

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

BETWEEN:

MUHAMMAD ABBAS JAFFER

APPLICANT  
(Appellant)

- and -

HER MAJESTY THE QUEEN

RESPONDENT  
(Respondent)

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APPLICANT'S MEMORANDUM OF ARGUMENT  
(Pursuant to Rule 25 of the *Rules of the Supreme Court of Canada*)

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## PART I – OVERVIEW AND STATEMENT OF FACTS

### A. Overview of National Importance

1. Following York Regional Police’s “Project Raphael” operation, the Applicant, Muhammad Abbas Jaffer, was convicted of two counts related to telecommunications with an undercover police officer, Det. Truong, who was posing as an underage escort.<sup>1</sup> The operation, which took place between 2014 and 2017, aimed to prevent juvenile prostitution by focusing on the demand side of the trade, identifying and arresting individuals attempting to purchase sexual services from children. To this end, undercover officers posted ads for the sale of sexual services on a website called, “Backpage” (backpage.com). While the ads did not state that the escorts were underage, this information was revealed to the men shortly after they engaged in conversation.

2. At the time of his arrest, Mr. Jaffer was 22 years old. He had graduated from the University of Toronto with an A- average, had a good employment record, and was actively involved in his community. All the while, however, Mr. Jaffer was suffering from undiagnosed Asperger’s Syndrome, including at the time of the offence. It was difficult for him to form and maintain relationships, and difficult to communicate with others or participate in social interactions. These traits and difficulties, common amongst individuals with Asperger’s Syndrome,<sup>2</sup> led to Mr. Jaffer’s presence on “Backpage”. They also impacted his communications with the undercover police officer, whom he believed to be an escort.

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<sup>1</sup> Specifically, Mr. Jaffer was convicted of telecommunications with a person under the age of 18 for the purpose of obtaining consideration for sexual service pursuant to s. 172.1(2) and obtaining sexual service for consideration, pursuant to s. 212(4) of the *Criminal Code*.

<sup>2</sup> *R v Kagan*, 2009 NSCA 43 at para 41 [*Kagan*]; *R v Harvey*, 2006 BCCA 355 at para 10; *R v J(M)*, 2016 ONSC 2769 at para 13; *R v McPherson*, 2019 NSCA 70 at para 46; *R v ZG*, 2009 ONCJ 798 at para 32 [*ZG*]; *R v W(MD)*, 2001 CarswellNS 370 (PC), [2001] NSJ No 259 at para 56 [*W(MD)*]; *R v Kunzig*, 2011 MBPC 81 at para 33; *R v Minassian*, 2021 ONSC 1258 at para 36; *R v JED*, 2017 MBPC 33 at paras 37, 44 [*JED*]; American Psychiatric Association, *Diagnostic and statistical manual of mental disorders*, 5th ed (Washington, DC: American Psychiatric Association, 2013) [*DSM 5*]; Michael Hogan & Joseph Micucci, “Same-Sex Relationships of Men With Autism Spectrum Disorder in Middle Adulthood: An Interpretive Phenomenological Study” (2020) 7:2 *Psychology of Sexual Orientation & Gender Diversity* 176 at 176-177; Matthew Roth & Jennifer Gillis, “Convenience with the Click of a Mouse: A Survey of Adults with Autism Spectrum Disorder on Online Dating” (2015) 33:1 *Sexuality & Disability* 133 at 134.

3. Mr. Jaffer is only 1 of 104 men who were arrested as a result of Project Raphael.<sup>3</sup> We cannot know whether any of the other 103 men suffered from any mental disorders, such as Asperger’s Syndrome, or from similar symptoms that impacted their interactions with police officers posing as underage escorts.

4. Mr. Jaffer’s mental disorder, and its effect on his communications with the undercover police officer, offers this Court the unique opportunity to address questions of law raising matters of national importance, relating to the objective nature of entrapment and the consequences that it has on accused persons with mental disorders.

5. As this Court has stated, entrapment is not a traditional defence excusing the accused from the commission of a crime, but rather exists “as an aspect of the abuse of process doctrine which enabled a court to enter a stay of proceedings in circumstances where allowing the accused to stand trial would offend the court’s sense of justice.”<sup>4</sup> Rather than focusing subjectively on the particular accused and their circumstances, however, an entrapment analysis focuses objectively on police conduct in determining whether it has exceeded legal limits, therefore constituting an abuse of process.<sup>5</sup>

6. This appeal, if granted leave, would focus on two broad issues. First, it raises the identical issues regarding the first branch of the entrapment test as the leave applications in *R. v. Haniffa* (39803), and *R. v. Dare* (39871) as well as the appeal as of right in *R. v. Ramelson* (39664). These three appeals were heard jointly at the Court of Appeal for Ontario as they arise from the same police project. In this regard, the applicant seeks to be joined with these appeals and adopts the issues raised by those applicants. Additionally, the applicant will raise issues related to the second branch of entrapment, which occurs when police conduct goes beyond providing an opportunity to commit an offence and induces the accused into committing the offence.<sup>6</sup>

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<sup>3</sup> York Regional Police, “York Regional Police Annual Report” (2017) at 19, online (pdf): *York Regional Police* <[yrp.ca/en/about/resources/2018-07-2017AnnualReport-YorkRegionalPolice.pdf](http://yrp.ca/en/about/resources/2018-07-2017AnnualReport-YorkRegionalPolice.pdf)>.

<sup>4</sup> *R v Mack*, [1988] 2 SCR 903, [1998] SCJ No 91 at paras 24, 70-77, 137 [*Mack*]; see also *R v Amato*, [1982] 2 SCR 418, [1982] SCJ No 72.

<sup>5</sup> *Mack*, *supra* at paras 99, 109.

<sup>6</sup> *Mack*, *supra* at paras 122, 133-135.

7. The analysis under the inducement branch of entrapment requires the trier of fact to consider whether the conduct of the police would have induced an average person, with both the strengths and weaknesses of the accused, into committing the offence.<sup>7</sup> This Court has also provided other factors for consideration when determining whether particular police conduct has gone beyond providing an opportunity to commit an offence, including “whether the police appear to have exploited a particular vulnerability of a person such as a mental handicap or a substance addiction.”<sup>8</sup> Both the hypothetical person test and the exploitation of vulnerability suggest that certain characteristics of the accused person are relevant and ought to be considered when determining whether the accused has been unlawfully induced. However, the analysis remains purely objective, with a focus on the police conduct, rather than the accused’s state of mind or individual characteristics.<sup>9</sup>

8. Given the nature of this focus on police conduct, even the consideration of individual vulnerabilities mentioned above must be viewed objectively. As such, for a vulnerability of the accused to be exploited by the police, the police officers must have been aware of that vulnerability. That reasoning becomes an issue when police operations move to the virtual realm, away from face-to-face contact with those under investigation.

9. Specifically, individuals with mental disorders and disabilities that impact in-person social interactions, skills, and beliefs, such as Asperger’s Syndrome, face an increased risk of being induced into the commission of an offence – and therefore entrapped – when they become the subject of police operations that take place virtually, such as Project Raphael. These symptoms are often easily detectable when the individual experiencing them participates in face-to-face social interactions, but this may not be as apparent during on-screen interactions. Because undercover officers working online only interact with individuals virtually, they are unable to recognize those vulnerabilities that are readily apparent in other situations. In other words, these officers interact with individuals virtually, through text, thereby avoiding the possibility of relying on a person’s vulnerabilities that would otherwise signal to the officers that that person may be more susceptible to inducement. In adopting these tactics, officers are unable to gauge the suspect’s vulnerabilities,

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<sup>7</sup> *Mack, supra* at para 123; *R v D’Argent*, 2014 ONSC 4270 at para 19.

<sup>8</sup> *Mack, supra* at para 145.

<sup>9</sup> *Mack, supra* at paras 123, 137, 151.

or their impact on the virtual interaction. Police officers in these situations may not be exploiting a person's mental disorder intentionally, but these operational designs fail to provide the opportunity for participating officers to be exposed to characteristics of an accused that may increase the likelihood of inducement.

10. If leave to appeal is granted, Mr. Jaffer will advocate for a new common law rule regarding the inducement branch of entrapment and the consideration of individual vulnerabilities of the accused person in question. Mr. Jaffer will endorse a principled framework of entrapment that, in the context of virtual police operations, shifts the focus of the inducement analysis from an objective examination of police conduct to one that takes a suspect's vulnerabilities into account, considering how those vulnerabilities may have impacted their interactions with the police and their likelihood of being induced had the interaction taken place in-person as opposed to through a screen.

## **B. Overview of the facts**

### **i. The undercover operation and the advertisement**

11. On October 24, 2014, Det. Truong, a member of the York Regional Police Force, was involved in an undercover police operation called, Project Raphael, aimed at identifying and arresting individuals engaged in child prostitution. Its objective was to be proactive, investigating juvenile prostitution, which often presents difficulties in both identifying children involved in the sex trade and obtaining information from those children. Given these difficulties, the police strategy focused on the "demand side" of the equation, aiming to identify purchasers of juvenile sex. Officers posted ads for the sale of sexual services on "Backpage," a website which, based on police experience, was said to be commonly associated with child prostitution.

12. Similar to websites like "Craigslist" or "Kijiji," "Backpage" was a website where users could post classified ads. The ads were divided into categories, including a designated "adult section", which further contained a subcategory for escort services. To pursue escort services, each user needed to agree that they had read the disclaimer – which indicated that this section of the site could only be used by individuals over the age of 18 – and that they were willing to follow the rules of the site. Additionally, in order to post an ad under this subcategory, "Backpage" charged a fee which required that the poster of the ad be connected with a credit card belonging to an

individual over the age of 18. Escort services ads typically include a photo and a phone number that interested clients can call or text in order to set up a date.

13. During Project Raphael, Det. Truong posted an ad in the “adults only” section of the site under the escort services subcategory. The ad advertised the services of an 18-year-old female named “Kathy Blunt” – *i.e.*, not a minor. The ad described a young girl with a tight body who was into sex and looking for fun. It provided a cell phone number to call or to text, along with an email. The ad included photographs of an undercover officer. Det. Truong explained the reasoning of the ad’s wording as follows: the phrase, “tight brand new girl”, was meant to portray a “young girl.” In both the header and body of the ad, “Kathy’s” age was unambiguously 18. Further, the photographs included in the ad did not establish that “Kathy” was underage.

**ii. The Appellant’s communications with the undercover officer**

14. Shortly after 9:00 p.m., Mr. Jaffer texted the number on “Kathy’s” ad asking for her rates. Det. Truong replied, stating half an hour would cost \$120. Twelve texts into their exchange, Det. Truong volunteered, “I’m not quite 18 yet. Are you okay with that?” Mr. Jaffer replied, “Yeah, I’m okay, but how much younger are you? 17?” Det. Truong texted back, “I’m turning 16 on Sunday.” This discussion was prompted by Det. Truong, despite his testimony that, in his extensive experience investigating prostitution offences, in most cases of juvenile prostitution, the issue of age is never discussed, as child sex workers often will not offer information regarding their actual age out of fear they will be caught by police or suffer violence at the hands of their pimps.

15. The text exchange continued until about 11:30 p.m. that night. During the course of the exchange, Mr. Jaffer confirmed that “Kathy” was not a police officer, indicating he did not want to get in trouble. Mr. Jaffer asked “Kathy” why she was escorting, noting that “people your age don’t know about the industry.” “Kathy” told Mr. Jaffer her friend “got her into it” and that she was escorting for money. “Kathy” then asked Mr. Jaffer to bring a condom, saying she only had one left. Mr. Jaffer responded that he would have to go back home to get one and asked if they could use hers. “Kathy” told the Mr. Jaffer to come to the Staybridge Suites at Leslie and Highway 7 in Markham. At 11:26 p.m., the Appellant messaged, “I think I’m there.” Det. Truong, still posing as “Kathy”, told him come to the room.

**iii. The Appellant arrives at “Kathy’s” hotel room**

16. Mr. Jaffer knocked on the door of “Kathy’s” room. He was greeted by Det. Truong and other officers of the York Regional Police. He was arrested. His pockets were searched. Police found \$145 cash and the iPhone used to text “Kathy.”

**iv. The Appellant’s evidence**

17. At the time of his arrest, Mr. Jaffer was 22 years old and resided with his family in Toronto. After completing high school, he studied at the University of Toronto, where he obtained a Bachelor of Science degree with a focus on environmental biology and psychology. He was an honours student, completing his degree in June 2014 with an A- average. Outside of school, he was actively involved with his mosque, as well as in volunteer activities that aided the homeless population. He was employed by his father’s company and also worked as a part-time teaching assistant at the University of Toronto. Apart from his family, Mr. Jaffer only had four or five friends that he saw every few months. He did not share a close relationship with any of them, and he had never had a girlfriend.

18. In his testimony, Mr. Jaffer explained that, when he contacted “Kathy”, he was interested in a sexual relationship; however, this purpose changed once she told him her age. Mr. Jaffer, who was admittedly odd, lacking in social relationships, and suffering from undiagnosed Asperger’s Syndrome, often met with adult escorts and communicated with them online. On the evening of his arrest, he was looking for an escort to have sexual contact with. When “Kathy” told him she was underage, he was worried, viewing the admission as a “cry for help”. Based on his experience speaking with escorts online, it was not normal for an escort to admit they were a minor. Det. Truong – an officer with extensive experience investigating sex trade – also testified that the communications were atypical. Underage escorts would not normally reveal their age out of concern they would be robbed or abused by a patron, caught by police, or harmed by their pimp.

19. Deciding he needed to help “Kathy,” Mr. Jaffer continued the conversation for the purpose of determining her location, in order to meet with her and then contact the police. Based on his experience, Mr. Jaffer knew of the precarious situations sex workers often find themselves in and the fear and harm they suffer at the hands of pimps. He wanted to help “Kathy” get out of the sex trade.

20. In fact, this was not Mr. Jaffer's first time cooperating with the police in an investigation into the sex industry. In the months prior, Mr. Jaffer had provided a police officer with information about a sex worker for whom he was genuinely concerned. That officer, Cst. Kang, gave Mr. Jaffer his business card. He asked Mr. Jaffer to contact him with any further information he may obtain related to the sex industry. Cst. Kang testified at trial and confirmed this version of events. Mr. Jaffer explained that, once he located "Kathy", he intended to call police immediately.

21. Importantly, Mr. Jaffer's version of events, including the fact that he was not meeting "Kathy" for sex, was corroborated by other evidence, namely he made arrangements to meet another escort after meeting with "Kathy". Not only did Mr. Jaffer testify that he had arranged a meeting with a different escort at 11:45 p.m. on the evening of his arrest, the later meeting was corroborated by his phone records which were admitted at trial, as well as the fact that he was arrested in possession of \$145—only enough money to pay for one escort. Further, Mr. Jaffer's browser history demonstrated that he looked at ads for escorts ranging in age from 18 to 40, with no suggestion that he was seeking out an underage escort.

22. Upon arriving at the hotel and entering "Kathy's" room with the intention of helping her, Mr. Jaffer was arrested. He told police, "I'm here to help you. I am trying to catch the pimp involved in this process. I wanted to help this underage girl." He told the officers about his previous encounter with Cst. Kang. In response, the arresting officers laughed at him and called him a liar.

#### **v. Judicial History**

23. At trial, the sole issue for the jury was whether Mr. Jaffer's purpose in communicating with "Kathy" was to obtain sexual services for consideration. The Crown's case turned on the communications themselves—purportedly establishing a sexual purpose. The defence's theory was corroborated by independent evidence.

24. Based on Mr. Jaffer's evidence, the defence argued that, though he initially sought sexual services on the evening of his arrest, his intentions changed when he learned that "Kathy" was underaged. His intentions then turned to helping "Kathy," whom he believed was in danger. Despite this cogent body of evidence, the jury convicted. Following his conviction, Mr. Jaffer applied for a stay of proceedings based upon entrapment. That application was dismissed.



25. Mr. Jaffer appealed his conviction and was joined with the appeals of *R v Haniffa* and *R v Dare*, as they all stemmed from Project Raphael.<sup>10</sup> Mr. Jaffer argued the trial judge erred by giving insufficient reasons, improperly focusing on the harm caused by the offence, and misapprehending the evidence. Specifically, Mr. Jaffer argued the trial judge erred by concluding that Project Raphael was a bona fide inquiry and failing to find that he was entrapped, and by failing to find he had been induced into committing the offence. On a thorough review of the record, Mr. Jaffer submitted the trial judge ought to have concluded he was entrapped and ordered the proceedings stayed.

26. Mr. Jaffer’s appeal was dismissed by the Court of Appeal for Ontario.<sup>11</sup> Regarding opportunity-based entrapment and the bona fide inquiry requirement, the Court concluded that, based on Det. Truong’s experience and testimony, the trial judge was given an evidentiary basis for concluding the police had reasonable suspicion persons were going to Backpage for the purpose of obtaining sexual services from a minor.<sup>12</sup> With regard to inducement-based entrapment, the Court concluded Mr. Jaffer had not been induced into committing the offence. Rather, the messages between Mr. Jaffer and “Kathy” provided a basis for the trial judge to conclude he was determined to purchase sexual services from “Kathy” and considered her age before acting.

## **PART II – STATEMENT OF QUESTIONS IN ISSUE**

27. In addition to the issues raised by *Ramelson*, *Hanniffa*, and *Dare*, this appeal would raise the following significant issue: Does the current analysis under the inducement branch of entrapment fail to meaningfully consider the vulnerabilities of accused persons with mental disabilities in the context of virtual police operations?

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<sup>10</sup> *R v Haniffa*, 2021 ONCA 326; *R v Dare*, 2021 ONCA 327.

<sup>11</sup> *R v Jaffer*, 2021 ONCA 325 [*Jaffer*].

<sup>12</sup> *Jaffer*, *supra* at para 15.

### PART III - STATEMENT OF ARGUMENT

#### A. The criminal justice system must properly account for people with mental disorders

28. The number of Canadians with mental health issues has increased such that the over-representation of individuals with mental disorders in the criminal justice system “is a reality beyond debate”.<sup>13</sup> As research in this area develops, academic literature, legal decisions, and policy frameworks have begun to advocate for accommodation of these individuals in the criminal justice system and being conscious of their needs. In fact, the need to accommodate offenders with mental disorders by providing individualized assessments and opportunities for treatment was reflected by the 1991 enactment of Part XX.1 of the *Criminal Code*, an entire part dedicated to the treatment of mental disorders within the court system.<sup>14</sup> In keeping with the values reflected in Part XX.1, a line of jurisprudence has developed recognizing mental disorder both as a mitigating factor in sentencing and as a factor reducing the moral culpability of offenders.<sup>15</sup>

29. The literature and policy in this area all point in the same direction: “Efforts should be directed at ensuring that as many mentally disordered offenders as possible are kept out of the justice system.”<sup>16</sup> This goal can be promoted by providing police officers with training regarding the recognition of signs and behaviours related to mental disorders in order to reduce the interactions between the criminal justice system and individuals with mental disorders.<sup>17</sup>

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<sup>13</sup>Justice Richard Schneider, “The Mentally Ill: How They Became Enmeshed in the Criminal Justice System and how We Might Get Them Out” (2015), online (pdf): *Government of Canada* <[justice.gc.ca/eng/rp-pr/jr/mental/mental.pdf](http://justice.gc.ca/eng/rp-pr/jr/mental/mental.pdf)>; *R v Verwindt*, 2016 ABPC 70 at paras 55-56; CAMH, “Mental Health and Criminal Justice Policy Framework” (2013) at 2, online (pdf): *CAMH* <[camh.ca/-/media/files/pdfs---public-policy-submissions/mh\\_criminal\\_justice\\_policy\\_framework-pdf.pdf](http://camh.ca/-/media/files/pdfs---public-policy-submissions/mh_criminal_justice_policy_framework-pdf.pdf)>.

<sup>14</sup> *Criminal Code*, RSC 1985, c C-46, Part XX.1; *Winko v Forensic Psychiatric Institute*, [1999] 2 SCR 625, [1999] SCJ No 31 at paras 20, 22, 43.

<sup>15</sup> *R v Adamo*, 2013 MBQB 224 at paras 29, 31, 34; *R v Carter*, 2014 SKPC 150 at para 311; *R v Bourgeois*, 2018 NLCA 13 at para 24; *R v Brennan*, 2019 CarswellNfld 370, [2019] NL No 301 (PC) at paras 13-20.

<sup>16</sup> John Hylton, “Care or Control: Health or Criminal Justice Options for the Long-Term Seriously Mentally Ill in a Canadian Province” (1995) 18:1 Intl JL & Psych 45 at 54.

<sup>17</sup> CAMH, “Mental Health and Criminal Justice Policy Framework” (2013), online (pdf): *CAMH* <[camh.ca/-/media/files/pdfs---public-policy-submissions/mh\\_criminal\\_justice\\_policy\\_framework-pdf.pdf](http://camh.ca/-/media/files/pdfs---public-policy-submissions/mh_criminal_justice_policy_framework-pdf.pdf)>.

**B. The current analysis under the inducement branch of entrapment fails to adequately consider the mental health of an accused person in the context of virtual operations**

30. Despite the body of literature emphasizing the need to consider the mental health of offenders within the criminal justice system, the current law surrounding entrapment fails to account for individuals with mental disorders in the context of virtual police operations.

31. The current law surrounding entrapment provides that entrapment may arise in one of two ways:

- a. When police provide an opportunity to a subject to commit a criminal offence, without having a reasonable suspicion at the time:
  - i. That the subject was already involved in the particular criminal activity; and/or
  - ii. That the subject is associated with a particular location where the particular criminal activity is likely occurring; or
- b. When police go beyond providing “an opportunity” and actually “induce” the commission of the offence.<sup>18</sup>

As stated previously, if granted, this appeal will focus on the second branch, which requires police conduct to induce the commission of an offence rather than simply providing an opportunity for the offence to be committed.

32. Because entrapment exists as part of abuse of process doctrine, the analysis under both branches focuses objectively on the police conduct in a given situation to determine whether it constitutes an abuse of process, rather than considering the subjective circumstances of a particular accused person.<sup>19</sup>

33. This Court has set out several factors to consider in determining whether police conduct has gone beyond providing an opportunity to commit an offence, including “whether an average person, with both strengths and weaknesses, in the position of the accused would be induced into the commission of a crime” and “whether the police appear to have exploited a particular

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<sup>18</sup> *Mack, supra* at paras 122, 133-135.

<sup>19</sup> *Mack, supra* at paras 24, 70-77, 99, 109, 137.

vulnerability of a person such as a mental handicap or a substance addiction.”<sup>20</sup> Both the hypothetical person standard and the consideration of exploitation of vulnerability suggest that certain characteristics of the accused person are relevant and ought to be considered when determining whether the accused has been induced under the second branch. However, this analysis clearly remains purely objective, with a focus on police conduct rather than the accused’s state of mind or individual characteristics.<sup>21</sup>

34. Given this focus on police conduct, even considerations of individual strengths, weaknesses, and vulnerabilities are viewed through an objective lens. As such, for a vulnerability of the accused to be considered exploited by police, the officer(s) must have been aware of that vulnerability. This becomes an issue when police operations take place online or through telecommunications as opposed to in-person, where officers engage in face-to-face interaction with the subjects of their investigations.

35. Specifically, individuals with mental disorders and disabilities that impact their in-person social interactions, skills, and beliefs, such as Asperger’s Syndrome, face an increased risk of being induced into the commission of an offence – and therefore entrapped – when they become the subject of police operations that take place virtually, such as Project Raphael. While these symptoms are often easily detectable when the individual experiencing them participates in face-to-face social interactions, they may not be apparent during interactions through a screen. Because police officers in online undercover operations only interact with individuals virtually, they are unable to exploit or rely on those vulnerabilities that are readily apparent in other situations. In other words, undercover officers are interacting with individuals virtually, through text, and therefore avoiding the possibility of recognizing a potential vulnerability that would signal the suspect’s increased susceptibility to inducement. In adopting these tactics, officers participating in these operations are unable to gauge the accused person’s vulnerabilities and the impact that they may have on the interactions. While police officers in these situations may not be exploiting a person’s vulnerabilities or mental disorder intentionally, the nature of the operations fails to

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<sup>20</sup> *Mack, supra* at paras 139-148.

<sup>21</sup> *Mack, supra* at paras 123, 137, 151.

provide the opportunity for participating officers to be exposed to characteristics of an accused that may increase the likelihood of inducement.

**C. Vulnerabilities of people with Asperger’s Syndrome and similar mental disorders: An example of the shortcomings of the entrapment analysis in the context of inducement and virtual police operations**

36. Individuals with Asperger’s Syndrome (now part of the broader category of Autism Spectrum Disorder), such as Mr. Jaffer, often have symptoms and characteristics that may render them susceptible to inducement in the context of virtual undercover operations. Specifically, the following symptoms are two amongst many that individuals with Asperger’s Syndrome often experience and which may impact their interactions with police officers engaged in undercover operations, therefore putting them at a higher risk for entrapment by way of inducement: (i) difficulty developing relationships, communicating with others, and interacting socially;<sup>22</sup> and (ii) rigid compliance with rules.<sup>23</sup>

***(i) Difficulty developing relationships and engaging in social interactions***

37. People with Asperger’s Syndrome commonly experience deficits in social communication and interactions, oftentimes resulting in difficulties developing and maintaining relationships.<sup>24</sup> These deficits may be observable when interacting with an individual with Asperger’s Syndrome face-to-face (e.g., obvious difficulty making and maintaining eye contact, reading body language, or picking up on social cues and customs, and naivety),<sup>25</sup> but they may be less readily detectable when interacting with that same individual online or via text message. Accordingly, while police officers involved in in-person undercover operations are given the opportunity to interact with suspects face-to-face, and therefore have the opportunity to observe these characteristics, police officers involved in virtual operations, such as Project Raphael, are not. Rather, individuals with Asperger’s Syndrome who become the subject of virtual police operations may more easily mask

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<sup>22</sup> *DSM 5, supra.*

<sup>23</sup> *R v Collier*, 2019 ONSC 7021 at para 27 [*Collier*]; *R v ZG*, 2009 ONCJ 798 at para 32.

<sup>24</sup> *DSM 5, supra.*

<sup>25</sup> *Kagan, supra* at para 41; *ZG, supra* at para 32; *DSM 5, supra*; *JED, supra* at para 37; *W(MD), supra* at para 56.

these vulnerabilities despite the fact that those vulnerabilities and symptoms remain present in both settings and have the same impact on a suspect's behaviour.

38. This issue is observable in the present case. While Mr. Jaffer is admittedly odd and lacking in social skills, these characteristics were not readily identifiable through his interactions with Det. Truong over text message. As such, Det. Truong was not made aware of Mr. Jaffer's vulnerabilities, despite their impact on the communications between the two men. Even though Det. Truong was unaware that he was exploiting Mr. Jaffer's vulnerabilities by engaging in conversation with him, Mr. Jaffer's lack of social understanding and communication skills still impacted his interactions.

39. Further, these difficulties in social settings and in forming relationships are often what lead individuals with Asperger's Syndrome to online forums and webpages in the first place. Given their deficits in understanding social situations and developing intimate relations, people with these mental disorders often turn to pornography or online dating sites in order to satisfy their desires.<sup>26</sup> There is a lack of data regarding the frequency at which individuals with these disorders visit online dating services and forums. However, research does suggest that such individuals report feeling more comfortable engaging in online interactions as opposed to face-to-face communication.<sup>27</sup> Despite these reports, the virtual world of dating and escorting still presents several difficulties for individuals with Asperger's Syndrome and similar disorders. Specifically, the virtual environment of these websites and communication methods present their users with "unwritten social rules and subtle social customs" that individuals with Asperger's Syndrome often have difficulty understanding, including the idea that individuals will often misrepresent themselves online.<sup>28</sup> Given these issues, some studies have proposed that individuals with these symptoms and disorders may be at an increased risk of victimization when using the internet or other forms of virtual communication.<sup>29</sup>

40. The increased presence of individuals with Asperger's Syndrome on online forums and escorting pages such as Backpage, combined with the added difficulties that accompany virtual

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<sup>26</sup> *JED*, *supra* at para 45; Roth & Gillis, *supra* at 133.

<sup>27</sup> Roth & Gillis, *supra* at 134; Hogan & Micucci, *supra* at 178.

<sup>28</sup> Roth & Gillis, *supra* at 134-135.

<sup>29</sup> *Ibid.*

communication methods, suggests these individuals may be more susceptible to inducement in virtual contexts. By posting ads as a part of their undercover operations on webpages that are frequented by individuals with mental disorders and symptoms that lead them to such forums and who have difficulty interpreting and understanding communications that take place in such contexts, police are therefore moving beyond merely providing the opportunity to commit an offence. Instead, they are inducing individuals into the commission of offences by exploiting the vulnerabilities and mental disorders that bring them to these websites to begin with.

41. Again, Mr. Jaffer's case provides an example of this. As stated in his evidence, Mr. Jaffer began seeing escorts after being directed to "Backpage" by a friend who had advised him that, if he could not get a girlfriend, he should do so through the website. Mr. Jaffer's symptoms and the difficulties associated with his undiagnosed Asperger's Syndrome brought him to the "Kathy's" ad in the first place. His symptoms compelled him to continue the interaction after learning that "Kathy" was underage.<sup>30</sup>

42. In the context of virtual police operations, these issues are not accounted for under the inducement branch of entrapment. Focusing on police conduct, the analysis ignores the fact that police officers act in these situations without meaningfully interacting with the subjects of their investigation. Police officers participating in virtual operations are deprived of the opportunity to uncover any vulnerabilities of a suspect, even when they may be experiencing a mental disorder that significantly influences their interactions.

(ii) *Rigid compliance with rules*

43. Individuals with Asperger's Syndrome often display an inflexible adherence to rules, and the corresponding belief that others will follow rules in the same way.<sup>31</sup> In cases involving sexual offences with underage children on online forums, this symptom may manifest itself in a genuine belief that, when a website requires individuals to be over the age of 18 to use the site, individuals on that website would follow that age rule and therefore be over 18.<sup>32</sup> While this may not have

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<sup>30</sup> This latter proposition is discussed in the following section.

<sup>31</sup> *Collier, supra* at para 27.

<sup>32</sup> See, for example, *Collier, ibid.*

been the case for Mr. Jaffer – who was admittedly shocked when “Kathy” revealed that she was underage and believed that she needed his help – the circumstances of his case do reveal another instance of strict adherence to a rule or request by a police officer with legal authority.

44. In his testimony, Mr. Jaffer recounted his previous encounter with Cst. Kang, during which he provided the officer with information about an escort he had been seeing, as well as her pimp. In return, Cst. Kang provided Mr. Jaffer with his business card, telling him to contact him if he learned of any additional information. Mr. Jaffer testified that, upon learning “Kathy” was underage, he continued the conversation in order to obtain information to provide to the police. He planned to meet her to confirm her location before alerting authorities. Mr. Jaffer’s behaviour and explanation are in line with the tendency of individuals with Asperger’s Syndrome to strictly adhere to rules. A law enforcement officer told him to do something; he believed he was complying.

45. Whether an individual experiencing this symptom of Asperger’s Syndrome when faced with a virtual police operation genuinely believes that their interlocutor is of age, or instead finds themselves in a situation in which they believe they must continue the communications in order to fulfill a request by a person in authority, the individual’s disorder is impacting their decision to continue communications. Police conduct is therefore exploiting a vulnerability of the accused that is otherwise unknown to the officer. Because the operation is taking place virtually and therefore the police officer involved is not given the opportunity to become aware of such symptoms or vulnerabilities arising as a result of a mental disorder, such conduct cannot amount to inducement, according to the current objective analysis focused on police conduct employed under the second branch.

46. Asperger’s Syndrome and the symptoms discussed above– from which Mr. Jaffer suffered at the time of his arrest – are merely one example of a mental disorder that may increase an individual’s susceptibility to inducement in the context of virtual police operations, unbeknownst to the officers involved in virtual investigations.



**D. A more effective approach to the inducement analysis that better accounts for accused persons with mental disorders is required**

47. Although the current law surrounding inducement-based entrapment hints that individual characteristics of an accused person ought to be considered (at least objectively) in determining whether police conduct constituted inducement, the use of virtual police operations in this case reveals the difficulty of meaningfully applying such a standard in a purely objective manner. Without the opportunity for face-to-face interaction, individuals with mental disorders impacting their communications, understandings, and beliefs are caught in a web of police operations that prevent officers from avoiding reliance on the vulnerabilities of their subjects.

48. Literature suggests that police training is already insufficient to prepare officers to identify and manage individuals with mental disorders.<sup>33</sup> The added complication of disengaged communication through a computer or telephone screen only adds to that difficulty, putting individuals with mental health issues at an even higher risk of being criminalized and victimized.

49. Given the considerations discussed above, Mr. Jaffer wishes to advocate for an analysis relating to the inducement branch of entrapment that is more subjective in nature, and more carefully considers the effects of mental disorders on an accused person in the context of virtual police operations. Mr. Jaffer submits that such an approach is consistent with the need to further account for and address mental health issues within the criminal justice system that is discussed in literature, caselaw, and policy frameworks.

**PART IV – SUBMISSION ON COSTS**

50. The applicant does not seek costs and asks that no costs be awarded against him.

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<sup>33</sup> Richard Lamb, Linda Weinberger & Bruce Gross, “Mentally Ill Persons in the Criminal Justice System: Some Perspectives” (2004) 75:2 Psych Q 107.

**PART V – ORDER REQUESTED**

51. It is respectfully requested that the application for leave to appeal to this Honourable Court from the decision of the Court of Appeal for Ontario be granted.

**DATED** at Toronto, Ontario this 22<sup>nd</sup> day of December, 2021.



for:

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**PART VI - TABLE OF AUTHORITIES & LEGISLATIVE PROVISIONS**

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**LEGISLATION**

[Criminal Code, RSC, 1985](#), c C-46, Part XX.1

28

[Code criminel \(L.R.C. \(1985\)\)](#), ch. C-46)

## APPENDIX "A"

### THE TEXT CONVERSATION

- Applicant: Hey was just wondering what your rates are. Also great job with your body, you look fit as hell.
- Officer: 120hh hun no greek
- Applicant: Can I come for 100? That's all I can do with right now.
- Officer: ok for 20 mins no bareback or anal ok
- Applicant: Ok I think I can come then.. but I forgot to ask if you do foot fetish...  
If it helps I'm really for like you so you'll enjoy it... oops meant to say... I'm a bodybuilder like you \*so you'll enjoy it
- Officer: Wow how old r u
- Applicant: 22.. I know you're probably asking why a bodybuilder like me doesn't have a gf ... its because I'm way to busy with my job. On day... For now I've gotta have a sex release through escorts since it takes less time and no commitments.
- Officer: lol ok ... well Im not quite 18 yet r u ok with that
- Applicant: So ... do you do foot fetishes lol? I've got a thing for sweat (figures lol) so if u can wear your sweaty socks that would be even better
- Officer: sure hun I can try
- Applicant: Yeah I'm ok ... but how much younger are u? 17?
- Officer: Im turning 16 on Sunday but I look 18
- Applicant: Um ... ok but how do I know you're not a cop? I really don't want to get in trouble ya know
- Officer: and I definitely don't want trouble
- Applicant: Ok can I ask why you're escorting if it's ok with u? Usually people your age don't know about this industry... Just curious

Officer: my friend got me into it ... I just need the money I don't do this all the time its my second time honestly I need the money

Applicant: I see ... I like that you're honest I can trust you then. So I'll come then but please please let's keep this between ourselves.

Officer: Lol r u crazy no im not a cop .. I should be the one worried ur thr bodybuilder... u better promise not to tell

Applicant: Lol I'm a very nice guy and would never hurt a woman. Even though I am strong... So can you wear your sweaty socks then? I promise

Officer: u want me to wear socks while u fuck me?

Applicant: Sweaty ones year I love the smell of a sweating tough girl... Btw where are u located? Because I'm about to leave

Officer: lol ok but be gentle ok .. and do u have a condom cause I only have one left

Applicant: Shoot I think I have one or 2 ... But I already left te house so it'll be annoying toget back ... Can we just use that one?

Officer: ok leslie n hwy 7 txt me when u get there n I will givr u hotel

Applicant: ok

Officer: how long hun

Applicant: I'll probably be there in 10 min... I live close ... Maybe 15 min

Officer: ok hun just wana make sure im ready for u

Applicant: Thank you u sound sweet in a hot way... Ok so I'm just at leslie now and highway 7... hello hello

Officer: sorry hun staybridge suites

Applicant: ok

Officer: 355 South park rd

Applicant: Ok I think Im there. Yup this is it

Officer: rm 319 hun... come up hun

Applicant: Sure thing