

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

File Number: 39664

BETWEEN:

COREY DANIEL RAMELSON

Appellant

and

HER MAJESTY THE QUEEN

Respondent

and

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

Interveners

**FACTUM OF THE INTERVENER
DIRECTOR OF PUBLIC PROSECUTIONS**

(Pursuant to Rules 37 and 42 of the *Rules of the Supreme Court of Canada*)

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File Number: 39803

AND BETWEEN:

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Respondent

and

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OF ONTARIO, BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION, CANADIAN
CIVIL LIBERTIES ASSOCIATION**

Interveners

File Number: 39871

AND BETWEEN:

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Appellant

and

HER MAJESTY THE QUEEN

Respondent

and

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

Interveners

AND BETWEEN:

MUHAMMAD ABBAS JAFFER

Appellant

and

HER MAJESTY THE QUEEN

Respondent

and

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

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PARTS I & II – OVERVIEW AND STATEMENT OF POSITION

1. Online crime represents an increasing danger to Canadian society. Whether it is the trafficking of drugs,¹ firearms,² or humans,³ child exploitation,⁴ or the fomenting of extremist ideologies,⁵ virtual spaces have become a force multiplier in the conduct of criminal activities. Virtual spaces such as Facebook, Instagram, and Kijiji are well known to Canadians. Other virtual spaces occupy a part of the internet known as the dark web and are less well known. The common feature is that crime takes place across different types of virtual spaces.⁶

2. This Court has repeatedly affirmed that the police need sufficient flexibility to combat evolving forms of crime in responsive and effective ways.⁷ The doctrine of entrapment, which ensures that the police do not employ random virtue testing as an investigative method, is premised on balancing effective law enforcement and intrusions on our personal freedoms.⁸

3. The Director of Public Prosecutions (“DPP”) intervenes in this appeal to make two key points with respect to claims of entrapment in digital spaces. Specifically, the DPP submits that: (i) a broad-based approach that considers all of the factors cited by this Court in *Ahmad* should be used to define digital spaces in assessing *bona fide* inquiries; and (ii) in the context of virtual spaces, reasonable suspicion that criminal activity is ongoing at a specific virtual location – the

¹ *R v Nelson*, 2021 BCCA 192; “Alleged B.C. trafficking ring used dark web to sell fentanyl globally”, *CBC News* (5 October 2017); Reid Southwick, “Inside the dark web drug trade”, *CBC News Interactive*.

² Jim Bronskill, “RCMP warns dark web being used to sell illicit guns to Canadians”, *The Globe and Mail* (25 March 2018).

³ United Nations Office on Drugs and Crime, *Global Report on Trafficking in Persons 2020* (UN, 2020) at 171 *et seq.*

⁴ Canadian Centre for Child Protection, “Child Sexual Abuse Images on the Internet” (January 2016).

⁵ Charlie Winter et al., “Online Extremism, Research Trends in Internet Activism, Racialization, and Counter-Strategies” (2020) 14(2) *International Journal of Conflict and Violence* 1 – 20.

⁶ United Nations Office on Drugs and Crime, *World Drug Report 2021, Booklet 2 – Global Overview* (UN, 2021) [“UN World Drug Report”] at 65–74. *See also* General Accounting Office, “Use of Online Marketplaces and Virtual Currencies in Drug and Human Trafficking” (GAO-22-105101, February 2022) at 10–15.

⁷ *R v Ahmad*, 2020 SCC 11 at para 18; *R v Campbell*, [1999] 1 SCR 565 at para 43; *R v Mack*, [1988] 2 SCR 903 at 916.

⁸ *R v Mack*, [1988] 2 SCR 903 at 964–965; *R v Ahmad*, 2020 SCC 11 at paras 16–17; *R v Pearson*, [1998] 3 SCR 620 at para 11.

bona fide inquiry – must remain distinct from reasonable suspicion that a specific person is engaged in criminal activity. Remaining true to these core principles will ensure that the “carefully calibrated balance struck in *Mack*,”⁹ is maintained, and the doctrine of entrapment remains moored to its foundational principles.

PART III – ARGUMENT

A. Defining Digital Spaces Requires a Broad-Based Consideration of All Relevant Factors

a. *Virtual Spaces Vary and Crime Knows No Boundaries*

4. The internet is not a monolith. The diversity of websites and platforms across the internet has exploded over the last two decades.¹⁰ Some virtual spaces exist on the clear web, where content is indexed by standard search engines (like Google), and is accessible to anyone with an internet connection. Other virtual spaces exist on the dark web, where content is not indexed, and passwords or encryption software are needed to enter.¹¹ The internet is continually evolving.

5. Criminal activity occurs across the whole of the internet. Some brief examples highlight the problem. Social media networks are fertile virtual spaces for the sale of drugs, with a UK study showing that 24% of youth (ages 16 – 24) surveyed saw illegal drugs advertised for sale on social media, including cocaine and MDMA/Ecstasy.¹² In 2021, Facebook took action against 12.3 million drug-related posts and 6 million firearms-related posts (that is posts where drugs or guns were being offered). Despite these actions, users saw hundreds of thousands of drug and gun-related posts.¹³

6. In 2013, US authorities shut down Silk Road, a dark web platform used to facilitate the sale of drugs, weapons and other illegal goods. At the time of its shutdown, the site had over 13,000

⁹ *R v Ahmad*, 2020 SCC 11 at para 23.

¹⁰ Estevan Ortiz-Ospina, “[The Rise of Social Media](#)”, September 18, 2019, Our World in Data.

¹¹ *UN World Drug Report* at 65; Lee-Ann Conrod, [Smart Devices in Criminal Investigations: How Section 8 of the Canadian Charter of Rights and Freedoms Can Better Protect Privacy in the Search of Technology and Seizure of Information](#), 2019 24 *Appeal: Review of Current Law and Law Reform* 115 at 119, 2019 CanLIIDocs 371.

¹² Liz McCulloch and Scarlett Furlong, [DM for Details: Selling Drugs in the Age of Social Media](#) (volteface, September 2019) [*“DM for Details”*] at 4.

¹³ Meta, Transparency Center, [“Regulated Goods: Drugs and Firearms”](#), (accessed 19 April 2022).

listings for controlled substances, and an estimated 100,000 users.¹⁴ In 2016, police in British Columbia arrested drug traffickers using the dark web to traffic fentanyl.¹⁵

7. The internet continues to provide criminal elements with increased tools to ply their trade. Over thirty years ago, Lamer J. presciently observed, “as crimes become more sophisticated so too must be the methods employed to detect their commission.”¹⁶ In a world where criminal activities can be carried out with increasing anonymity, these words have never been more true.

b. Balancing Privacy and the Needs of Law Enforcement

8. The doctrine of entrapment is a careful balance. As this Court recognized in *Ahmad*, it is concerned with both the need to protect privacy and personal freedom from state overreach, and the state’s legitimate interest in investigating and prosecuting crime. Unlike section 8 cases, where demonstrating a reasonable expectation of privacy is foundational to the right,¹⁷ entrapment balances the right to be left alone while allowing police to combat crimes that are difficult to investigate. As acknowledged by this Court in *Ahmad*, while the balance is achieved by constraining investigative techniques, it is also concerned with “permitting” them.¹⁸

9. The law of entrapment allows the police to offer any individual the opportunity to commit a crime where there is reasonable suspicion to believe that criminal activity is taking place within a precisely defined space (the *bona fide* inquiry).¹⁹ Thus, in *Barnes*, the police were entitled to offer Mr. Barnes an opportunity to traffic drugs even though they approached him based on his appearance.²⁰ Similarly, in *Mack*, Lamer J., as he then was, recognized that police would be entitled to plant a handbag containing money in a bus depot and make an arrest for theft if they had reasonable suspicion that theft was occurring there.²¹ Once an area is defined with sufficient

¹⁴ US Attorney’s Office (Southern District of New York), “[Ross Ulbricht, the Creator and Owner of the Silk Road Website, Found Guilty in Manhattan Federal Court on All Counts](#)” (February 5, 2015); US Drug Enforcement Agency, “[Senior advisor of the ‘Silk Road’ website pleads guilty in Manhattan Federal Court](#)” (January 30, 2020).

¹⁵ *R v Nelson*, 2021 BCCA 192.

¹⁶ *R v Mack*, [1988] 2 SCR 903 at 916.

¹⁷ *R v Marakah*, 2017 SCC 59 at para 10.

¹⁸ *R v Ahmad*, 2020 SCC 11 at para 22.

¹⁹ *R v Mack*, [1988] 2 SCR 903 at 956; *R v Ahmad*, 2020 SCC 11 at paras 19–20.

²⁰ *R v Barnes*, [1991] 1 SCR 449 at 460.

²¹ *R v Mack*, [1988] 2 SCR 903 at 957.

precision, “the police may present any person associated with the area with the opportunity to commit an offence.”²²

10. The law of entrapment must allow the police to respond to the challenges posed by criminals moving from the physical to the virtual domain. Indeed, the flexibility and latitude that this Court has recognized are particularly acute in online spaces.²³ The police need sufficient leeway to develop techniques to fight online crime that are responsive to the needs of the community, and tailored to the evidence at their disposal about the prevalence of crime in particular virtual spaces.

11. Virtual spaces cannot and should not, in the name of privacy, become spaces where crime cannot be effectively investigated. The police are entitled to operate in virtual spaces.²⁴ However, the police should not be restricted to acting as passive listening posts while in virtual spaces. Only a balanced interpretation of the *bona fide* inquiry branch can preserve the ability of the police to engage in proactive policing.²⁵

c. Defining Digital Spaces in the Context of Entrapment

12. Trial judges must retain the ability to define virtual spaces using a contextual and holistic approach. Virtual spaces exist along a spectrum. At one end of the spectrum are dark websites that are almost entirely devoted to criminal activity. At the other end of the spectrum are social media platforms such as Facebook or Instagram, whose primary uses are legitimate. In each case, the particular factors relevant to the analysis will vary.

13. In *Ahmad*, this Court articulated a non-exhaustive list of factors that trial judges may consider in assessing whether a virtual space has been defined with precision. 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 in the selection of the location, the level of privacy expected in the area or space; the importance of the virtual space to freedom of expression; and the availability of other, less intrusive

²² *R v Barnes*, [1991] 1 SCR 449 at 463.

²³ See e.g. *R v Chiang*, 2012 BCCA 85 at para 19.

²⁴ *R v Ghotra*, 2020 ONCA 373 at paras 29–31, aff’d 2021 SCC 12.

²⁵ *R v Campbell*, [1999] 1 SCR 565 at para 43; *R v Mack*, [1988] 2 SCR 903 at 916, 938–940.

investigative techniques. These factors were endorsed by the majority and largely by the dissent.²⁶

14. The jurisprudence applying these factors remains in its infancy. *Ahmad* is not even two years old and few trial courts outside of the present cases, have dealt with the issue.²⁷ Given this context, it is imperative that this Court endorse a full and liberal approach taking into consideration all potentially relevant factors in defining virtual spaces when assessing *bona fide* inquiries.

15. The definition of online spaces and the scope of legitimate police activity should not be artificially constrained by approaches that focus solely on privacy, statistical evidence of crime, or any other single factor. Account must be taken of the seriousness of the offence, the difficulty of investigating in virtual spaces, and any steps taken to minimize the risk “that the police will attract people who would not otherwise have involvement in crime.”²⁸

i) The Seriousness of the Crimes Being Investigated Remains an Important Factor

16. There can be little doubt that the internet is a venue for serious criminal conduct. While specific offences cannot be separated into distinct categories for the purposes of entrapment, the seriousness of the crimes under investigation should continue to be an important consideration in assessing claims of entrapment.²⁹ The seriousness of the offence, based on information known to the police, rightly informs whether a police investigation amounts to a *bona fide* inquiry, or alternatively amounts to “creating crime for the purpose of prosecution,” that the citizenry cannot tolerate. This “crucial distinction” is at the very heart of the balance that underpins the doctrine of entrapment.³⁰ More serious offences may require more robust police activities.

17. For example, police have targeted virtual spaces to combat the luring of juveniles for sexual purposes, a group recognized as particularly vulnerable.³¹ Police have also targeted digital drug operations,³² and gathered evidence in respect of terrorism-related offences in virtual spaces.³³

²⁶ *R v Ahmad*, 2020 SCC 11 at paras 41 and 161–162.

²⁷ See *R v Brown*, 2021 NLCA 27, leave to appeal ref’d, November 10, 2021, SCC No 39731; *R c Brodeur*, 2021 QCCS 2401; *R c Beaumont*, 2021 QCCQ 4193.

²⁸ *R v Barnes*, [1991] 1 SCR 449 at 460.

²⁹ *R v Ahmad*, 2020 SCC 11 at para 41; *R v Mack*, [1988] 2 SCR 903 at 916–917.

³⁰ *R v Mack*, [1988] 2 SCR 903 at 917.

³¹ *R v Mills*, 2019 SCC 22 at para 23.

³² See e.g. *R v Nelson*, 2021 BCCA 192.

³³ See e.g. *R v Hamdan*, 2017 BCSC 676.

Where the internet helps to facilitate offences of this nature, the community expects the police to effectively investigate.³⁴

ii) The Manner of Investigation May Reduce the Number of People Affected in a Proposed Virtual Space

18. The potential number of people affected by a police investigation online will vary widely. Trial judges, with the benefit of evidence, will be able to assess the potential number of people affected by an investigation in a virtual space. However, assessing the number of people that may be affected should not be determined simply by the number of users, estimated or actually known, that may visit or use a website. The structure and conduct of a police investigation will also determine the number of people potentially affected.

19. To date, police investigations in digital spaces have fallen into two broad categories:

- 1) Category 1 - Police react to a posting or other information available in a digital space. For example, a social media or internet post on a site such as Craigslist where a user, using coded language, is offering drugs for sale. In this category, the target is narrowly defined – a particular ad or posting;³⁵ and
- 2) Category 2 - An undercover operative enters a digital space and makes their presence known (i.e., through a post). The posting may use coded language or images appropriate to the type of crime being investigated, signalling that illicit products or services may be on offer. But the undercover operative waits for potential targets to contact them.³⁶

20. In this second category, how the police conduct their investigation may reduce the number of people potentially affected. For example, in the present appeal, the police post included geographic indicators, and used language designed to attract users who might be seeking a juvenile.³⁷ Thus, the police limited the pool of users who might take notice of the post.³⁸ Mindful again that virtual spaces are heterogeneous, the manner in which police approach their

³⁴ *R v Ahmad*, 2020 SCC 11 at para 18.

³⁵ See e.g. *R v DeFrancesco*, [2015] OJ No 6485 (CJ).

³⁶ See e.g. *R v Ghotra*, 2020 ONCA 373 at paras 4–8, aff'd 2021 SCC 12.

³⁷ *R v Ramelson*, 2021 ONCA 328 at para 119.

³⁸ See e.g. *R v Ghotra*, 2020 ONCA 373 at paras 30 – 31, aff'd 2021 SCC 12.

investigation will have an impact on the number of people affected, and the extent to which an investigation may intrude on the lives of Canadians.

21. The presence of lawful activities in a virtual space does not negate the existence of reasonable suspicion. This Court has long accepted that a *bona fide* inquiry can occur in spaces where lawful activity takes place, be it the Granville Mall or hypothetical bus station. The issue in assessing a *bona fide* inquiry is not whether a space hosts lawful activity. The issue is whether the police have reasonable suspicion of criminal activity in a place such that the “inevitable risk” associated with allowing the police to offer someone the opportunity to commit a crime is acceptable in the circumstances.³⁹

22. It is apparent from this Court’s decision in *Ahmad*, and the carefully calibrated balance that is required, that digital spaces cannot be defined solely in reference to a statistical or formulaic perspective. The exact percentage of illicit transactions on a particular website compared to total transactions is not a bar to the existence of reasonable suspicion in a sufficiently defined space. Such an approach would be unmoored from the foundational principles on entrapment because:

- 1) A statistical or formulaic approach would be inconsistent with the reasonable suspicion standard and transform the analysis of entrapment from one based on possibilities, to one based on probabilities;⁴⁰ and
- 2) The mere fact that there is a high volume of innocent traffic in a particular virtual space does not mean that there is not also a significant amount of criminal activity taking place in the reasonably defined space.⁴¹

³⁹ See *R v Mack*, [1988] 2 SCR 903 at 956. In their factum, Haniffa (at paras 65–66), suggests that steps taken by a virtual space, such as Backpages prohibition on individuals registering an account when younger than 18 negates or weakens the existence of reasonable suspicion. However, as the example of Facebook (above at para 5) demonstrates, efforts to prevent posting related to illicit activities does not mean such efforts will succeed.

⁴⁰ *R v Ahmad*, 2020 SCC 11 at paras 46–47.

⁴¹ Recall that in *R v Barnes*, [1991] 1 SCR 449 at 462–463, 484, the statistical evidence showed a high number of drug charges in the Granville Mall relative to other areas of the city, but there was no statistical evidence of the percentage of drug offences as compared to innocent uses of

iii) Privacy Interests Are Not “One-Size Fits All” in Virtual Spaces

23. As this Court recognized in *Ahmad*, Canadians reasonably expect privacy in most digital communications that are not analogous to a public post.⁴² While virtual spaces raise unique concerns for the intrusion of the state into individuals’ private lives, the heterogeneity of digital spaces will necessarily affect the weight that should be accorded to privacy-specific factual circumstances. Some virtual spaces may require passwords, or require users to be invited into a particular area.⁴³ A particular area of a website may have a small or large number of visitors, with users being able to see what other users are saying or doing. Some sites will point users to private communications rooms. Others may be more public in nature.

24. The mere fact that a targeted virtual space may involve a significant number of users does not automatically mean that a bona fide inquiry will result in a profound and unjustified breach of privacy. What must be avoided is the arbitrary infringement of an individual’s right to be left alone, police investigations that amount to random virtue testing, or the unjustified use of police powers that intrude on our personal lives.⁴⁴

25. Privacy is not absolute. In the context of entrapment, privacy is balanced against the investigative actions of police in order to combat crimes that are difficult to detect.⁴⁵ Only a broad based approach that involves a careful weighing of all of the factors cited in *Ahmad* will allow trial judges to correctly assess the particular privacy concerns at issue, and calibrate those concerns with the other important considerations this Court has articulated.

iv) Fewer Less Intrusive Investigative Techniques May Be Available in Virtual Spaces

26. Investigating crimes in digital spaces poses profound challenges distinct from physical spaces. Police may have reasonable suspicion that crimes are being committed in a virtual space,

the mall. Indeed McLachlin J. for the minority stressed the fact that thousands of innocent people used the Granville Mall on a daily basis, whereas the statistics showed 506 arrests for the entire year.

⁴² *R v Ahmad*, 2020 SCC 11 at para 36.

⁴³ *DM for Details* at 21 *et seq.*

⁴⁴ *R v Mack*, [1988] 2 SCR 903 at 941; *R v Ahmad*, 2020 SCC 11 at paras 25–28.

⁴⁵ *R v Ahmad*, 2020 SCC 11 at paras 20–26.

but the question is who is committing the crime. Usernames and hashtags are core features of the internet; all in the name of affording anonymity.

27. The prevalence of anonymity will often require police to be proactive in digital spaces. A user relying on anonymity may not be inclined to reveal their identity, thereby affording the police investigate alternatives.⁴⁶ And with many web platforms housed in foreign jurisdictions, the police may have few if any options beyond engaging directly individuals in the virtual space to investigate serious crimes.⁴⁷

B. Reasonable Suspicion in a Virtual Space Must Remain Distinct from Reasonable Suspicion that a Specific Person is Engaged in Criminal Activity

28. Under the first branch of entrapment, police may provide individuals an opportunity to commit an offence if they have reasonable suspicion that (1) a specific person is engaged in criminal activity; or (2) criminal activity is occurring at a specific location.⁴⁸ These two ways in which reasonable suspicion can be established are analytically distinct, and must remain so or the very concept of a *bona fide* inquiry will no longer play a meaningful role in entrapment cases.

29. From the very beginning of the entrapment jurisprudence in *Mack*, Lamer J., as he then was, recognized that it was “clearly permissible” to provide opportunities to people to commit offences associated with a location where it was reasonably suspected that criminal activity was occurring. This was so even if the police did not know the identities of specific individuals who were involved.⁴⁹ This is particularly germane in the context of investigating online crime where those engaged in criminal activity benefit from the anonymity that the internet affords.

30. An approach that would require the police to connect reasonable suspicion in a virtual space with a specific individual would effectively eliminate *bona fide* inquiries. In every case, the police would be required to develop reasonable suspicion in relation to an individual who happened to be using a virtual space. This Court stated in *Barnes* that a *bona fide* inquiry is an

⁴⁶ *R v Nelson*, 2021 BCCA 192 at para 62.

⁴⁷ *R v Ramelson*, 2021 ONCA 328 at paras 111–119.

⁴⁸ *R v Ahmad*, 2020 SCC 11 at para 19.

⁴⁹ *R v Mack*, [1988] 2 SCR 903 at 956.

“exception” to the rule requiring personalized suspicion.⁵⁰ Further, as noted in *Ahmad*, “individualized” suspicion relates to an individual target, whether that be a person or a place.⁵¹

31. There is no reason why the two distinct kinds of reasonable suspicion should apply any differently in virtual spaces or online investigations. The unique concerns arising from virtual spaces and the greater potential reach of police investigations are fully protected from abuse by the requirement that the virtual space in question be defined with sufficient precision. That allows all relevant factors to be considered, maintains the balance between the integrity of the judicial system and the repression of criminal activity, and avoids introducing unnecessary confusion into the law.

32. In *Ahmad*, this Court affirmed that the framework articulated in *Mack* and *Barnes* applies to the digital world. In so doing, the Court articulated a multi-factor analysis to assess *bona fide* inquiries in virtual spaces.⁵² That multi-factor analysis should be left to trial judges to apply and develop to meet the challenges posed by an evolving digital environment. This Court should be clear that no one factor should dominate the analysis. Contextualizing the investigative steps taken by police in virtual spaces will simultaneously protect the public and ensure that the police can meet the challenges posed by the shift of crime to digital spaces.

PART IV – SUBMISSIONS AS TO COSTS

33. The DPP does not seek any costs and makes no submissions as to costs.

PART V – ORDER SOUGHT

34. The DPP takes no position on the relief to be granted in these appeals

All of which is respectfully submitted this 3rd day of May 2022.

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⁵⁰ *R v Barnes*, [1991] 1 SCR 449 at 463.

⁵¹ *R v Ahmad*, 2020 SCC 11 at paras 48–49.

⁵² *R v Ahmad*, 2020 SCC 11 at paras 36–41.

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