SCC File Nos. 39664, 39676, 39803, 39871
SCC File No. 39664

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

B E T W E E N:

COREY 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

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SCC File No.: 39664

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

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

AND BETWEEN:

SCC File No.: 39803

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

ERHARD HANIFFA

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:

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

SCC File No.: 39871

TEMITOPE DARE

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:

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

SCC File No.: 39676

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 CIVIL LIBERTIES ASSOCIATION

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PART I – STATEMENT OF THE CASE

1. These appeals present this Court with the opportunity to consider the application of the entrapment doctrine in the context of a large-scale and ongoing police investigation that engages the liberty and privacy interests of hundreds and potentially thousands of individuals. While the Criminal Lawyers' Association of Ontario ["CLA"] shares the concerns of the Appellants and the Intervener Canadian Civil Liberties Association about the overly broad delineation of the digital space identified by the York Regional Police, Project Raphael and similar investigations undertaken by other police services highlight a significant deficiency in the current common law entrapment doctrine particularly as applied to virtual spaces. It is backward looking. The doctrine remedies abusive police conduct (offering opportunities to commit criminal offences at virtual locations in the absence of reasonable suspicion) only after it has occurred in the context of a trial. For those accused who have the wherewithal to challenge the police conduct, they can only do so after being arrested, brought to trial and found guilty. Similarly, significant police, prosecutorial and judicial resources will already have been expended on multiple cases that each end up judicially stayed. Relying on existing jurisprudence and normative privacy concepts in virtual spaces, the time is ripe for this Court to require that police operations like the one at issue in these appeals be subject to a prior judicial authorization regime.

2. A requirement of prior judicial authorization for investigations such as Project Raphael would better balance and protect the legitimate social interests in empowering police to detect and combat serious criminal activity occurring online with the very real concerns that individuals have in being free from unrestrained random virtue testing as they use the internet, a tool that has become a virtually necessity in the modern digital era.

3. York Regional Police operated Project Raphael in numerous waves over the course of approximately five years from 2014 to 2018. By posting ads on classified websites posing as prostitutes who were at least 18 years of age, police were able to attract the interest of individuals from all over the Greater Toronto Area. Without reasonable suspicion that any of these individuals were interested in engaging in sexual conduct with minors, police investigators nonetheless offered opportunities to commit the offences proscribed by ss. 172.1(2) and 286.1(4) of the *Criminal Code.* Project Raphael led to over 100 arrests. Whether the police conduct amounted to entrapment was

repeatedly challenged as the individual cases made their way through the courts. While judges largely concluded that the requisite police suspicion that criminal activity was occurring on backpages.com was reasonable,[1] the judicial determinations were done in hindsight. At the time of the operation, the police relied upon their own assessment as to whether the threshold of reasonable suspicion in relation to the virtual backpages.com location had been met. If it turned out they were wrong, thousands of people would have been exposed to unlawful police conduct and hundreds would have been caught in an abusive police sting. Liberty interests would have been infringed and improper exposure to the criminal justice system would have followed. Rather than risking significant and boundless abusive police conduct, CLA proposes a simple solution:

> Where a police force suspects that criminal activity is occurring at or through a specific digital location, a prolonged investigation predicated on offering opportunities to numerous individuals without individualized reasonable suspicion is presumptively abusive and contrary to ss. 7 and 8 of the *Charter*, unless the police obtain prior judicial authorization confirming: (a) that the suspicion of criminal activity is objectively reasonable, (b) that the digital location is sufficiently circumscribed and (c) that the intended manner of offering the opportunity is appropriately connected to the suspected criminal activity.

Had police obtained prior judicial authorization for Project Raphael, much of the subsequent court time required for repeated litigation of entrapment applications would have been unnecessary, freeing up court resources to deal with other matters. Accused persons would not have been precluded from challenging the judicial authorization, but could have done so as part of a joint pre-trial application, as is often done with project wiretap cases.

4. The CLA acknowledges that entrapment, as a particular species of the abuse of process doctrine, has always been treated as an *ex post facto* remedy that must be sought by the accused once a verdict of guilt has been entered. This is consistent with the rationale that entrapment is not a substantive defence, but a remedy for state overreach that does not negate the guilt of the accused. In limited or "one-off" scenarios, such as the recent decisions of this Court in *R. v. Ghotra*[2] and *R. v. Ahmad*,[3] the CLA accepts that this can remain an appropriate approach to the application of the entrapment doctrine. But police investigations like Project Raphael pose risks on such a scale that they necessitate pre-emptive protection. The various societal interests in effectively combatting

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[1] Save for the decision of Justice De Sa in the instant case of *R. v. C.D.R.* 2020 ONSC 5030
[2] *R. v. Ghotra*, 2021 SCC 12
[3] *R. v. Ahmad*, 2020 SCC 11 ["*Ahmad*"]

online crime, efficiently using court resources, and protecting the integrity of the justice system all align to require pre-emptive judicial authorization confirming that the investigative plan is tailored to an appropriately circumscribed digital location at which it is reasonably suspected that criminal activity is occurring.

5. The CLA agrees that the substantive entrapment framework, as first set out in *R. v. Mack,*[4] and explicated most recently in *Ahmad, supra,* remains sufficiently flexible to apply to the online world. The requirement for prior judicial authorization is simply a modification of the doctrine in a specific circumstance to recognize that certain police conduct will be abusive *ex ante*. This modification is consistent with, and flows from, the legal underpinning of the entrapment doctrine in the inherent jurisdiction of the Court to regulate and control its own processes to prevent state misuse. It also better protects the constitutionally-entrenched privacy and liberty interests imperiled by random virtue testing that is not anchored by reasonable suspicion on the part of the police. What the CLA proposes is in effect a judicially-created prophylactic mechanism to ensure that the court's process is not conscripted to prosecute dozens or hundreds of cases that would otherwise be abusive and undermine the interests guaranteed by the *Charter of Rights and Freedoms*.

PARTS II AND III – STATEMENT OF ISSUE AND ARGUMENT

THE RISKS POSED BY INVESTIGATIONS LIKE PROJECT RAPHAEL

6. Prolonged and large-scale investigations like Project Raphael pose unique risks to the interests protected by the entrapment doctrine. The internet has greatly expanded the scale, scope, and ease with which state actors can undertake agent-provocateur investigations. Online investigations implicate the liberty and privacy interests of far more individuals than an investigation targeted at a physical location, as in *R. v. Barnes*,[5] or even a digital location like a single phone line, as in *Ahmad*, *supra*. In the physical world, reverse sting operations are limited by the number of personnel – a single police officer can only target a limited number of individuals. The same is not true of investigations into digital spaces. There a single officer can ensnare dozens of individuals in the course of a single day. By leveraging the reach of the internet, police can efficiently effect hundreds or even thousands of arrests in a short period of time. This makes

[4] *R. v. Mack*, [1988] 2 S.C.R. 903, 1988 CanLII 24 [*"Mack"*]
[5] *R. v. Barnes*, [1991] 1 S.C.R. 449, 1991 CanLII 84 ["*Barnes*"]

investigations like Project Raphael different both in kind and in scale from other police techniques that this Court has previously considered. The majority in *Ahmad* recognized this risk, observing that:

> Technology and 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[6]

7. While there is no doubt that the internet is used by criminals to pursue their criminal ventures (including the victimization of children or the trafficking in illicit drugs or guns), the internet is also a place where lonely, vulnerable but pro-social people gather to share interests, feel part of something, or to seek company and community. Ongoing agent-provocateur operations like Project Raphael are particularly at risk of capturing unsophisticated individuals who may have no prior inclination or desire to prey on children through the internet. Often these individuals may lack support systems and be desperate for human connection, rendering them particularly susceptible to the deceptive "bait and switch" tactics employed by the police.

8. The scale of the investigation also has important consequences for the administration and integrity of the criminal justice system that extend beyond just those accused whose liberty and privacy interests are engaged by their arrest. Reverse sting operations will often lead to post-verdict applications to stay the proceedings on the basis of entrapment. These applications must be heard individually, although the justification for a police operation that targets a particular location generally rests on the same or similar grounds of suspicion in each case. As these cases demonstrate, the result is repetitive litigation which consumes valuable court resources. It also affects the rights of other accused in the system – as Moldaver J. observed in *R. v. Jordan*, "[a] criminal proceeding does not take place in a vacuum."[7] Court time that is consumed with individually litigating the propriety of the same police conduct necessarily "deprives other worthy litigants of timely access to the courts."[8] It also increases litigation uncertainty and raises the spectre of inconsistent judicial decisions. Finally, in the event that courts decide that the police suspicions were either unreasonable or not directed at a sufficiently narrow target, the amount of court time taken up in prosecuting

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[6] *Ahmad, supra* at para. 37
[7] *R. v. Jordan*, 2016 SCC 27 at para. 43
[8] *Ibid*

multiple individual accused not only means that these individuals were unnecessarily subjected to deprivations of their liberty, either as a result of pre-trial detention or the imposition of strict bail conditions, it also risks undermining the integrity of the criminal justice system generally, as the public will reasonably question why these prosecutions proceeded in the first place if they were legally flawed from the outset.

THE BENEFITS OF PRIOR JUDICIAL AUTHORIZATION

9. Preemptive judicial vetting of these investigations would largely ameliorate these risks and has significant practical benefits for the orderly administration of justice. Investigations that receive prior judicial authorization would be presumptively compliant with ss. 7 and 8 of the *Charter*, subject to an accused establishing on a balance of probabilities that the authorization could not have issued or that the agent provocateur's conduct strayed beyond the bounds of the judicial authorization into inducing the commission of the offence. Importantly, any challenge to the police conduct could then occur prior to the consumption of court resources necessitated by the various trials. Rather than numerous individual post-verdict entrapment applications, any challenge to the prior judicial authorization can be made as part of a joint pre-trial application, considerably enhancing the efficiency of the prosecutions and promoting predictability and consistency. Accused persons could also make more informed decisions about whether to challenge the police operation for entrapment because all the evidence articulating the police grounds for suspicion would be contained in the materials placed before the issuing justice.

10. The prior judicial authorization process would also benefit the police. Had a justice determined that police had not accumulated the necessary evidence to found a credibly-based suspicion of ongoing criminal activity at the particular electronic location, or had the justice determined that the location was not suitably circumscribed, police would have the opportunity to collect additional information or refine their target *in advance* of the investigation, rather than imperiling numerous convictions after significant court time and police resources had been expended. Similarly, if the proposed police tactics ran an undue risk of ensnaring vulnerable individuals, prior judicial review would have alerted police to the risk and enabled them to revise and correct their investigative plan.

11. Finally, as with wiretap authorizations, requiring judicial oversight would provide a mechanism to ensure that a prolonged operation like Project Raphael does not continue once the

grounds for suspicion have dissipated. Criminal activity facilitated by a particular digital space when the investigation began may have migrated to a wholly different digital space as the investigation continues. The judicial authorization regime could be utilized to ensure that the grounds for suspicion do not become temporally disconnected by requiring periodic renewals of the authorization if police wish to continue the investigation for lengthy periods.

PRIOR JUDICIAL AUTHORIZATION IS CONSISTENT WITH THE RATIONALE OF THE ENTRAPMENT DOCTRINE

12. Prior judicial authorization is both consistent with, and advances, the legal rationale for the entrapment doctrine. Since *R. v. Mack*, the entrapment doctrine has functioned as a mechanism for balancing important societal and individual interests.[9] As the majority recently summarized in *R. v. Ahmad, supra*, "[t]he rule of law, and the need to protect privacy interests and personal freedom from state overreach are balanced against the state's legitimate interest in investigating and prosecuting crime by permitting *but also constraining* entrapment techniques."[10] The entrapment framework shares this purpose with the prior judicial authorization regime. As Dickson J. observed in *Hunter v. Southam*, "the purpose of a requirement of prior authorization is to provide an opportunity, before the event, for the conflicting interests of the state and the individual to be assessed, so that the individual's right to privacy will be breached only where the appropriate standard has been met, and the interests of the state are thus demonstrably superior."[11]

13. From the outset, the entrapment doctrine has been animated by the same values that have received constitutional recognition in the *Charter*. In *Mack*, Lamer J. (as he then was) pointed out this common thread when he noted that abuse of process, which grounded the Court's power to stay proceedings in response to entrapment by the state, shares with sections 7 to 14 of the *Charter* the principle that "the state is limited in the way it may deal with its citizens."[12] Several years later, the right not to be entrapped by the state implicitly received constitutional protection in *R. v. O'Connor* when this Court merged the common law abuse of process doctrine with the rights guaranteed by s. 7 of the *Charter*: "conducting a prosecution in a manner that contravenes the community's basic

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[9] *Mack, supra* at 941
[10] *Ahmad, supra* at para. 22
[11] *Hunter v. Southam*, [1984] 2 S.C.R. 145 at 161-162, 1984 CanLII 33
[12] *Mack, supra* at 939

sense of decency and fair play and thereby calls into question the integrity of the system is also an affront of constitutional magnitude to the rights of the individual accused."[13] Thus, an individual who is offered an opportunity to commit a crime that is not anchored on a reasonable suspicion of ongoing criminal activity has been deprived of his or her liberty in a manner that is inconsistent with fundamental principles of justice, contrary to s. 7 of the *Charter*.

14. In addition to s. 7 liberty rights, the entrapment doctrine also rests on privacy interests that are commonly protected under s. 8 of the *Charter* and balanced through the prior judicial authorization regime. The constitutional underpinning of the entrapment doctrine in s. 8 of the *Charter* was made explicit by a majority of this Court in *Ahmad*. There the majority emphasized that "[i]ndividuals 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",[14] and specifically recognized that the entrapment doctrine was related to the right of Canadians "to carve out spaces in their lives, sanctuaries where they may interact freely, unhindered by the possibility of encounters with the state".[15]

15. Requiring prior judicial authorization for investigations that proceed on the basis of reasonable suspicion in a location is consistent with the legal and constitutional foundations of the entrapment doctrine. While individuals may not have a reasonable expectation of privacy in the *contents* of communications with undercover officers, as this Court concluded in *Mills*,[16] that does not mean that they must assume the risk that police will, under the cover of anonymity, set out to test their virtue by offering them opportunities to commit crime. Properly understood, the privacy interest that animates the entrapment doctrine is privacy as anonymity, the right of Canadians to "go about their daily lives without courting the risk that they will be subjected to the clandestine

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[13] *R. v. O'Connor*, [1995] 4 S.C.R. 411, 1995 CanLII 51 at para. 63, per L'Heureux-Dube J.
[14] *Ahmad*, *supra* at para. 37
[15] *Ibid*, at para. 38
[16] *R. v. Mills*, 2019 SCC 22. In *Mills*, the privacy interest advanced was privacy as control, not anonymity (para. 21).

investigatory techniques of agents of the state".[17] As this Court has unanimously recognized, privacy as anonymity is "particularly important in the context of internet usage."[18]

16. That "virtual spaces raise unique concerns for the intrusion of the state into individuals' private lives",[19] as noted by the majority in *Ahmad, supra*, reflects the notion of privacy as anonymity – protection from the efforts of the state to randomly test the virtue of its citizens online – and compels a recognition that large-scale reverse sting operations ineluctably implicate reasonable expectations of privacy, requiring the use of pre-emptive judicial oversight to remain true to the constitutional roots of the entrapment doctrine. Prior judicial authorization also dovetails harmoniously with the doctrine's roots in the Court's inherent jurisdiction to control its processes and preserve them from being co-opted by the state for abusive purposes. One could hardly imagine anything more abusive of the Court's process than prosecuting hundreds of individuals in the absence of reasonable suspicion. Prior judicial authorization would minimize the risk of this affront to the integrity of the justice system.[20]

PRIOR JUDICIAL AUTHORIZATION WILL NOT HAMPER THE ABILITY OF THE POLICE TO COMBAT ONLINE CRIME

17. The benefits of prior judicial authorization—including those benefits that *enhance* the effective investigation and prosecution of online crime—come without cost to society's interest in ensuring that police can effectively detect and combat online crime. Given the nature of well-resourced online agent provocateur investigations like Project Raphael, there is little reason to

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[17] *Barnes, supra* at , per McLachlin J. (as she then was) in dissent, cited by the majority in *Ahmad, supra* at para. 39

[18] *R. v. Spencer*, 2014 SCC 43 at para. 45

[19] *Ahmad, supra* at para. 36

[20] Section 487.01 of the *Criminal Code* permits a court to "issue a warrant in writing authorizing a peace officer to, subject to this section, use any device or investigative technique or procedure or do any thing described in the warrant that would, if not authorized, constitute an unreasonable search or seizure in respect of a person or a person's property". The CLA recognizes that this would require the police to meet a higher standard than is currently required by the entrapment framework, but there is nothing to preclude Parliament from legislating a provision creating a lower standard of reasonable suspicion for these types of investigations.

believe the modest time and energy required to obtain prior judicial authorization on a reasonable suspicion standard would have negative repercussions for fighting crime. By definition, operations with the scope and scale of Project Raphael involve significant planning and upfront investigation. It is not unduly onerous to require police to articulate their basis for suspecting that criminal activity is occurring in a particular location *in advance* of commencing a reverse sting operation. Online agent provocateur activities are not among those investigative strategies where the time required to seek prior judicial authorization is liable to frustrate the object of the operation. In any event, were genuinely exigent circumstances necessitating such an investigation to arise, the fruits of that investigation could still be preserved by the Crown demonstrating that the defendant was not, in fact, entrapped.

PARTS IV AND V – COSTS AND ORDER SOUGHT

18. The CLA does not request any Order in connection with this appeal. The CLA is a non-profit organization with limited resources. Its counsel act *pro bono publica*. The CLA does not seek costs against any party, and asks that no costs be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 2nd day of May, 2022

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PART VI – TABLE OF AUTHORITIES AND LEGISLATIVE PROVISIONS

CASES REFERENCED IN MEMORANDUM	AT PARA.
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LEGISLATIVE PROVISIONS

The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11, s. 7, 8

Loi constitutionnelle de 1982, Annexe B de la Loi de 1982 sur le Canada (R-U), 1982, c 11, a. 7, 8

Criminal Code, 1985, c C-46, s. 172.1(2), 286.1(4), 487.01

Code criminel (L.R.C. (1985), ch. C-46), a. 172.1(2), 286.1(4), 487.01