait and switch" that clearly raised entrapment concerns.[6]

14. Given these findings, it is not surprising that the trial judge concluded that the police's investigative approach in this case resulted in random virtue testing. In essence, the trial judge found that the police investigative conduct caused the Appellant to commit an offence that he otherwise would not have committed. The police in this case effectively "manufactured" the offence, and failed to capture the intended target of the Project, namely a person specifically seeking the sexual services of underage girls. In this vein, it has not escaped the notice of

[6] *R. v. C.D.R.*, 2020 ONSC 5030, at paragraphs 25-33

academics who study the design, implementation and effects of such projects on the young people they are designed to help, that they do not achieve their desired goals, and in fact end up doing more harm than good.[7]

Procedural History

15. On July 29, 2019, after a judge alone trial in the Ontario Superior Court in Newmarket, Ontario, Justice de Sa found the Appellant guilty on an indictment alleging three offences under Sections 172.1, 172.2, and 286.1 of the *Criminal Code*.[8] On November 28, 2019, Justice de Sa dismissed an application to stay the proceedings on the basis of entrapment.[9] On February 14, 2020, Justice de Sa declared the relevant mandatory minumum sentences to be unconsitutional. Further sentencing submissions were made on March 6, 2020. Due to the intervening COVID-19 pandemic, the Applicant had not yet been sentenced.

16. On May 29, 2020, this Court released its decision in *Ahmad*, in which the Court reviewed the law of entrapment in the context of "dial-a-dope"operations. As a result of the release of the decision in *Ahmad*, Justice de Sa asked the parties to address the impact, if any, of *Ahmad* on the entrapment analysis in this case. As noted above, as a result of those further submissions, Justice de Sa stayed the proceedings against the Appellant on the basis that he was entrapped. The Court of Appeal for Ontario reversed the stay on a further Crown appeal.

Background & Key Facts at Trial and on the Entrapment Applications

Overview

17. The Appellant was one of over 100 men arrested between 2014 and 2017 as part of Project Raphael, a scheme developed by its "architect", Detective Truong, to target the "buyer side" of "juvenile prostitution". The project was conducted in various stages during those years. The manner in which the Appellant was alleged to have committed these offences was fairly typical among Project Raphael cases. He responded by text message to an ad posted by Officer Cook, in

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[7] Lauren Menzie and Taryn Hepburn, "Harm in the Digital Age: Critiquing the Construction of Victims, Harm, and Evidence in Proactive Child Luring Investigations", (2020), 43 Manitoba Law Journal 391

[8] *R. v. C.D.R.* 2019 4061

[9] *R. v. CDR*, 2019 ONSC 6894

the adult classified section of Backpage.com advertising the sexual services for hire of an 18 year-old woman. About half an hour into the conversation Officer Cook represented to the Appellant that "she" and "her friend" were actually underage. Officer Cook agreed, after some initial hesitation to do so, that the best practice, given the targets of the project, was to introduce the issue of age as early in the text conversation as possible. The Appellant was arrested when he later showed up at the hotel that was the agreed upon location of their arranged sexual encounter. Despite finding the Appellant guilty, the trial judge made the following notable finding in his reasons for judgment:

> It is evident that the accused did not initially intend to obtain sexual services from someone who was underage. There is nothing to indicate the accused was looking for a person who was underage by contacting the posted ad. Nothing in his initial conversation [that lasted about 27 minutes] would indicate that he was looking for an underage female.[10]

18. There is little dispute that Project Raphael was created due to generalized concerns about the ills of child prostitution and was designed to target "buyers" of sex with children. The project was *not* intended to target consumers of adult prostitutes. Rather, the focus of the project was on men that were purchasing sex *and would engage in sex* with prostituted children.

19. Each year, the Project was carried out more or less the same way. The scheme of placing ads and their content are largely the same in each case. All the postings represented the escort to be at least 18 years old, included multiple photographs of someone apparently over 18, and typically included prices that would be charged for sexual services. Although specific sexual services may or may not have been specified, there could be no doubt that each posting advertised sexual services for hire. It is common ground that the Backpage.com interface required the poster to specify an age that was 18 or greater. If someone attempted to list their age as lower than 18, the software would reject the entry.

Pertinent Facts from the Appellant's Trial

20. Officer Cook posted an ad on March 27, 2017 at 2:57 pm. The ad included 3 photographs of a female officer posing as an underage prostitute.[11] The female officer pictured in the ad was in fact in her 30's at the time the photographs were taken.

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[10] *R. v. C.D.R.* 2019 4061 at paragraph 67
[11] Appellant's Record, Volume I, at pp. 130-131

21. In addition to the photographs, the ad included the following text:

> Back only for a few days – Tight Brand NEW girl in [north of Toronto] - Waiting for you – 18
>
> Hi guys my name is Michelle and I'm a girl who is sexy and YOUNG with a tight body looking for fun. I'm only here for a few days just visiting from out of town.
>
> I also have a YOUNG FRIEND if you interested too.
>
> Highway 7 and Leslie area :)
>
> In calls only. Don't miss this you'll be sorry!!
>
> 80 hh 140fh[12]
>
> TEXT ONLY
>
> Poster's age: 18

The Conversation with the Appellant

22. On March 27, 2017, at 16:01, the Appellant contacted Officer Cook's posted ad. Officer Cook, who was holding himself out to be Michelle, responded. The text conversation went as follows:

> 16:01 - Accused: Hey hun are you available
>
> 16:02 - UC: Yep
>
> 16:02 - Accused: Where are you located and what are your rates hun
>
> 16:14 - UC: Leslie and 7. 80 hh for protected sex and bj.
>
> 16:15 - Accused: Bbbj?
>
> 16:16 - UC: Yep.
>
> 16:16 - Accused: You have a Friend you mentioned in your ad
>
> 16:17 - UC: Yep Jamie she is on BP too. Blonde

[12] The reference in the ad to "80 hh" and "140 fh" indicated that it would cost $80 for one half hour of sexual services, and $140 for a full hour.

16:17 - UC: 150hh

16:21 - Accused: For both?

16:22 - UC: Yep

16:22 - Accused: Can't find her ad

16:24 - UC: 6474956233

16:26 - Accused: OK yes I want to see you girls.

16:26 - Accused: When is best time to come[13]

23. After the Appellant confirmed he wanted to see the women, the conversation continued as follows:

16:28 - UC: Just so you know we under 18. Some guys freak out and I don't want problems. We are small and it's obvious.

16:29 - Accused: I'm cool with it. I'll be gentle as long as you're sexy and willing.

16:30 - Accused: I'll start making my way to you now. Where are you staying?

16:31 - UC: We are both willing. We're 14 but will both be turning 15 this year. That cool? We are buddies and very flexable??

16:32 - Accused: Should be lots of fun

16:32 - Accused: Are those real photos from the ads. Those girls look a bit older.

16:36 - UC: they are both us.

16:37- Accused: Ok. I'm going to leave now.

16:37 - Accused: Where are you located.

16:39 - UC: Go to [north-end Toronto] and msg me. I tell you where to go then.

16:39 - Accused: ok. It's a hotel?

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[13] Appellant's Record, Volume I, at p. 133

16:40 - UC: Yeah hotel. Ok just so we know you want sex with both of us and a blow job? I don't need any surprises.

16:41 - Accused: Yes sex with both and bbbj from both

16:42 - Accused: Can you girls dress up for me

16:44 - UC: Like what

16:44 - Accused: Do you have a body suit

16:44 - UC: No

16:44 - Accused: Leggings?

16:44 - UC: I'm 14 I got regular clothed and my bra and underwear.

16:45 - Accused. Ok. Dress in something cute and sexy

16:45 - Accused: Same with Jamie

16:46 - UC: OK will do

16:46 - Accused: I like thongs if you have

16:47 - UC: I do.

16:47 - Accused: Perfect

16:47 - Accused: Ok so I'll text when I'm there

16:49 - UC: Kk[14]

24. At 17:49, Officer Cook texted the Appellant again to determine his whereabouts. The conversation continued:

17:49 - UC: You coming

17:50 - Accused: Yes just in some traffic

17:50 - Accused: I'm on my way

17:51 - UC: How long so I can get ready

17:51 - Accused: 20

[14] Appellant's Record, Volume I, at p. 134-135

17:51 - UC: Ok

18:13 - Accused: Which hotel

18:14 - UC: You at [north-end Toronto] area

18:14 - Accused: Yeah

18:14 - UC: [hotel in north-end Toronto]

18:14 - UC: Msg when in the lot and I'll give you room number

18:14 - Accused: Ok be there shortly

18:15 - UC: Ok

18:15 - UC: Can't wait

18:16 - Accused: Both you girls ready looking cute

18:16 - UC: I would say we look hot

18:16 - UC: ☺

18:23 - Accused: Good I'm here

18:23 - UC: Ok come up to 440[15]

25. Officers were waiting in Room 440. At 18:27, the Appellant knocked on the door. The police opened the door and ushered the Appellant into the hotel room where he was arrested.

Other Notable Evidence at Trial

26. Officer Cook's specific experience with Project Raphael was originally limited to being part of the arrest teams in 2014. He rejoined the Project in 2017, and his first experience in conducting an undercover conversation as part of the Project was on March 27, 2017, the day of the Appellant's arrest. He received no formal training for his assignment aside from some brief conversations with superior officers who asked him to review "some case law". Officer Cook described these as "passing conversations nothing formal just to make sure I was okay with the role".[16]

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[15] Appellant's Record, Volume I at pp. 135-136
[16] Appellant's Record, Volume IV at pp. 48-51

27. Officer Cook did not create the ad to which the Appellant replied. Rather, Detective Truong created the ad. Officer Cook acknowledged that the photographs in the ad were of a police officer who was in her 30's when the photographs were taken. In fact, during his text conversation with the Appellant, the Appellant noted his own observation that the photographs in the ad appeared to be of women that were older than Officer Cook suggested. The trial judge also specifically found that that the photographs depicted a woman clearly over the age of 18.[17]

28. Officer Cook acknowledged, although somewhat grudgingly in cross-examination, that the best practice as devised by the Project's "architect" Detective Truong, was for the undercover officer to introduce the topic of age as early as possible in the conversation. This was consistent with *raison d'etre* of the Project, which was to target persons interested in obtaining the sexual services of underage children, and not, for example, to target persons seeking sexual services from an adult sex trade worker.[18]

29. With respect to the text conversation, Officer Cook agreed that he had at least 6 chances to introduce the issue of age into the conversation earlier than he ultimately did. He was repeatedly asked to explain why he did not. His "best" answer was that the issue simply did not "fit the flow" of the conversation. Despite this claim, when he was taken to each of the 6 specific places that he could have introduced the issue of age, he agreed that he could have raised it at any of those points without difficulty. Ultimately, Officer Cook only advised the Appellant that "Michelle" and her friend were underage, about 27 minutes into the text exchange. This was after he and the Appellant had agreed on the range of sexual services and the prices for them.[19]

30. Officer Cook also acknowledged that certain techniques that are often used, by himself and other undercover officers, to send a clear signal that the undercover officer is in fact portraying someone underage, were not used during his conversation with the Appellant. Among those techniques are referring to the school that the girl is attending, the time that the girl is due to finish

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[17] Appellant's Record, Volume IV at pp. 52-54; 92-93; *R. v. C.D.R.* 2019 ONSC 4061 at paragraphs 5 and 60; *R. v. C.D.R.* 2020 ONSC 5030, at paragraph 26
[18] Appellant's Record, Volume IV at pp. 56-60; 72-79
[19] Appellant's Record, Volume IV at pp. 80-89; 90-92

school for the day, and the fact that the girl will need someone else to book the hotel room since she is too young to arrange for the room on her own.[20]

Trial Judge's Reasons at Trial

31. The trial judge convicted the Appellant at trial, but in the course of so doing made certain findings that are relevant to the subsequent entrapment applications. The trial judge accepted and held that the woman portrayed in the photographs in the ad was in her early 30's, and clearly appeared to be over the age of 18. Further, he accepted that nothing else in the ad suggested that "Michelle" was under the age of 18. The trial judge accepted that it was not until at least 26 or 27 minutes into the text conversation that Officer Cook introduced the age issue. Finally, the trial judge accepted that the Appellant did not initially intend to obtain the services from someone who was underage when he replied to the ad. Nothing indicated that the Appellant was looking for an underage person by contacting the posted ad, and nothing in his initial conversation with the undercover officer indicated that he was looking for an underage female.[21]

Reasons on Original Entrapment Application

32. The trial judge dismissed the Appellant's initial application for a stay of proceedings based on entrapment. In so doing, the trial judge seemed to interpret the Court of Appeal for Ontario decision in *Ahmad* as suggesting that in cases involving virtual space, the inherent difficulties the police face in investigating targets of criminal activity operating in that space ought to be factored into a more flexible assessment of the reasonableness of the police action, a position taken by the trial crown in her original submissions. The trial judge also reiterated his finding that the Appellant was not looking to have sex with an underage girl until the police intervention, but that this, in his view, was a matter more relevant to the appropriate sentence.[22]

Reasons on Post-Ahmad Entrapment Application

33. After this Court released its judgment in *Ahmad* and *Williams*, the trial judge requested that the parties make additional submissions on the entrapment application. After receiving both

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[20] Appellant's Record, Volume IV at pp. 89-90
[21] *R. v. C.D.R.* 2019 ONSC 4061 at paragraphs 5, 14, 60 and 67
[22] *R. v. CDR*, 2019 ONSC 6894 at paragraphs 47-48 and 66; Appellant's Record, Volume VI at pp. 116-117

written and oral submissions, the trial judge found that in light of the reasoning in *Ahmad* and *Williams*, the Appellant was entrapped and he therefore entered a stay of proceedings.

34. The trial judge described the decision in *Ahmad* as a clarification of the existing legal framework in the area of entrapment that had been previously established in cases like *Mack* and *Barnes*. The trial judge took note of this Court's comments on the application of the entrapment doctrine in the context of virtual spaces, specifically that virtual spaces raise unique concerns of an entirely different qualitative order than police surveillance over a public space. During the course of submissions, the trial judge understandably and correctly focused on this Court's interpretation of the specific conversations in *Ahmad* and *Williams* that led the Court to come to opposite conclusions on the entrapment issue, even though the virtual space in both cases was the same (a phone number), and qualified as a justified area for police investigation.[23]

35. The trial judge acknowledged that the escort section of Backpage.com qualified as a proper location for police investigation into potential juvenile prostitution, although he also found, based on the evidentiary record before him, that the overwhelming majority of traffic on the website were men seeking the sexual services from adult sex trade workers. Indeed, based on the content of the ad in this case, there was no reasonable basis to believe that the Appellant, by replying to the ad, was looking for an underage girl.[24]

36. Further, with respect to the text conversation, nothing in the initial exchanges indicated that the Appellant was looking for anything other than an adult woman. After 27 minutes, and only after all the specific arrangements for the sexual services and prices were established, did the undercover office raise the age issue. The trial judge referred to this as a "bait and switch" technique. The undercover officer did nothing, before providing the Appellant with the opportunity to commit the targeted offence, to establish a reasonable suspicion that the Appellant was looking for an underage girl. The trial judge expressly relied on the reasoning in *Ahmad*, where the majority of this Court noted that reasonable suspicion is formed prospectively and requires some action by the police to form reasonable suspicion before the opportunity to commit

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[23] *R. v. C.D.R.* 2020 ONSC 5030, at paragraphs 5, 12, 18-20; Appellant's Record, Volume VII at pp. 23-45

[24] *R. v. C.D.R.* 2020 ONSC 5030 at paragraphs 22-24; 26-27

a crime is offered to the target. The result of the specific approach of the police in this case resulted in prohibited, random virtue testing, and therefore, the charges were stayed.[25]

PART II – QUESTIONS IN ISSUE

37. The decision of the Court of Appeal for Ontario is appealed on the following grounds, which the Appellant submits are inter-related and can be addressed in a largely compendious fashion:

a. In light of *R. v. Ahmad*, 2020 SCC 11, what is the proper approach to determining whether police had a reasonable suspicion that criminal activity was occurring in virtual space before extending an offer to commit a criminal offence?

b. Under what circumstances is reasonable suspicion of the individual required under the *bona fide* inquiry prong of the entrapment framework as set out in *R. v. Ahmad*, 2020 SCC 11?

c. What is the proper analysis to be applied in determining whether a virtual space, in which police virtue tested persons randomly, was sufficiently precisely and narrowly defined to meet the standard of a *bona fide* inquiry?

d. To what extent is the number of innocent persons, who are randomly virtue tested in a space, a factor in assessing whether or not a virtual space was sufficiently precisely and narrowly defined to meet the standard of a *bona fide* inquiry?

e. To what extent are the activities that would be affected by the police investigation relevant to the assessment of whether random virtue testing has occurred?

f. To what extent is a comparative analysis of the nature and content of the expression taking place in the targeted virtual space relevant to the assessment of whether random virtue testing has occurred?

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[25] *R. v. C.D.R.* 2020 ONSC 5030 at paragraphs 28-29; 32-36

g. What is the nature and scope of the evidence required to establish that the police had reasonable suspicion in a space to satisfy the *bona fide* inquiry prong of the entrapment framework as set out in *R. v. Ahmad*, 2020 SCC 11?

h. To what extent is the difficulty in investigating the target activity a relevant factor in assessing whether the *bona fide* inquiry prong of the entrapment framework has been met?

PART III – STATEMENT OF ARGUMENT

Overview

38. Entrapment arises in either of two situations: (a) where police offer someone an opportunity to commit a crime with no reasonable suspicion that the person is already engaged in criminal activity — unless that opportunity was offered in the course of a *bona fide* investigation; or, (b) where police do have a reasonable suspicion or were acting in the course of a *bona fide* investigation, but went beyond simply providing an opportunity and employed tactics designed to induce the person to commit an offence. The focus is on the conduct of the police, not the predisposition of the accused to commit offences.[26]

39. Some of the essential lessons derived from *Mack* and *Barnes* are as follows: First, providing an opportunity to commit an offence without reasonable suspicion (relating to the person or to the location) is, by definition, "random virtue testing.". Second, when considering the presence or absence of a reasonable suspicion of prior criminality (either with respect to the person or to the location), the reasonable suspicion must relate to the particular criminal activity that is the subject of the opportunity presented. A reasonable suspicion of general (or other) criminal activity is insufficient. Third, the mere fact that the police investigation relates to a "consensual" crime such as drug trafficking does not give the police any leeway with respect to the reasonable suspicion/random virtue testing branch of the law of entrapment.[27]

40. The reasoning of this Court in *Ahmad* affirms the entrapment framework first established in *Mack* and *Barnes*, and provides guidance on how the reasonable suspicion standard is to be

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[26] *R. v. Mack*, [1988] 2 SCR 903; *R. v. Barnes*, [1991] 1 SCR 449
[27] *R. v. Barnes*, *supra*, at paragraph 24

applied over "virtual places" like phone lines, message boards and websites. The majority's judgment tightly prescribes the methods by which police must conduct investigations to avoid "random virtue testing." Both cases involved police investigations into "dial-a-dope" schemes. The facts of *Ahmad* and *Williams* are strikingly similar: the police made a call, an opportunity to traffic drugs was provided, an in-person exchange of drugs for money took place, and then Ahmad and Williams were arrested and charged with drug-related offences. In both cases, the information the police had prior to placing the call amounted to: (1) a name; (2) a phone number; and (3) an allegation that the person behind this number was dealing drugs. Despite these similarities, the majority of this Court found that Mr. Williams was entrapped but Mr. Ahmad was not. This was the same result reached by the respective trial judges in *Williams* and *Ahmad*.

41. In *Ahmad* and *Williams*, the appeals centered on the first branch of the entrapment doctrine, namely that authorities must not provide an opportunity to commit an offence without acting with reasonable suspicion or as part of a *bona fide* inquiry. As this Court developed in its earlier jurisprudence, the police will be acting as part of a *bona fide* inquiry when their investigation is directed at an area where it is reasonably suspected that criminal activity is occurring.

42. Both trial judges in *Ahmad* and *Williams* analyzed the entrapment issues by paying close attention to the specific words used on the phone calls in order to determine whether the police had reasonable suspicion before the offer was made. In *Williams*, the trial judge stayed the proceedings; in *Ahmad* the trial judge did not. In this Court, the majority agreed with the trial judges that Williams was entrapped but Ahmad was not, thus reinstating the stay for Williams. The majority also agreed with Justice Himel's concurring judgment in the Court below that in the dial-a-dope context, information about a person and information about a location such as a phone line, is typically a distinction without a difference. The majority poses the ultimate question to be asked as: "are there objective factors supporting a reasonable suspicion of drug trafficking by the individual answering the cell phone when police provide the opportunity to commit such a crime? Those factors may relate in part to reasonable suspicion of the individual, or of the phone number itself, or to both". The majority's approach relied heavily on the precise words used on the phone calls.[28]

[28] *R. v. Ahmad*, 2020 SCC 11 at para. 42

43. The effect of the majority decision is that that if police do not investigate the reliability of the tip before calling the number provided in the tip, the police may nevertheless attempt to form reasonable suspicion in the course of a telephone conversation with the target, as long as they do so before presenting an opportunity to commit a crime. In its application of the entrapment framework, the majority made it clear that in the dial-a-dope context the entrapment analysis is identical whether it is purported to be done under the personal reasonable suspicion branch or the *bona fide* inquiry branch. A *bona fide* investigation is not a separate and freestanding way for police to entrap an individual, but a means of expressing the threshold of reasonable suspicion in a location. The majority acknowledged that virtual locations like phone numbers or message boards on websites can qualify as places over which the police can have reasonable suspicion. A key requirement is that the virtual space in question must be defined with sufficient precision in order to ground reasonable suspicion.[29]

44. Furthermore, although the majority acknowledged the difficulty of investigating "consensual" crimes, unlike the dissent, they elected not to adjust the objective "reasonable suspicion" standard, and maintained it as the singular yardstick that measures the opportunity-based entrapment analysis for these types of offences. As such, while the majority recognized the *need* to resort to undercover sting operations to try to uncover these types of crimes, it did not lower the obligation to form a reasonable suspicion prior to presenting their target with an opportunity to commit an offence.

45. Finally, the majority emphasized the qualitative difference between police surveillance of virtual spaces versus public places (emphasis added):

> …**conversations over text message, social media messaging, or email, are not analogous to a "public post"** . . . **Virtual 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.
>
> **It follows that state surveillance over virtual spaces is of an entirely different qualitative order than surveillance over a public space. Technology and**

[29] *R. v. Ahmad*, 2020 SCC 11 at paragraph 20

> **remote communication significantly increase the number of people to whom police investigators can provide opportunities, thereby heightening the risk that innocent people will be targeted. Online anonymity allows police to increasingly fabricate identities and "pose" as others to a degree that would not be possible in a public space like the Granville Mall.** And they can do so anytime and anywhere, since cell phones are a 24/7 gateway into a person's private life. Individuals must be able to enjoy that privacy free from state intrusion, subject only to the police meeting an objective and reviewable standard allowing them to intrude…
>
> …the entrapment doctrine ensures Canadians can "go about their daily lives without courting the risk that they will be subjected to the clandestine investigatory techniques of agents of the state" (*Barnes*, at p. 480, per McLachlin J., dissenting). **It is therefore important to carefully delineate and tightly circumscribe virtual locations in which police can provide the opportunity to commit a crime.** As Lamer C.J. noted in *Barnes*, at pp. 462-63, a reasonable suspicion can attach to a place only if it is defined with sufficient precision and "in many cases, the size of the area itself may indicate that the investigation is not *bona fide*." Given that such an inquiry hinges on the presence of reasonable suspicion, the location must be "sufficiently particularized"…
>
> … we note that lower courts have already found that police can conduct *bona fide* inquiries into virtual spaces other than phone numbers. **We repeat, however, that the serious risk of random virtue testing in such inquiries requires that the virtual space be defined narrowly and with precision (Barnes, at p. 463). In our view, entire websites or social media platforms will rarely, if ever, be sufficiently particularized to support reasonable suspicion.** To permit police to target wide virtual spaces is inconsistent with *Mack* and its threshold of reasonable suspicion, and disregards that legitimate communities exist as much online as they do in the physical world.

In the above noted passages, the Court emphasized the strong link between a phone number and an individual. This link differentiates a phone number from a physical location like Granville Mall, which may be accessed by any member of the public. Therefore, reasonable suspicion over a phone number looks much more like individualized suspicion than suspicion over a physical location. The majority clarified as much when it stated, "reasonable suspicion is also *individualized*, in the sense that it picks an individual target -- whether a person, an intersection or a phone number -- out of a group of persons or places".[30]

[30] *R. v. Ahmad*, 2020 SCC 11 at paragraphs 42-48

46. By individualizing suspicion, even where the space is digital, the majority in *Ahmad* reflected the Court's earlier decision in *R. v. Marakah*, and the Court's general concerns in that case with protecting the privacy interests found in digital space from the overreach of law enforcement. Similarly, the majority in *Ahmad* noted that the "increasing prominence of technology as a means by which individuals conduct their personal lives". Privacy is a main consideration of the Court, and police must have reasonable suspicion over a "well-defined virtual space" which is tied to an individual before they are able to present an opportunity to offend. The Court stressed "well-defined" in order to prevent random virtue testing over a broad swath of virtual landscapes and digital communications.[31]

How the Court of Appeal Went Astray

47. The approach of the Court of Appeal to the breadth of the virtual space being investigated will result in almost any website or social media platform being defined as narrow, even if in practice it is extremely wide. First, the Court of Appeal found that what made the virtual space "precisely defined" was that users had to click on posts and respond to ads. However, this ignores the fact that thousands of users could be viewing these posts. Second, the Court of Appeal dismissed the Appellant's argument that the text in the body of the ad could have easily been made more explicit in terms of indicating that the person was underage. This approach would allow the police to erroneously "reasonably suspect" that anyone who responded to the ad was seeking an underage girl and would avoid the label of random virtue testing. Respectfully, by placing weight on engagement with a post without regard for the number of potential users viewing the title of the post or the full post itself but not responding, the Court of Appeal demonstrated a misunderstanding of the nature and breadth of social media platforms.[32]

48. In *Ahmad,* this Court also listed a non-exhaustive list of factors that "may be helpful" to reviewing courts in determining whether or not the police have narrowed their scope so that the purview of their inquiry is no broader than the evidence allows. These factors include: the seriousness of the crime in question; the time of day and the number of activities and persons who might be affected; whether racial profiling, stereotyping or reliance on vulnerabilities played a part

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[31] *R. v. Ahmad*, 2020 SCC 11 at paragraphs 36-41; *R. v. Marakah*, 2017 SCC 59 at paras. 25-55; 67-69

[32] *R. v. Ramelson* 2021 ONCA 328 at paragraphs 114-126

in the selection of the location; the level privacy expected in the area or space; the importance of the virtual space to freedom of expression; and the availability of other, less intrusive investigative techniques. [33]

49. In *Ahmad*, this Court agreed with comments made by Justice Himel below that, when dealing with an individual phone number, there will often be "little real difference between information that the police obtain about the phone line and information that they obtain about the person who answers it". However, as noted above, when expanding the analysis to virtual spaces *other than phone numbers,* this Court cautioned about "the serious risk of random virtue testing" and observed that "entire websites or social media platforms will rarely, if ever, be sufficiently particularized to support reasonable suspicion".[34]

50. The Appellant submits that the appellate result in the present case demonstrates the challenges that will be faced by courts in determining the propriety of certain proactive investigations like Project Raphael, if the Court of Appeal's analysis is affirmed. As noted, one of the listed factors is the "importance of the virtual space to freedom of expression". The Court of Appeal noted that the discussions among would-be customers and the undercover officers did not "fall into the traditional categories of expression valued in a democratic state, such as political speech, social commentary or religious opinion". The Court of Appeal also noted that the communication itself (at least from the proposed purchaser's side) would constitute a criminal offence of communicating for the purpose of prostitution (section 286.1 of the *Criminal Code).*[35]

51. Respectfully, there are likely to be few, if any, police investigations in wide virtual spaces that relate to "political speech, social commentary, or religious opinion". If one accepts that *Ahmad* was an effort by this Court to take the principles of *Mack* and *Barnes* from the physical street and into the virtual world, the fact that the communication used within the investigation constitutes some form of criminal activity ought not to be determinative. This Court observed, in *Mack* and in *Barnes,* that the opportunity to commit the offence must relate to the same criminal activity suspected to be occurring. For this reason, it is impermissible to provide a suspected hashish dealer

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[33] *R. v. Ahmad*, 2020 SCC 11 at paragraph 41
[34] *R. v. Ahmad*, 2020 SCC 11 at paragraph 43
[35] *R. v. Ramelson* 2021 ONCA 328 at paragraphs 128-129; 136-138

with an opportunity to traffic in cocaine without suspicion of the latter, more serious, offence. Applied to the virtual world, providing a person clearly attempting to communicate with an adult prostitute[36] with the opportunity to communicate with a juvenile (without the requisite additional suspicion) is an impermissible step up.

52. Of course, communicating by sex trade workers is not an offence. Each such person who advertised their own sexual services on Backpage.com was committing no offence and was entitled to have their freedom to express their intentions respected. This should also be a relevant factor in the analysis.

53. Finally, the Court of Appeal noted "the number of persons affected" as a "significant" factor, but qualified this comment by observing that, in *Ahmad*, this Court did not assign this factor "greater prominence than the other factors listed". Of course, the failure to single out this factor in *Ahmad* may well have been explained by the facts of *Ahmad,* which simply did not involve the potential for a disproportionate impact on those who were "innocent". [37]

54. The Court of Appeal then continued to compare Project Raphael and its impact on the innocent with the Granville Mall ("in which a considerable majority of persons … did not traffic in drugs") and quoted Justice Moldaver's observation in *Ahmad* that "*Barnes* enabled the police to target thousands of unknown persons and provide them with an opportunity to traffic in drugs" (emphasis added). Of course, in *Barnes*, while the police were "enabled" (meaning "permitted") to provide opportunities to traffic in drugs to thousands of unknown persons, there is no evidence that they *actually* provided those opportunities to a single other person.[38]

55. In Project Raphael, however, the police actually provided opportunities to commit the offence to thousands of other unknown persons and "could have" provided opportunities to a much higher number of people who visited the adult personal section of Backpage.com. Evidence at the Appellant's entrapment hearings showed that the adult classified sections of Backpage.com

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[36] Backpage.com asked all users to verify they were at least 18-years-old and prohibited any solicitation directly or in a coded fashion for any illegal service.

[37] *R. v. Ramelson* 2021 ONCA 328 at paragraph 145
[38] *R. v. Ramelson* 2021 ONCA 328 at paragraphs 141-145

worldwide received approximately 4 million visitors per month. While the number of visitors to the Greater Toronto Area section was not established (and would obviously have been much lower), the number was high enough to sustain 1,000 to 2,000 paid ads placed in the Greater Toronto Area section each day (a figure that *was* in evidence).

56. Further, to the extent that this Court noted in *Ahmad* that the list of factors to be included in the analysis is not closed, it is submitted that this Court should also consider factors that relate to the unique aspects of *inchoate* offences.

57. Offering a random person who responds to an online advertisement for adult sexual services the opportunity to commit the offence of communicating electronically for the purposes of prostitution with a minor is exclusively a test of the virtue of that random person, even if the legal question of whether or not the exercise constitutes "impermissible random virtue testing" is an open one.

58. By contrast, asking a hashish dealer to sell heroin is both a test of virtue and a test of that person's inventory. Someone at a "location" known for hashish trafficking may reject the opportunity to sell a harder drug for either reason. Anyone who completes the transaction and sells the harder drug has demonstrated both their willingness to commit the offence and the fact that they had access to the drug. In short, the success of the police investigation in its goal of reducing the crime in question can be measured. Every ounce of the drug sold to an undercover officer is an ounce that did not get sold by the target to someone else. There is a tangible and measurable result.

59. Targeting those who use websites to hire adult prostitutes is not the same thing. There is no test of "availability", only of virtue. Someone presented with the opportunity to purchase the sexual services of a juvenile will say yes or no based only on their willingness, or lack thereof, to commit the offence. It is therefore impossible to know if the operation was successful in any measurable way. Did the police, by pretending to be underage, actually intercept a single "buyer" who was seeking to purchase a juvenile prostitute? While all the men arrested in Project Raphael were demonstrated to be "willing", it is impossible to know retrospectively if even one of them was actually intending to commit the offence being investigated and was diverted by the police from doing so. Since it is entirely possible that every single person arrested had no such intention,

it may be that all men arrested committed purely police-created crimes that they otherwise would not have committed.

60. The Appellant's case provides a good paradigm for this analysis. In this case, Officer Cook posted an ad for an 18-year-old escort and invited replies by text message. The placing of the ad was an opportunity presented to all users of Backpage.com to commit the section 286.1(1) offence – communicating for the purpose of adult prostitution. A positive text reply to the ad was all that was required to complete the communicate adult prostitution crime. The Appellant accepts that the ad itself was not an opportunity to commit any of the child prostitution offences. Additional steps still needed to be taken to complete any of them; namely, the customer would still need to be told the escort was underage, and would need to continue the communication after that point.

61. The Appellant submits that the "opportunity" in this case was presented at the time when Officer Cook texted at 16:28 that he and his friend were underage. This is based on the context of their exchange to that point and on the words of the ad. The primary basis for this submission is that all that was left to complete the child prostitution offence, after this text was sent, was a positive response from the Appellant. By then, he had clearly known that prostitution services (sex for money) were being offered. The rates were initially set out in the ad posted by Officer Cook.

62. Before the 16:28 text was sent, the Appellant was involved in an ongoing series of texts with Officer Cook to arrange to meet and purchase sexual services from an adult. The section 286.1(1) (adult prostitution) offence was long complete by then. Once age (under 18) was introduced by Officer Cook, the Appellant could have avoided committing the more serious section 286.1(2) only by discontinuing the conversation. Any response that furthered the conversation towards finalizing the details of the rendezvous completed the child prostitution offence. Prior to the introduction of age, only the lesser offence was being committed. By introducing age, Officer Cook upped the *ante* and, both legally and factually, provided the Appellant with the opportunity to commit the more serious offence.

63. The assertion at 16:28 that he and his friend were underage was crucial. This was not merely a benign inquiry, devoid of context, to see if the Appellant "approved" of Officer Cook being underage. It was a loaded assertion to see if the Appellant, who had already agreed to meet

Officer Cook and exchange money for sex, was "ok" to continue with the planned transaction notwithstanding the additional information about age that was provided.

64. The Appellant's position finds support in the recent decision of this Court *R. v. Mills,* 2019 SCC 22. In *Mills,* the Court carved out the first relationship based exception for Section 8 privacy protection by finding that an adult who *knows from the outset* that the stranger is underage and chooses to initiate communication with her has no reasonable expectation of privacy. The Court based this exception on (i) the fact that the police investigative tactic permitted the accused to know the person was underage *before choosing to communicate* with that stranger; and (ii) that the relationship between an adult who chooses to communicate with a child who is a stranger is so inherently suspicious that an adult cannot reasonably expect privacy from the state.

65. As this Court noted, Mills was communicating with someone he believed to be a *child,* who was a *stranger* to him. Mills' claim was, therefore, that even when conversing with a child who was a stranger to him, he retained the ability to choose, *selectively,* with whom he would share certain communications. This presupposes that there is nothing inherently different between a relationship involving an adult and a child unknown to them, and other relationships, for the purposes of the Section 8 privacy analysis.[39]

66. This Court went on to say:

> We must also bear in mind that most relationships between adults and children are worthy of s. 8's protection, including, but in no way limited to, those with family, friends, professionals, or religious advisors. Significantly, *and most importantly for the disposition of this appeal,* this difficulty does not arise here. Here, the police were using an investigative technique allowing it to *know from the outset* that the adult was conversing with a child who was a stranger.
>
> While this Court has not traditionally approached s. 8 from the perspective of the particular relationship between the parties subject to state surveillance, this is because of its view of s. 8's protection as content-neutral. In this case, the police technique permitted them to know that relationship in advance of any potential privacy breach.
>
> Our s. 8 jurisprudence is predicated on police obtaining prior authorization before a *potential* privacy breach. But no such potential exists here. The police *created* the fictitious child and waited for adult strangers to message them… [P]olice knew from the outset the nature of the relationship between these conversants.

[39] *R. v. Mills,* 2019 SCC 22, at paragraph 22

> [T]o repeat, it is that Mills cannot establish an objectively reasonable expectation of privacy in these particular circumstances, where he conversed with a *child* online who was *a stranger* to him and, *most importantly,* where the police knew this when they created her.[40]

67. In carving out this unprecedented exception to section 8 of the *Charter,* this Court foreshadows the issue raised in this case by adding the following important caveat:

> However, this conclusion in no way gives the police a broad license to engage in general online surveillance of private conservations…the common law doctrines of abuse of process **and entrapment place limits on the ways police can use electronic communications in the course of an investigation**.[41]

68. In the Appellant' case, he did not know from the outset that he was communicating with someone claiming to be a child. Rather, he chose to communicate on an adult-only site with a female whose profile claimed she was 18 years old. It was the police officer who changed the nature of the relationship by telling the unsuspecting Appellant that "she" was 14 years old. The police created the opportunity for the Appellant to communicate online with a 14-year-old girl that was a stranger to him. The Appellant did not go looking for this opportunity. Determining whether an opportunity was provided to an individual requires an analysis of the police conduct, not how the individual responds to that conduct. The fact that the person "takes the bait" is irrelevant.

69. Rather, the appropriate question is whether or the police were entitled to "go "fishing" to begin with. The rationale for conducting the entrapment analysis only up until the time the offer is made was explained with great clarity and force by Justice Lamer in *Mack* and it holds equal force today:

> It is a deeply ingrained value in our democratic system that the ends do not justify the mean. In particular, evidence or convictions may, at time, be obtained at too high a price. This proposition explains why as a society we insist on respect for individual rights and procedural guarantees.
>
> The test for entrapment cannot be safely based on the assumption that a predisposed person can never be responding to police conduct in the same way a non-predisposed person could be. It is always possible that, notwithstanding a person's predisposition, in the particular case it is the conduct of the police which has led the accused into the commission of a

[40] *R. v. Mills,* 2019 SCC 22, at paragraphs 24-25; 27-28; 30
[41] *R. v. Mills,* 2019 SCC 22, at paragraph 60

> crime. … To justify police entrapment techniques on the ground that they were directed at a predisposed individual is to permit unequal treatment.[42]

70. For the entrapment analysis to have any meaning, how enthusiastically a person accepts an opportunity provided by the police must always be an irrelevant consideration. The focus must remain on whether the police crossed the "fine line" and offered the person an opportunity to commit the crime, not whether they took the bait. That is what happened in this case.

Policy and Practical Considerations

71. The efficacy of proactive child luring investigations like Project Raphael cannot be divorced from their purported animating principles. If there is a disconnect between the two, then this surely informs the entrapment analysis. In a recent article noted above, the authors examined the efficacy of such proactive child luring investigations. This article was presented to the Court of Appeal for Ontario and was the subject of argument, but the Court did not engage with its analysis, or mention it in their decision.[43]

72. The authors' observations and conclusions are both informative and enlightening, as they review the history of the current child luring legislation and the related jurisprudence, and they address many of the underlying themes of the entrapment framework, and how it is currently being applied in the child luring context. Further, Project Raphael is specifically referenced, as is the Appellant's particular case, and that of the companion cases before the Court of Appeal below, among others.

73. In the Abstract at the beginning of the article, the authors set out their position as follows:

> We question the legitimacy of proactive investigations as a redress to child sexual exploitation online by examining child luring cases. **We note that while prosecutions brought forward through the proactive investigation process have significantly increased, they rarely uncover any instances of harmful behaviour, 'real' victimization, or any criminal activity aside from the initial conversation**.

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[42] *R. v. Mack*, [1988] 2 SCR 903, at paragraphs 74 and 109

[43] Lauren Menzie and Taryn Hepburn, "Harm in the Digital Age: Critiquing the Construction of Victims, Harm, and Evidence in Proactive Child Luring Investigations", (2020), 43 Manitoba Law Journal 391

The authors proceed by describing the typical proactive investigation:

> A proactive investigation relies upon the anonymity of online spaces; police officers pose as youth online--often young women--and act as 'bait' for potential predators. Often these discussions are initiated by the officers. In many of the cases we have found, officers are responding to posts seeking casual sexual relationships and, more troubling, at times these posts have no clear solicitation of youth underage. Policing in this online context allows us to read the state's construction of the "digital girl" as both highly sexualized and commoditized. Police present young people as willing communicants who are compliant, even enthusiastic, about an in-person meeting.[44]

74. The authors then proceed to examine the intersection of the proactive child luring police investigations and the law of entrapment. They conclude that "proactive child luring investigations will, in many instances, demonstrate egregious police involvement akin to entrapment". The authors are critical of the assumptions that police make about internet websites, and that it may be time for courts begin to question how particular spaces online are targeted and subject to suspicion by police. They go on to state:

> There is a need to question the legitimacy of an untethered conception of 'risk' online; there is further need to question whether this conception embodies a valid form of social governance. It is critical that the law recognize that the very real product of proactive policing investigations is the creation of a victim, the co-creation of evidence by the police and accused, and the construction of harm. **This project argues that, rather than preventing harm or curbing risks of harm, police officers are engaging in random virtue testing within their communities.** Further, in many cases, this virtue testing extends beyond the law's intention to protect children and results in the policing of acceptable sexuality through the strategic use of victim construction and selection of space. We suggest that Canada has seen a significant expansion of these cases and has accordingly expanded the scope of the legislation. In this sense, the state is making more space for co-created evidence and legitimizing its use by affording it more legal weight.[45]

75. The authors also review the child luring amendments to the *Criminal Code* that led to this Court's decision in *R. v. Morrison*, 2019 SCC 15, and then observe, with specific reference to Project Raphael, as follows:

> **These cases arise from a new investigatory process named 'Project Raphael'**:

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[44] Menzie and Hepburn, *supra*, at pp. 391-394
[45] Menzie and Hepburn, *supra*, at pp. 394-396

> officers maintain active profiles on adult sex work websites, and only after a prolonged communication and discussion of costs and services will they disclose their age as younger than posted or previously communicated. **Not only does this investigation target persons who are seeking consensual sex with an adult, it also articulates a hyper-sexualized character through the online communicant. By situating the communication on escort sites, police officers remove any need to lure or groom a victim, indeed, the focus of the exchange is sex, specifically, sex offered by an agentic, entrepreneurial young woman who sets the terms and price of the encounter.** This disparate treatment of youth through policy and police construction both gives the state a means to govern and control the boundaries of acceptable sexuality while still promulgating its investment to sexualize and uncomplicate the sexualization of young women.

The authors then cite Morrison's case to illustrate the following point:

> Morrison was targeted through a proactive investigation, which further complicates the issue as he had no history of offending, communicating with children, and no other offences that arose from the investigation. There are significant consequences from this section and that these investigations have the capacity to do significant harm to those accused rather than prevent harm to youth. [Emphasis in the Original][46]

The Appellant observes that this aptly describes his situation as well.

76. The authors spend a considerable part of their article explaining how proactive child luring investigations both fail to achieve their desired goals in protecting against the sexual exploitation of young people, and the harm caused to those caught by the police who otherwise would not have committed an offence against a child. The failings of the design of these projects is summarized as follows by the authors:

> …[i]n proactive luring investigations the dominant characteristic of the offence becomes the represented age of the communicant and not the content of the communication, the behaviour of the officer, the potential for exploitation, and the intentions of the accused. The Court sees luring by seeing age; in doing so, the represented age of an undercover officer is often enough for conviction alone….
>
> …In constructing and imagining an online, potential luring victim, officers play into and reproduce tropes about young people online. A proactive luring investigation contributes to crime statistics representing rates of youth victimization and further fuels the widespread cultural anxiety about the vulnerability and recklessness of young people online. This perpetuates the rising

[46] Menzie and Hepburn, *supra*, at pp. 397-402; *R. v. Morrison*, 2019 SCC 15

> concern with youth victimization, where incidents are entirely manufactured through proactive investigations such as in *Gowdy*, but are then presented to the public as a real, quantifiable risk. This 'imaginary' victimization functions as a means of control, to cast youth as vulnerable and ill-equipped in an increasingly digitized world.[47]

77. At the end of their article, the authors present two charts: the first, cases that are a result of proactive child luring investigations (including the Appellant, Haniffa, and Jaffer), and the second, cases that resulted from non-proactive investigations. As a result of their empirical review, the authors conclude that:

> …when police restrict the scope of the investigation to online spaces that present a greater degree of reasonable suspicion or to a person that they believe poses a risk to the community, we can see a greater likelihood that a proactive investigation will capture more harmful, or otherwise risky, behaviours. These cases, where we believe investigations align closer to a true *bona fide* inquiry, are marked in grey. **What can be seen from the results is that there are effective ways for proactive luring investigations to respond to and prevent the reoccurrence of harm but, as it stands, this policing practice does little to prevent tangible harm from occurring.**
>
> … **Our findings illustrate that the majority of proactive investigations fail to address any tangible harm posed by the accused. It is then difficult to say with certainty that this is behaviour that would have occurred independent of law enforcement intervention; in fact, the evidence demonstrates that police contact likely induced the offence.** The nature of offences through a proactive investigation means that police are able to strategically co-create evidence likely to result in a conviction. Proactive investigations have taken place on BDSM-themed, adult-only chat rooms, as well as on adult escort sites, falling significantly outside where a predator could reasonably be said to look for victims.[48]

78. In the end, the specific import of the article lies in its well-reasoned and independent support for the concerns and criticisms of the use of Project Raphael in this case, referenced by Justice de Sa in his decision to enter a stay of proceedings. More generally, the article lends substantial support to the broader concerns over the rationale, creation and implementation of Project Raphael.

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[47] Menzie and Hepburn, *supra*, at pp. 408-409
[48] Menzie and Hepburn, *supra*, at pp. 410-419

Conclusion

79. The Appellant submits, by way of conclusion, that neither the legal principles that inform the entrapment doctrine, nor policy, can justify the approach that the State has chosen to address the important goal of eradicating the societal problem of online child sexual exploitation. More specifically, in the Appellant's case, the trial judge's conclusion that while there is no doubt that the Appellant failed the "virtue" test he was subjected to, the police were not entitled to test the Applicant in the manner that they did, is consistent with this Court's most recent entrapment jurisprudence and should be affirmed.

PART IV – SUBMISSIONS CONCERNING COSTS

80. The Appellant does not seek costs and makes no submissions as to costs.

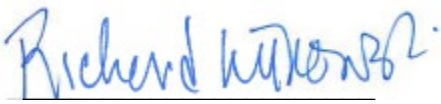
PART V – ORDERS SOUGHT

81. The Appellant requests that this Appeal be allowed, that the decision of the Court of Appeal for Ontario be set aside, and that the trial judge's order to stay the Appellant's convictions be restored.

PART VI – SUBMISSIONS ON CASE SENSITIVITY

82. There is no sealing or confidentiality order, publication ban, classification of information in the file that is confidential under legislation or restriction on public access to information in the file that could have an impact on the Court's reasons in the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 20th day of December, 2021



Richard Litkowski
Counsel for the Appellant

PART VII – TABLE OF AUTHORITIES

APPLICANT'S AUTHORITIES	CITED AT PARAGRAPH NO.
CASES	
R. v. Ahmad, 2020 SCC 11	1, 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, 16, 33, 34, 37, 40, 41, 42, 43, 46, 48, 49, 51, 53, 54, 56
R. v. Barnes, [1991] 1 SCR 449	38, 39, 40, 45, 51, 54
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