

IN THE SUPREME COURT OF CANADA

(ON APPLICATION FOR LEAVE TO APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

B E T W E E N:

ERHARD HANIFFA

Applicant
(Appellant)

-and-

HER MAJESTY THE QUEEN

Respondent
(Respondent)

MEMORANDUM OF ARGUMENT

PART I: STATEMENT OF THE FACTS

A. OVERVIEW OF THE RESPONDENT'S POSITION

1. The Applicant answered an ad in the escort section of Backpage.com ["Backpage"] and arranged to meet a person he believed to be an underage prostitute at a hotel for sexual services. When he arrived at the agreed upon hotel, at the agreed upon time, the Applicant was met, not by an underage girl, but by the police. He was arrested. At the time, the York Regional Police ("YRP") had been conducting an undercover investigation into the escort section of Backpage, a "place" known to police as a location that enabled users to access and purchase sex from child prostitutes.
2. The Applicant was tried by Kenkel J. in the Ontario Court of Justice. He was ultimately found guilty of three child luring related offences. In the courts below, the Applicant asserted that his s. 11(b) *Charter* right had been violated, and that he was entrapped by the police. The trial judge rejected both claims. So did the Court of Appeal.

3. The Applicant seeks an extension of time to file an application for leave to appeal to this Court. He further seeks leave to appeal to this Court arguing that the Court of Appeal for Ontario [“Court of Appeal”] erred in concluding that the trial judge correctly found that the police conduct did not amount to entrapment, and that the Applicant’s s. 11(b) rights were not breached.

4. The Respondent consents to the application for an extension of time to file an application for leave to appeal to this Court. The Respondent respectfully requests that the application for leave to appeal be dismissed. This case is an entirely fact-driven application of well-developed legal principles on the doctrine of entrapment and on s. 11(b) of the *Charter*. No issues of national or public importance arise from this case. Further, the courts below correctly rejected both the Applicant’s entrapment and s. 11(b) complaints. There was no clear error in the Court of Appeal’s analysis on either issue that necessitates the intervention of this Court.

B. SUMMARY OF THE FACTS

(i) York Regional Police’s Project Raphael

5. Project Raphael was an undercover investigation that began in 2014 by the YRP. It targeted juvenile prostitution by conducting “sting” operations on prospective consumers who responded to online ads for underage prostitutes. The overall goal of Project Raphael was to reduce the demand for underage prostitution. In 2016, the age communicated to responding targets over text was 15 years old. Inspector Truong, testified that through training and investigation, law enforcement determined that a specific webpage, Backpage, was a market leader for sex advertising, and with that, came a high demand for juvenile prostitution.

6. Inspector Truong testified that Project Raphael involved posting ads on Backpage with the listed age of 18 (the lowest the website allowed). The ad contained content that suggest that the

“girl” was inexperienced, new and/or fresh to the industry. At some point after the prospective buyer would initiate conversation, the undercover officer would indicate over text that “she” was younger than 18 and would specify her age (e.g. 15). At that point, the prospective buyer would either cease communications, or continue to engage and arrange to meet.

(ii) The Applicant’s March 2016 messages with “Jamie” & arrest

7. In March 2016, Inspector Truong created and posted Backpage ads offering the sexual services of “Jamie.” The ad included pictures of “Jamie” and read as follows:

YOUNG Shy FRESH and NEW – Vaughan tonight only hy 7/ hy 27 – Be gentle – 18
 Hi super new to this and pretty shy so be nice and gentle please. I have brown hair and green eyes and I like to play volley ball.
 80 hh, 140 fh, I like nice guys. In calls near Hwy 7 n Hwy 27 Vaughan. I cant be working all night :)
 I have a friend also working, shes young like me text me if you r serious. No phone calls please. TEXT ONLY 289-335-5721
 Jamie :)

When the ad was posted, the website automatically added that the poster’s age was 18 (as that was the minimum stated age required to post). Inspector Truong was involved in choosing the words, “young”, “shy”, “fresh” and “new” that appeared in the headline of the ad. He did so to appeal to individuals who were looking for prostituted children.¹

8. The Applicant first contacted Inspector Truong on the cell phone number provided in the Backpage ad on March 18, 2016. There was no discussion at that time. The Applicant again contacted Inspector Truong on March 22nd at 10:18 a.m. and the following exchange took place:

¹ *R. v. Haniffa*, Applicant’s Record, Tab 1b, PDF p. 14, para. 3; *R. v. Haniffa*, 2021 ONCA 326, Applicant’s Record, Tab 1i, PDF p. 47, paras. 5-6

	Date	Time	Sent by	Received by	Content
1.	2016-03-18	10:49	Applicant	Inspector Truong	Hi
2.	2016-03-18	10:49	Applicant	Inspector Truong	Any chance u working right now? Or soon :)
3.	2016-03-19	00:52	Inspector Truong	Applicant	now
4.	2016-03-22	10:18	Applicant	Inspector Truong	Hi
5.	2016-03-22	10:30	Inspector Truong	Applicant	hi babe tn in Richmond hill
6.	2016-03-22	11:13	Applicant	Inspector Truong	U busy?
7.	2016-03-22	13:09	Inspector Truong	Applicant	im free tn after school
8.	2016-03-22	13:13	Applicant	Inspector Truong	What time is school done?
9.	2016-03-22	13:19	Inspector Truong	Applicant	3:30
10.	2016-03-22	13:28	Applicant	Inspector Truong	U have a place u are working out of
11.	2016-03-22	13:28	Applicant	Inspector Truong	?
12.	2016-03-22	13:30	Inspector Truong	Applicant	i will...my regular client will be getting a room b4 he drops me off
13.	2016-03-22	13:43	Applicant	Inspector Truong	Ok around Richmond hill?
14.	2016-03-22	13:49	Inspector Truong	Applicant	yes hun
15.	2016-03-22	14:02	Applicant	Inspector Truong	Ok let me know where and I will be there
16.	2016-03-22	14:12	Applicant	Inspector Truong	So what time can I see u
17.	2016-03-22	14:33	Inspector Truong	Applicant	5pm hun
18.	2016-03-22	14:34	Applicant	Inspector Truong	Gfe right u ok with kissing and receiving oral?
19.	2016-03-22	14:34	Inspector Truong	Applicant	yes hun
20.	2016-03-22	14:35	Inspector Truong	Applicant	r u ok if im not quite 18 yet?
21.	2016-03-22	14:53	Applicant	Inspector Truong	Is this like a cop thing or something?
22.	2016-03-22	14:53	Applicant	Inspector Truong	Can u call u?
23.	2016-03-22	15:00	Inspector Truong	Applicant	no silly
24.	2016-03-22	15:01	Applicant	Inspector Truong	How old r u?
25.	2016-03-22	15:03	Applicant	Inspector Truong	Anyway let me know if I can call u
26.	2016-03-22	15:22	Applicant	Inspector Truong	U enjoy receiving oral?
27.	2016-03-22	16:06	Applicant	Inspector Truong	Let me know where at 5pm to be
28.	2016-03-22	16:06	Applicant	Inspector Truong	Thanks
29.	2016-03-22	16:18	Inspector Truong	Applicant	im 15 to be hones but i look older hun
30.	2016-03-22	16:20	Applicant	Inspector Truong	Mm
31.	2016-03-22	16:20	Applicant	Inspector Truong	Ok so where will u be working?
32.	2016-03-22	16:24	Inspector Truong	Applicant	why the mm babe
33.	2016-03-22	16:27	Applicant	Inspector Truong	As in mm ok
34.	2016-03-22	16:27	Applicant	Inspector Truong	Sorry in a meeting
35.	2016-03-22	16:28	Applicant	Inspector Truong	So out of curiosity do u like receiving oral? And kissing
36.	2016-03-22	16:28	Applicant	Inspector Truong	Those are huge for me

	Date	Time	Sent by	Received by	Content
37.	2016-03-22	16:28	Applicant	Inspector Truong	And where in Richmond hi are u working
38.	2016-03-22	16:29	Applicant	Inspector Truong	I need to know quick cause I have to see u and do groceries and then get home
39.	2016-03-22	16:31	Inspector Truong	Applicant	yes i love it
40.	2016-03-22	16:31	Inspector Truong	Applicant	but u have to pay hun
41.	2016-03-22	16:31	Applicant	Inspector Truong	Yes I know
42.	2016-03-22	16:31	Applicant	Inspector Truong	How much for the half?
43.	2016-03-22	16:31	Applicant	Inspector Truong	And where ?
44.	2016-03-22	16:34	Inspector Truong	Applicant	80 for hh i shud have a room by 515 near the sheraton
45.	2016-03-22	16:34	Inspector Truong	Applicant	hy 7 n leslie
46.	2016-03-22	16:34	Applicant	Inspector Truong	And how do I know this is not some setup?
47.	2016-03-22	16:36	Inspector Truong	Applicant	omg hun im not how long have we been txtng...and besides i am the one who shud be worried
48.	2016-03-22	16:37	Applicant	Inspector Truong	Heading over to that area txt me when ready
49.	2016-03-22	16:37	Applicant	Inspector Truong	How wet do u get?
50.	2016-03-22	16:38	Inspector Truong	Applicant	how wet do u like it
51.	2016-03-22	16:42	Applicant	Inspector Truong	Dripping
52.	2016-03-22	16:42	Applicant	Inspector Truong	Why?
53.	2016-03-22	16:42	Applicant	Inspector Truong	And squirting if possible
54.	2016-03-22	16:45	Inspector Truong	Applicant	im 15 hun...dont u have to be older to squirt...well i havent been able to
55.	2016-03-22	16:45	Applicant	Inspector Truong	But do u get soaking wet?
56.	2016-03-22	16:45	Applicant	Inspector Truong	Let me know where adapter
57.	2016-03-22	16:45	Applicant	Inspector Truong	ASAP sorry
58.	2016-03-22	16:46	Inspector Truong	Applicant	yes hun
59.	2016-03-22	16:47	Inspector Truong	Applicant	wait at the Sheraton hun i shud have a room there or close by in the next 25 mins or so
60.	2016-03-22	17:05	Inspector Truong	Applicant	r u there yet hun
61.	2016-03-22	17:05	Applicant	Inspector Truong	20 mins
62.	2016-03-22	17:06	Inspector Truong	Applicant	ok txt when u get here hun
63.	2016-03-22	17:07	Applicant	Inspector Truong	What hotel
64.	2016-03-22	17:08	Inspector Truong	Applicant	staybridge suits 355 south park rd
65.	2016-03-22	17:14	Applicant	Inspector Truong	So u do this often
66.	2016-03-22	17:20	Inspector Truong	Applicant	not too often

	Date	Time	Sent by	Received by	Content
67.	2016-03-22	17:20	Inspector Truong	Applicant	hun what time will u be here im just trying to book and make sure i have enough time with u
68.	2016-03-22	17:20	Inspector Truong	Applicant	hun what time will u be here im just trying to book and make sure i have enough time with u
69.	2016-03-22	17:20	Applicant	Inspector Truong	U sure this is safe
70.	2016-03-22	17:21	Applicant	Inspector Truong	10 mins away
71.	2016-03-22	17:21	Inspector Truong	Applicant	hun what time will u be here im just trying to book and make sure i have enough time with u
72.	2016-03-22	17:22	Applicant	Inspector Truong	5 30
73.	2016-03-22	17:23	Inspector Truong	Applicant	k
74.	2016-03-22	17:27	Inspector Truong	Applicant	So am i booking u in for 88 hh?
75.	2016-03-22	17:27	Applicant	Inspector Truong	Yes
76.	2016-03-22	17:28	Inspector Truong	Applicant	k gotcha ! what did u want the service to be babe?
77.	2016-03-22	17:29	Applicant	Inspector Truong	As in?
78.	2016-03-22	17:30	Applicant	Inspector Truong	Why all questions
79.	2016-03-22	17:31	Inspector Truong	Applicant	cause im safe babe...i havent been with u before so i dont want u suddenly trying something we dont agree on silly!
80.	2016-03-22	17:32	Applicant	Inspector Truong	Like what?
81.	2016-03-22	17:33	Inspector Truong	Applicant	well i dont do bbfs only bbbj and normal sex with a condom
82.	2016-03-22	17:33	Applicant	Inspector Truong	K
83.	2016-03-22	17:34	Applicant	Inspector Truong	Not getting a good feeling about this
84.	2016-03-22	17:35	Inspector Truong	Applicant	babe ur worrying me are u a cop
85.	2016-03-22	17:36	Applicant	Inspector Truong	No r u
86.	2016-03-22	17:36	Applicant	Inspector Truong	Can I call u?
87.	2016-03-22	17:37	Applicant	Inspector Truong	No right?
88.	2016-03-22	17:40	Inspector Truong	Applicant	I don't take calls sorry and no im not a cop hun
89.	2016-03-22	17:41	Applicant	Inspector Truong	Too nervous to do this with u
90.	2016-03-22	17:41	Applicant	Inspector Truong	Don't even know if I am talking to the person I am seeing
91.	2016-03-22	17:43	Inspector Truong	Applicant	its me silly
92.	2016-03-22	17:43	Inspector Truong	Applicant	trust me
93.	2016-03-22	17:44	Applicant	Inspector Truong	This could become a complete disaster so no sorry
94.	2016-03-22	17:44	Inspector Truong	Applicant	i shud be the one whose worried but usually if u look creepy i dont open my door

	Date	Time	Sent by	Received by	Content
95.	2016-03-22	17:44	Inspector Truong	Applicant	its ok if u dont wana see me hun i understand but i need to book other clients
96.	2016-03-22	17:44	Applicant	Inspector Truong	I understand
97.	2016-03-22	17:45	Applicant	Inspector Truong	I am downstairs too lol sorry
98.	2016-03-22	17:47	Inspector Truong	Applicant	ok rm 236
99.	2016-03-22	17:48	Applicant	Inspector Truong	U sure?
100.	2016-03-22	17:48	Inspector Truong	Applicant	yep im ready hun but if u look creepy im not opening the door
101.	2016-03-22	17:49	Applicant	Inspector Truong	What's creepy
102.	2016-03-22	17:51	Inspector Truong	Applicant	if u look like a creep i can usually tell
103.	2016-03-22	17:51	Inspector Truong	Applicant	r u coming now?
104.	2016-03-22	17:52	Applicant	Inspector Truong	Yea
105.	2016-03-22	17:53	Applicant	Inspector Truong	I don't think this is a good idea
106.	2016-03-22	17:53	Applicant	Inspector Truong	In elevator

The Applicant was arrested by police shortly thereafter when he arrived at room 236.²

(iii) The Applicant's trial before Kenkel J.

9. The Applicant was tried by Justice Kenkel of the Ontario Court of Justice. The parties were clear that the only issue for the trial judge to determine was whether the Applicant believed that he was communicating with a 15 year old prostitute to arrange for sexual services. The Applicant testified that prior to his conversation with “Jamie”, he was an experienced user of Backpage. He claimed that at no time did he believe that he was conversing with a minor. The Applicant thought that once the issue of age was raised, that he was speaking to either a police officer, or a pimp or escort who was planning to extort him for money. Despite this stated belief, he agreed that his sexually explicit messages, as well as his pursuit of knowing the price and location, only made his situation worse if he was speaking to the authorities or someone looking to commit extortion. The

² *R. v. Haniffa*, Applicant's Record, Tab 1b, PDF p. 14-17, paras. 4-15; *R. v. Haniffa*, 2021 ONCA 326, Applicant's Record, Tab 1i, PDF p. 47, paras. 6-7

Applicant testified that he continued the conversation because he was trying to figure out who exactly was on the other end of the conversation.³

10. The trial judge rejected the Applicant's evidence and found that he was neither reliable nor credible. The Applicant was convicted on all three counts. The parties then addressed several post-verdict motions, including entrapment and s. 11(b) motions. All of them were dismissed by the trial judge. With respect to entrapment, the trial judge determined that the Applicant was not entrapped as Project Raphael was a bona fide investigation conducted at a location where the targeted criminal activity (juvenile prostitution) was active and reasonably suspected to be ongoing.⁴ The trial judge further determined that the Applicant's s. 11(b) right was not violated. He concluded that an entrapment application was not included as part of the trial as it is defined in *Jordan*. He further determined that all of the nine post-trial applications were conducted and decided with efficiency such that the delay could not be said to be unreasonable.⁵

(iv) The Applicant's appeal to the Court of Appeal for Ontario

11. The Applicant's appeal to the Court of Appeal was heard alongside three other Project Raphael cases that also raised an entrapment issue: *R. v. Jaffer*, *R. v. Dare* and a Crown appeal in *R. v. Ramelson*.⁶ On appeal, the Applicant raised several issues including the correctness of the trial judge's entrapment and s. 11(b) rulings.

³ *R. v. Haniffa*, 2021 ONCA 326, *Applicant's Record*, Tab 1i, PDF p. 47-48, paras. 7-10

⁴ *R. v. Haniffa*, *Applicant's Record*, Tab 1b, PDF p. 20-21, paras. 30-33

⁵ *R. v. Haniffa*, 2017 ONCJ 781, *Applicant's Record*, Tab 1c, PDF p. 22-24; *R. v. Haniffa*, 2018 ONCJ 615, *Applicant's Record*, Tab 1g, PDF p. 40-42

⁶ As the Court of Appeal overturned the stay of proceedings in *R. v. Ramelson*, Mr. Ramelson has a right of appeal to this Court. As of the time of writing this memorandum, Mr. Ramelson has filed his notice of appeal, but has not yet filed his appellant's materials (see SCC file #39664). The applicant Jaffer has filed an application for leave to appeal (see SCC file # 39676). As of the time

- Entrapment

12. The Applicant relied on *R. v. Ahmad* to argue that the trial judge was wrong to find he was not entrapped. The central issue raised by the Applicant at the Court of Appeal was whether the police were acting pursuant to a bona fide inquiry when they offered individuals the opportunity to obtain the sexual services of an underage person. The Court of Appeal set out the legal framework to determine whether the Applicant was, in the circumstances of this case, entrapped. The Court of Appeal held that *R. v. Ahmad* did not change the law of entrapment. Instead, *R. v. Ahmad* made apparent that the bona fide inquiry analysis is multi-faceted. The Court held:

A bona fide inquiry requires the police to have the genuine purpose of investigating and repressing crime, that the police have objectively verifiable reasonable suspicion that people are engaged in the criminal activity within the space, that the space being investigated is sufficiently precise and narrow, and finally, that consideration of an open-ended list of factors enables the court to conclude that random virtue testing was avoided.⁷

13. The Court of Appeal held that police had the required reasonable suspicion that the criminal activity under investigation was taking place in the escort section of Backpage. The Court of Appeal rejected the Applicant's position that the police conduct amounted to impermissible virtue testing. The Court of Appeal held that Inspector Truong had ample and extensive experience dealing with juvenile prostitution. As such, the trial judge was entitled to rely on his evidence that police had a reasonable suspicion that some users of Backpage were obtaining for consideration the sexual services of minors, contrary to the *Criminal Code*.⁸

of writing this memorandum, that application is incomplete. The applicant Dare has also served an extension of time and leave application (no SCC file # yet assigned).

⁷ *R. v. Ramelson*, 2021 ONCA 328, *Applicant's Record*, Tab 1j, PDF p. 67-81, paras. 16-51

⁸ *R. v. Ramelson*, 2021 ONCA 328, *Applicant's Record*, Tab 1j, PDF p. 88-93, paras. 70-81

14. The Court determined that the appropriate balance was struck between a person's right to be left alone and society's interest in eliminating the social harm caused by juvenile prostitution.⁹

The Court of Appeal considered the various factors highlighted in *Ahmad*, including:

- The seriousness of the offence

The Court recognized that the offence of obtaining sexual services from a juvenile for consideration is a grave crime. The Court also accepted that child prostitution is difficult to investigate and that less intrusive investigative techniques than those used in Project Raphael were not available. This latter factor, the Court held, warranted significant weight in the analysis.¹⁰

- The impacted privacy interest

The Court of Appeal accepted that the police activity involved in Project Raphael intruded upon a personal privacy interest. However, the Court also held that although purchasers responding to the ad were entitled to expect privacy during the text chat before the undercover officer disclosed that "she" was underage, those purchasers who continued to chat after that disclosure could not reasonably expect privacy with minors they did not know.¹¹ The Court of Appeal noted that in the circumstances of this case, all individuals who could be tested by the police were engaged in communications to obtain sexual services for consideration, which is a criminal offence pursuant to section 286.1 of *the Criminal Code*. The Court observed that society has little interest in protecting the criminal activity of purchasing a prostitute from intrusion by the state.

- The significance of the targeted location to freedom of expression

The Court also considered the importance of the virtual space to freedom of expression. The expression in this virtual space was devoted to detailing sexual services, negotiating their cost, and confirming a location. The Court held that the escorts section of Backpage had little importance to freedom of expression.¹²

- The scope of people affected by the investigation

⁹ *R. v. Ramelson*, 2021 ONCA 328, *Applicant's Record*, Tab 1j, PDF p. 55-56, paras. 146-149

¹⁰ *R. v. Ramelson*, 2021 ONCA 328, *Applicant's Record*, Tab 1j, PDF p. 101-106, paras. 100-113

¹¹ *R. v. Ramelson*, 2021 ONCA 328, *Applicant's Record*, Tab 1j, PDF p. 111-112, paras. 130-135

¹² *R. v. Ramelson*, 2021 ONCA 328, *Applicant's Record*, Tab 1j, PDF p. 111, paras. 127-129; p. 113, paras. 136-138

The Court of Appeal confirmed that the number of innocent people who would be affected by a police investigation is a significant factor in the overall analysis. However, this factor must still be considered in the context of the other factors. While the Court acknowledged the Applicant's submission that the majority of persons who responded to the police ad did not engage the sexual services when offered the opportunity to do so, the Court held that this fact must be assessed in light of the established jurisprudence on entrapment. The fact that the majority of men disengaged when they learned that "she" was underage is not determinative on its own. All of the circumstances of the case must be considered in determining whether the space within the scope of the investigation is precisely and narrowly defined.¹³

15. The Court of Appeal ultimately concluded that the escort section of Backpage was a precisely defined virtual space. The Court accepted that police narrowed the scope of their investigation only to users who clicked on the ad and then responded to the ad. The ad itself offered sexual services in York Region, emphasized the escort's youthfulness by stating their age to be 18, and described the escort in a manner that police intended to signal that the user could be purchasing the sexual services of a young girl or child. Only users who initiated contact could be offered the opportunity to purchase sexual services from someone underage. The Court accepted that customers who were indifferent that the 18 year old they were engaging may actually be an underage girl were legitimate targets of the police investigation. The Court held that police narrowed the scope of the investigation as much as the evidence warranted.¹⁴

16. As the Court of Appeal concluded that Project Raphael was a bona fide police inquiry, the police did not require reasonable suspicion that the specific person responding to the ad was seeking someone underage before offering an opportunity for an individual to commit an offence.

¹³ *R. v. Ramelson*, 2021 ONCA 328, *Applicant's Record*, Tab 1j, PDF p. 74-75, paras. 34-36; p. 113-115, paras. 140-145

¹⁴ *R. v. Ramelson*, 2021 ONCA 328, *Applicant's Record*, Tab 1j, PDF p. 106-111, paras. 114-126

The Court of Appeal also concluded that in the course of the investigation the police necessarily provided individuals with the opportunity to commit the rationally connected and proportionate offence of communicating with a person they believed to be underage to facilitate sexual contact with them.¹⁵

- Section 11(b)

17. The Court of Appeal held that the trial judge was correct to find that an entrapment application is not included within the *Jordan* framework and ceilings. The Court of Appeal noted that this Court in *R. v. K.G.K.* determined that the *Jordan* ceilings “apply from the charge to the end of evidence and no further”, and “explicitly rejected the possibility that *Jordan* ceilings apply from the charge ‘to the conclusion of post-trial motions’”.¹⁶ The Court of Appeal considered the entirety of the post-verdict period and ultimately concluded that the Applicant’s s. 11(b) right had not been violated.

PART II: POINTS IN ISSUE AND RESPONDENT’S POSITION

18. The Applicant sets out two issues in his memorandum of argument:

- (1) How should courts “precisely define” virtual spaces such as entire websites and social media platforms in determining whether or not entrapment has occurred?
- (2) Should presumptive ceilings extend to the end of previously anticipated and scheduled (non-sentencing) post-verdict applications?

19. Leave should not be granted in this case. In *Ahmad*, this Court recently and exhaustively set out the framework to determine if police conduct amounts to entrapment, including in virtual spaces. Applying *Ahmad*, the Applicant was not entrapped. Further, both the nature of an

¹⁵ *R. v. Ramelson*, 2021 ONCA 328, *Applicant’s Record*, Tab 1j, PDF p. 55-56, paras. 146-149

¹⁶ *R. v. K.G.K.*, 2020 SCC 7 at para. 33

entrapment application relative to the trial proper and the perimeters of the application of the *Jordan* framework have been considered and defined by this Court. There is no need to revisit these issues as this Court has been unambiguous and unanimous with respect to both.

PART III: BRIEF OF ARGUMENT

A. THE ISSUES RAISED ARE NOT QUESTIONS OF NATIONAL IMPORTANCE

20. The issues raised by the Applicant are not questions of national importance that require the consideration of this Court. This Court has had occasion to recently consider both the law of entrapment and post-trial s. 11(b) issues. The principles this Court has clearly and recently set out regarding both issues provide clear guidance to the lower courts in addressing both points. The Applicant has not shown any confusion in the present state of the law that warrants the intervention of this Court. He merely disagrees with how the well-settled legal principles were applied by the Court of Appeal to the specific facts of his case. Such case-specific complaints do not warrant that leave be granted for a further appeal to this Court.¹⁷

B. THE APPLICANT WAS NOT ENTRAPPED

21. Leave to appeal to this Court is further not warranted because the Court of Appeal's entrapment analysis discloses no legal error. Both the trial judge and Court of Appeal correctly concluded that the Applicant was not entrapped.

(i) The law of entrapment is well settled

22. The entrapment doctrine recognizes judicial disapproval of intolerable police or prosecutorial conduct in the investigation and prosecution of crimes. It balances the competing objectives of the vital need for the police to have considerable leeway in the techniques used to

¹⁷ *R. v. Ahmad*, 2020 SCC 11; *R. v. K.G.K.*, 2020 SCC 7

investigate criminal activity, with the important need to guard against police power becoming so untrammelled as to permit random virtue testing. The accused bears the onus to show, on a balance of probabilities, that he was entrapped. This burden is not easily discharged. It requires a situation-specific analysis. Ultimately, entrapment can only be found in the clearest of cases — when state action “shocks the conscience” and offends our sense of “decency and fair play.”¹⁸

23. This Court in *R. v. Mack* held that entrapment can arise in two situations:

- (1) Where state authorities, acting without reasonable suspicion or for an improper purpose, provide a person with an opportunity to commit an offence; or,
- (2) Even having reasonable suspicion or acting in the course of a good faith inquiry, the police go beyond providing an opportunity to commit a crime and actually induce the commission of an offence.¹⁹

24. Regarding the first branch, police may present an individual with an opportunity to commit a crime upon forming reasonable suspicion that *either* (a) that specific person is engaged in criminal activity *or* (b) people are carrying out the criminal activity at a specific location. Assuming that investigators are engaged in such a “*bona fide* inquiry,” an offer to engage in criminal conduct will not amount to entrapment.²⁰

25. The “place” over which the police may form reasonable suspicion is not limited to physical spaces. Virtual spaces, such as phone numbers or websites may constitute “places” over which investigators can form a reasonable suspicion. When police have the requisite reasonable suspicion

¹⁸ *R. v. Mack*, [1988] 2 S.C.R. 903 at paras. 7, 125; *R. v. Ahmad*, 2020 SCC 11 at paras. 15-23

¹⁹ *R. v. Mack*, [1988] 2 S.C.R. 903 at paras. 115, 126; *R. v. Ahmad*, 2020 SCC 11 at paras. 15-18, 23, 88, 115; *R. v. Barnes*, [1991] 1 S.C.R. 449 at paras. 21-24; *R. v. Imoro*, 2010 ONCA 122 at paras. 8-10

²⁰ *R. v. Ahmad*, 2020 SCC 11 at paras. 19-21

regarding a particular place, it is unnecessary for them to have any additional suspicion regarding any specific individual associated to that defined place. As this Court clarified in *R. v. Barnes*,

The basic rule articulated in *Mack* is that the police may only present the opportunity to commit a particular crime to an individual who arouses a suspicion that he or she is already engaged in the particular criminal activity. An exception to this rule arises when the police undertake a *bona fide* investigation directed at an area where it is reasonably suspected that criminal activity is occurring. When such a location is defined with sufficient precision, **the police may present any person associated with the area with the opportunity to commit the particular offence.** Such randomness is permissible within the scope of a *bona fide* inquiry.²¹

26. The same reasonable suspicion standard applies no matter what kind of “place” that is under investigation. A reasonable suspicion requires only the possibility, rather than the probability of criminal activity. The investigators’ suspicion must be focused, precise, reasonable and based in “objective facts that stand up to independent scrutiny.” On an entrapment application, the Court must consider all of the circumstances and determine whether the police had the requisite reasonable suspicion *before* offering the accused an opportunity. In *R. v. Ahmad*, this Court identified several non-exhaustive considerations that may be helpful in evaluating whether police have sufficiently identified the specific space where they reasonably suspect the target criminal conduct is occurring, including: the seriousness of the crime, the circumstances of the activity, the level of privacy expected in an area or space, the importance of the virtual space to freedom of expression and the availability of less invasive investigative techniques.²²

(ii) The Applicant was not entrapped

27. The Court of Appeal correctly observed that *R. v. Ahmad*, 2020 SCC 11 did not change the law of entrapment. The Court of Appeal made no error in applying the *Ahmad* framework to the

²¹ *R. v. Barnes*, [1991] 1 S.C.R. 449 at para. 23; *R. v. Ahmad*, 2020 SCC 11 at paras. 34-36, 40-43

²² *R. v. Ahmad*, 2020 SCC 11 at paras. 4, 25-32, 41, 45, 46; *R. v. Chehil*, 2013 SCC 49 at paras. 3, 21, 26, 27, 58; *R. v. MacKenzie*, 2013 SCC 50 at paras. 41, 74

specific facts of this case. There is no basis for this Court to relitigate the application of established legal principles simply because the Applicant disagrees with the Ontario Court of Appeal's conclusion that he was not entrapped.²³

28. First, the Court of Appeal recognized the need for precise and narrow definition of the place over which the police form a reasonable suspicion to ground the bona fide inquiry analysis. The Court of Appeal correctly concluded that the police had the requisite reasonable suspicion that the targeted criminal conduct was occurring in the space under investigation: the escort section of Backpage. Like the trial judge, the unanimous Court of Appeal concluded that this virtual space was sufficiently circumscribed to ensure that police retained a reasonable suspicion regarding the specific criminal activity occurring in that area.²⁴

29. This conclusion discloses no error. The evidence established that juvenile prostitution was occurring through the escort subpage on Backpage and that the police investigation into this criminal activity was a legitimate initiative. Police narrowed the scope of this particular investigation by taking steps including:

- Posting the ad only to users within the escort subpage on Backpage;
- The escort offered sexual services in York Region;
- The ad emphasized the youthfulness of the escort by using words such as “fresh” “young” and “new”, and listing “her” age as 18 (the minimum stated age allowed by the escort subpage); and,
- By only offering those users who initiated contact with the supposed child prostitute an the opportunity to engage the sexual services of a juvenile prostitute.

²³ *R. v. Ramelson*, 2021 ONCA 328, *Applicant's Record*, Tab 1j, PDF p. 74, para. 34; *R. v. Haniffa*, 2021 ONCA 326, *Applicant's Record*, Tab 1i, PDF p. 58, para. 46

²⁴ *R. v. Ramelson*, 2021 ONCA 328, *Applicant's Record*, Tab 1j, PDF p. 78, para. 43; p. 99, para. 94

In considering all of the circumstances in this case, the Court of Appeal was satisfied that the police narrowed the targeted location as much as the evidence warranted. The Court of Appeal's analysis is sound and reveals no error. There is no basis for this Court to relitigate this issue.²⁵

30. Second, the unanimous Court of Appeal demonstrated how the non-exhaustive factors enunciated in *R. v. Ahmad* may be weighed, balanced, and applied in a fact-specific inquiry involving a virtual space. Simply because each factor did not garner equal emphasis in the Court of Appeal's overall analysis does not mean that the factors need to be "recalibrated" or "weighted" differently in the context of a virtual space as the Applicant suggests. Rather, the Court of Appeal's analysis demonstrates the multifaceted and flexible nature of the *Ahmad* framework that permits a proper context-specific judicial assessment to the specific location at issue, virtual or not.²⁶

31. The Court of Appeal followed the clear pronouncement from *R. v. Ahmad* that courts are required to exercise heightened vigilance in striking the balance between a person's privacy in a virtual space, secure from state intrusion, against society's interest in repressing harmful criminal activity. The Court of Appeal considered all the relevant factors in the Applicant's case and correctly held that a proper and complete analysis leads to the conclusion that the Applicant was not entrapped. This Court need not revisit the well-settled doctrine of entrapment, or to revisit what factors courts may consider when scrutinizing the evidence to determine whether entrapment occurred in the specific context of a given case.²⁷

²⁵ *R. v. Haniffa*, Applicant's Record, Tab 1d, PDF p. 29-31, paras. 18-26; *R. v. Ramelson*, 2021 ONCA 328, Applicant's Record, Tab 1j, PDF p. 78-79, paras. 43-46; p. 106-111, paras. 114-126

²⁶ *R. v. Ahmad*, 2020 SCC 11 at paras. 22-23, 41

²⁷ *R. v. Ahmad*, 2020 SCC 11 at paras. 22-23; *R. v. Ramelson*, 2021 ONCA 328, Applicant's Record, Tab 1j, PDF p. 99, para. 95

32. Third, there is no basis for this Court to consider that inchoate offences are deserving of special consideration or ought to be treated differently in determining whether entrapment is established. This Court has already declined to divide the entrapment analysis based on the nature of the criminal conduct under investigation. The focus of the entrapment analysis is not on the conduct of the accused, or on the specific elements of the criminal conduct under investigation. Rather, regardless of the offence, the focus of the entrapment analysis remains on the conduct of police in the course of its investigation and whether that conduct exceeded acceptable limits. There is no reasoned basis for this Court to reverse its settled position.²⁸

C. THE APPLICANT'S S. 11(B) RIGHT WAS NOT BREACHED

33. The Court of Appeal made no error in upholding the trial judge's dismissal of the Applicant's s. 11(b) applications. The time taken to complete a post-verdict entrapment application does not count towards the applicable *Jordan* ceiling.

(i) Entrapment applications are separate from the trial proper

34. The response to the Applicant's s. 11(b) complaint begins with an understanding of the nature of an entrapment proceeding. Entrapment is a post-trial, post-conviction application, the result of which is a stay should the application succeed. Entrapment is not a full defence at trial, nor does it amount to an excuse at law. It is an abuse of process application not to be considered unless and until the required elements on the offence(s) charged are proven at trial. It is not a part of the trial in the sense that it involves consideration of the merits of the trial at the stage at which the matter is turned over to the trier-of-fact. Entrapment does not turn on the criminal liability of

²⁸ *R. v. Mack*, [1988] 2 S.C.R. 903 at paras. 15-18, 71, 73-74, 77-78, 102, 106, 108-109, 129-130; *R. v. Barnes*, [1991] 1 S.C.R. 449 at paras. 17-18, 23, 25; *R. v. Ahmad*, 2020 SCC 11 at paras. 1-2, 15-23, 112-114

the accused. Rather, “no consideration of the merits – that is whether the accused is guilty independently of a consideration of the conduct of the Crown – is required to justify a stay”. An entrapment application can only be advanced after all the evidence on the trial is in, final arguments made, the trier-of-fact has deliberated, and a verdict rendered. It is a post-verdict application. If the result of an entrapment application is overturned on appeal, a new trial does not result. Instead, the appellate court retains the jurisdiction to quash formal order of conviction but affirm the verdict of guilt and direct that the new trial be limited to the post-verdict entrapment motion.²⁹

(ii) **Post-trial applications are not part of the Jordan framework**

35. In *R. v. K.G.K.* this Honourable Court made clear that the *Jordan* ceilings and analytical framework are applicable to one period only – the start of trial (defined as the date the Information is laid) to the end of trial. The end of trial is defined as “the end of evidence and argument at trial” and “the ceilings in *Jordan*, beyond which delay is presumed to be unreasonable under s. 11(b), apply to the end of the evidence and argument at trial, and no further”. This definition best accords with the reasoning behind the *Jordan* decision and the mischief the framework was intended to address. As this Court indicated, “...the ceilings represented a specific solution designed to address a specific problem: the culture of complacency towards excessive delay associated with “*bringing those charged with criminal offences to trial*” (emphasis added).³⁰

36. Post-trial applications were *explicitly excluded* from comprising any part of the trial proper and are therefore not to be considered part of the *Jordan* ceiling count. In excluding post-trial

²⁹ *R. v. Mack*, [1988] 2 S.C.R. 903 at paras. 25-34, 74-93, 99, 103; *R. v. Jewitt*, [1985] 2 S.C.R. 128 at para. 56 p. 148; *R. v. Pearson*, [1998] 3 S.C.R. 620 at paras. 7-16; *R. v. Imola*, 2019 ONCA 556 at paras. 28-29; *R. v. Ghotra*, 2020 ONCA 373 at para. 16

³⁰ *R. v. K.G.K.*, 2020 SCC 7 at paras. 3, 33-34; *R. v. Jordan*, 2016 SCC 27 at paras. 2, 4, 13, 117, 121, 129

motions from consideration under the applicable ceiling, this Court made no distinction based on when such motions were contemplated (at the front end vs. the end of trial). Nor were any particular types of post-trial motions made an exception to the rule. The delineation was clear – *Jordan* applies to the end of evidence and argument on the trial proper and no further.³¹

37. That the nature of an entrapment application relative to a trial is clearly defined. That such applications were plainly excluded from consideration under the *Jordan* framework leaves no basis to conclude that there exists any issue in need of resolution by this Court. This Court’s decisions in *Mack* and *K.G.K.* were unambiguous and unanimous. An entrapment motion is a post-trial application, and the time needed to litigate and resolve it is not subject to the *Jordan* framework. The Court of Appeal’s decision discloses no error that merits the intervention of this Court.³²

PART IV: SUBMISSIONS ON COSTS

38. Costs are not sought by either party and should not be awarded.

PART V: ORDER REQUESTED

39. The Respondent consents to the Applicant’s application for an extension of time to file his application for leave to appeal and asks that he be granted an extension of time. The Respondent respectfully requests that the Application for Leave to Appeal be denied.

All of which is respectfully submitted this 21st day of October, 2021,



for Tracy Kozlowski, Lisa Fineberg and Katie Doherty
Counsel for the Respondent

³¹ *R. v. K.G.K.*, 2020 SCC 7 at paras. 3, 33-34

³² *R. v. Mack*, [1988] 2 S.C.R. 903; *R. v. K.G.K.*, 2020 SCC 7

PART VI: AUTHORITIES CITED

Cases:	Paragraph No.:
<u>R. v. Ahmad, 2020 SCC 11</u>	12, 19, 20, 22, 23, 24, 25, 26, 30, 31, 32
<u>R. v. Barnes, [1991] 1 S.C.R. 449</u>	23, 25, 32
<u>R. v. Chehil, 2013 SCC 49</u>	26
<u>R. v. Ghotra, 2020 ONCA 373</u>	34
<u>R. v. Haniffa, 2021 ONCA 326</u>	7, 8, 9, 27
<u>R. v. Haniffa, 2017 ONCJ 781</u>	10
<u>R. v. Haniffa, 2018 ONCJ 615</u>	10
<u>R. v. Imola, 2019 ONCA 556</u>	34
<u>R. v. Imoro, 2010 ONCA 122</u>	23
<u>R. v. Jewitt, [1985] 2 S.C.R. 128</u>	34
<u>R. v. Jordan, 2016 SCC 27</u>	17, 19, 33, 35, 36
<u>R. v. K.G.K., 2020 SCC 7</u>	17, 20, 35, 36, 37
<u>R. v. Mack, [1988] 2 S.C.R. 903</u>	22, 23, 32, 34, 37
<u>R. v. MacKenzie, 2013 SCC 50</u>	26
<u>R. v. Pearson, [1998] 3 S.C.R. 620</u>	34
<u>R. v. Ramelson, 2021 ONCA 328</u>	12, 13, 14, 15, 16, 27, 28, 29, 31

PART VII: STATUTES AND REGULATIONS

Statutory Provisions or Regulations:	Paragraph No.:
<u>Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11, s. 11(b)</u> <u>Loi constitutionnelle de 1982, édictée à l'annexe B de la Loi de 1982 sur le Canada, 1982, ch. 11 (R.-U.), art. 11(b)</u>	2, 3, 4, 10, 11, 17, 20, 33, 34, 35
<u>Criminal Code, R.S.C., 1985, c. C-46, ss. 286.1</u> <u>Code criminel, L.R.C. (1985), ch. C-46, art. 286.1</u>	14