# Online Entrapment:

## A Comparison of the Approach Adopted in the United States, Canada, and Other Common-Law Countries

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On November 24, 2022, the Supreme Court of Canada released four judgments in which it considered the defence or excuse of entrapment (*R. v. Ramelson*, 2022 SCC 44, *R. v. Jaffer*, 2022 SCC 45, *R. v. Haniffa*, 2022 SCC 46, and *R. v. Dare*, 2022 SCC 47). The entrapment issue was considered in these appeals in the context of online police investigations in which the police provided individuals with an opportunity to commit sexual offences against children. All four of the appeals involved the accused communicating with undercover police officers through an online escort service. In each case, the undercover officers indicated that they were children. In each case, the accused, despite this information, agreed to meet the children at a hotel room. All four went to the designated room where they were arrested and charged with various offences.

At their trials, all four argued that a judicial stay of proceedings should be entered based upon them having been entrapped. These arguments were rejected by the trial judges in all of the cases except one (*Ramelson*). In the latter case, the Ontario Court of Appeal set aside the stay (see 2021 ONCA 328). All four individuals were granted leave to appeal from conviction by the Supreme Court of Canada. The appeals gave the Court the opportunity to consider how entrapment applies to online investigations.

In this column, I will consider these decisions in an attempt to determine if the Supreme Court of Canada has formulated a new standard for assessing entrapment in online investigations. I will compare the Canadian approach to the American approach. I will also consider the approach taken in other common-law countries. I commence with a review of the Supreme Court of Canada's entrapment jurisprudence to put their recent decisions in context. This requires that I start with *R. v. Mack*, [1988] 2 S.C.R. 903, the Supreme Court of Canada's seminal judgment on the law of entrapment.[1]

### R. V. MACK

In *Mack*, the accused was charged with possession of drugs for the purpose of trafficking. The police had used an individual who was involved in the drug trade to pressure the accused to obtain drugs for him. The accused did so and was charged. He argued that he had been entrapped.

On appeal to the Supreme Court of Canada, it was held that "the police must not, and it is entrapment to do so, offer people opportunities to commit crime unless they have a reasonable suspicion that such people are already engaged in criminal activity or, unless such an offer is made in the course of a *bona fide* investigation." The Court indicated that the "central question in a particular case will be: have the police gone further than providing an opportunity and instead employed tactics designed to induce someone into the commission of an offence?" (*Mack*, para. 118).

The Supreme Court summarized its views on entrapment in the following manner:

> There is, therefore, entrapment when: (a) the authorities provide an opportunity to persons to commit an offence without reasonable suspicion or acting *mala fides*, as explained earlier or, (b) having a reasonable suspicion or acting in the course of a *bona fide* inquiry, they go beyond providing an opportunity and induce the commission of an offence. (*Mack*, para. 119)

Similarly, the Supreme Court of the United States has held that the police go too far when they "implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute" (see *Sorrells v. United States*, 287 U.S. 435, *at p.* 442).

### A COMPARISON WITH THE APPROACH IN THE UNITED STATES

It has been held in the United States that entrapment "is an affirmative defense on which the government bears the burden of proof beyond a reasonable doubt" (see *United States v. Berrios*, 2022 WL 17075289, *at p.* 8). In contrast, in Canada it has been indicated that "[e]ntrapment is a unique area of the criminal law. In our view, it has been somewhat inappropriately referred to as an affirmative defence. In our opinion, that misdescribes it" (see *R. v. Pearson*, [1998] 3 S.C.R. 620, para. 6).

The Supreme Court of Canada has also held that entrapment is "completely separate from the issue of guilt or innocence as is

**Footnotes**

1. *Mack*, contains an extensive review of the American jurisprudence on entrapment. However, the Supreme Court of Canada suggested that "[w]hile much of which has been said in the American courts and by academic writers is extremely useful, the context of the American experience and allocation of power between the executive and judicial branches, and between the federal and state courts, must not be ignored. Nor would it be safe to forget that the federal courts have a limited jurisdiction in the United States. The defence of entrapment is especially complicated because it is not grounded in the American Constitution and the various states are free to follow whatever approach they want. Some states adopt a subjective test while others adopt an objective one and some use a combination of the two. There is also considerable variation in the procedural rules associated with the determination of an entrapment allegation. I have confined my summary to the decisions of the Supreme Court to avoid confusion" (*para.* 39).

reflected by the fact that it is dealt with at a separate proceeding from the trial on the merits….A claim of entrapment is in reality a motion for a stay of proceedings based on the accused's allegation of an abuse of process. It does not rely on the underlying charge and does not affect the admissibility of any evidence which might influence the jury on the merits" (*Pearson*, para. 7-8).

In addition, in Canada entrapment "is a question to be decided by the trial judge," not the jury. Thus, in Canada entrapment "is not a traditional defence, but a form of abuse of process whose only remedy is a stay of proceedings" (*Ramelson*, *para.* 19).

Finally, in Canada, entrapment must be established by the accused. It can only be raised after a finding of guilt (see *Pearson*, para. 5). In *Pearson*, the Supreme Court summarized the Canadian approach by stating (para. 12):

> Once the accused is found guilty of the offence, the accused alone bears the burden of establishing that the conduct of the Crown and/or the police amounted to an abuse of process deserving of a stay of proceedings, a standard this Court has held will arise only in the clearest of cases.

In contrast, the approach adopted in the United States was summarized in *United States v. Cabrera*, 13 F.4th 140 (2021), in the following manner (*at page* 146):

> The affirmative defense of entrapment consists of "two related elements: government inducement of the crime, and a lack of predisposition on the part of the defendant to engage in the criminal conduct." *Mathews v. United States*, 485 U.S. 58, 63 (1988) (citations omitted). "[W]hen a defendant has presented credible evidence of inducement by a government agent, the government has the burden of proving beyond a reasonable doubt that the defendant was predisposed to commit the crime." *United States v. Flores*, 945 F.3d 687, 717 (2d Cir. 2019) (citing *Jacobson v. United States*, 503 U.S. 540, 548–49 (1992)).

Therefore, in the United States, in order to "obtain a jury instruction and shift the burden of disproving entrapment to the government, the defendant must proffer evidence on both elements of the defense…this initial burden of production is not great. An entrapment instruction is warranted if the defendant proffers some evidence that the government induced him to commit the crime and he was not predisposed to commit it…Put another way, '[a]lthough more than a scintilla of evidence of entrapment is needed before instruction on the defense becomes necessary, the defendant need only point to evidence in the record that would allow a rational jury to conclude that he was entrapped'" (*Berrios*, *at p.* 8-9).[2]

Twelve years after *Mack*, Supreme Court of Canada considered the law of entrapment in the context of "dial-a-dope" investigations.

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### R. V. AHMAD

In *R. v. Ahmad*, 2020 SCC 11, the Supreme Court of Canada considered entrapment again, but in a very different context as compared to *Mack*. In *Ahmad*, the appeal involved police investigations "of suspected dial a dope operations, in which drug traffickers use cell phones to connect with their customers and sell them illicit drugs." The Court indicated it was being "asked to determine when and how reasonable suspicion is established when an officer receives a tip or information that a phone number may be used for drug dealing" (*para.* 3).

In *Ahmad*, the police received tips that phone numbers were associated with suspected "dial a dope operations." The police called the numbers and spoke to the individuals who answered. Meetings were arranged for the purchase of drugs. In *Ahmad*, the following conversation occurred:

> *[Male]: Hello.*
> *[Officer]: Hey, It's Mike, Matt said I can give you a call, this is Romeo?*
> *[Male]: He did, did he?*
> *[Officer]: Yeah, said you can help me out?*
> *[Male]: What do you need?*
> *[Officer]: 2 soft.*
> *[Male]: Hold on, I'll get back to you.*
> *[Officer]: Alright.*

The Supreme Court of Canada held that the police "cannot offer a person who answers a cell phone the opportunity to commit an offence without having formed reasonable suspicion that the person using that phone, or that phone number, is engaged in criminal activity. Whether the police are targeting a person, place or phone number, the legal standard for entrapment is a uniform one, requiring reasonable suspicion in all cases where police provide an opportunity to commit a criminal offence. Reasonable suspicion is a familiar legal standard that provides courts with the necessary objective basis on which to determine whether the police have justified their actions. A bare tip from an unverified source that someone is dealing drugs from a phone number cannot ground reasonable suspicion" (*para.* 4).

The Court concluded that "given the principles governing our entrapment doctrine, police investigating a dial-a-dope operation by calling a phone number they suspect is being used to traffic illegal drugs must form reasonable suspicion before offering an opportunity to traffic drugs. If they cannot form reasonable suspicion before making the call, they must in the course of their

2. In *Ali Syed, R. v* [2018] EWCA Crim 2809, the Court of Appeal for England and Wales surveyed the law of entrapment in common law countries. The Court of Appeal indicated that those countries "differed in the nature of the remedy provided in entrapment cases. In the United States of America, entrapment was a substantive defence; the issue was, accordingly, one for the jury. In Canada, as already observed when considering *Mack*, the remedy was by way of a stay of proceedings. In Australia, the trial Judge had a discretion to exclude evidence. In New Zealand, the court had an inherent jurisdiction to exclude evidence to prevent an abuse of process" (*para.* 76).

**"Given the Internet's potential reach, there is strong public interest in ensuring that online police investigations do not unduly intrude on public life . . . the Internet's unique features must be considered."**

conversation form reasonable suspicion before making the offer. A determination of whether this requirement is satisfied must be the product of strict judicial scrutiny, taking into account the constellation of factors that indicate involvement in drug trafficking. And, if it is determined that the offer was presented before reasonable suspicion was formed, entrapment is established and the proceedings must be stayed" (*para*. 69).

With this context, let us now consider the Supreme Court of Canada's consideration of entrapment as applied to online investigations. I will start with the nature of the investigations and the circumstances that all of the appeals have in common.

## THE COMMON CIRCUMSTANCES INVOLVED IN ALL OF THE APPEALS

The general circumstances involved, which were common to each of the four accused, were described by the Supreme Court of Canada in the following manner (*Ramelson,* paras. 3, 12, 15):

> Between 2014 and 2017, "Project Raphael", an online investigation of the York Regional Police (YRP), led to the arrests of 104 men for child luring and related offences. Ads posted by the police on the escort subdirectory of Backpage.com spurred text-message conversations, where an undercover officer, after agreeing to provide sexual services, revealed themselves to be a juvenile. All those who took up the invitation to visit the designated hotel room were arrested. Among them was the appellant in this case, Mr. Ramelson, as well as the three appellants in the related appeals…Mr. Jaffer… Mr. Haniffa…and Mr. Dare… [t]hey argue they were entrapped.
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> Project Raphael placed similar ads on Backpage, listing the age as 18 (the minimum the website would permit) and using words like "tight", "young", "new" or "fresh" in the ad's text, emulating common Backpage advertisements for the youngest sex workers. When potential clients responded, the police, imitating an adolescent's idiom, arranged a sexual transaction. When the client agreed, the police revealed the sex worker was underage. When the client continued to engage, the police invited them to a hotel room.
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> Although never recorded, the number of responses was "overwhelming". And the number of arrests was significant. In 2014-15, posing most often as a 16-year-old, the police made a total of 32 arrests in 8 days online. In 2016, with the age lowered to 15, the police made 53 arrests in 8 days. And in 2017, with the age further lowered to 14, the police made 19 arrests in 4 days. In total, Project Raphael led to the arrest of 104 people, all in only 20 days of operation *(internal citations omitted)*.

Interestingly, in *United States v. Sassak*, 2022 WL 17253645, it was indicated that "there is nothing overreaching or otherwise improper about online undercover investigations in and of themselves (See *United States v. Fernando*, 291 F. App'x 494, 495–96 (4th Cir. 2008) (unpublished) (holding that the entrapment defense was not warranted where the defendant was chatting online with an undercover officer posing as a fourteen-year-old girl)" (*at p.* 4-5).

## THE ELEMENTS OF THE DEFENCE OF ENTRAPMENT IN CANADA

The Supreme Court of Canada described the elements of the entrapment defence as follows (*Ramelson*, para. 4-5):

> When the police lack reasonable suspicion that the individual is already engaged in criminal activity, the entrapment doctrine forbids them from offering opportunities to commit offences unless they do so in the course of a "*bona fide* inquiry": that is, where they (1) reasonably suspect that crime is occurring in a sufficiently precise space; and (2) have a genuine purpose of investigating and repressing crime (*R. v. Ahmad*, 2020 SCC 11, para. 20). That test applies to investigations in physical and virtual spaces alike. But as this Court noted in *Ahmad*, "state surveillance over virtual spaces is of an entirely different qualitative order than surveillance over a public space" (*para*. 37). There, the Court considered those differences in the context of surveillance that transpired in the investigative "space" of a phone number. This appeal, and the three related appeals, require us to do the same in the context of the Internet.
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> At its core, the entrapment doctrine recognizes that sometimes "the ends do not justify the means" (*R. v. Mack*, [1988] 2 S.C.R. 903, *at p*. 938). Given the Internet's potential reach, there is a strong public interest in ensuring that online police investigations do not unduly intrude on public life. In assessing whether an online space is sufficiently precise to ground the police's reasonable suspicion, then, the Internet's unique features must be considered. Being informational rather than geographical, online spaces flout the limitations of physical spaces; they may lead people to behave differently than they do in person; and their use can raise distinct rights concerns, notably over privacy. Unlike physical spaces, an online space's parameters may say little about whether the space of an investigation was sufficiently precise. Instead, the space must be viewed with particular attention to its functions and interactivity to ensure that the space has been "carefully delineate[d] and tightly circumscribe[d]" (*Ahmad*, para. 39). The factors discussed by this Court in *Ahmad*—in particular, the number of activities and people affected, the interests of privacy and free expression, and the availability of less intrusive investigative techniques—may assist in that assessment. They may be key to ensuring that the purview of an online police investigation was no "broader than the evidence allow[ed]" (*para*. 41).

## THE ENTRAPMENT DOCTRINE

The Supreme Court noted that "[w]hatever their utility in fighting crime, some police techniques are 'unacceptable in a free

society with strong notions of fairness, decency, and privacy'… Entrapment is one of them. It is not a traditional defence, but a form of abuse of process whose only remedy is a stay of proceedings. It may occur in two ways" (*Ramelson*, para. 29):

> (a) the authorities provide a person with an opportunity to commit an offence without acting on a reasonable suspicion that this person is already engaged in criminal activity or pursuant to a *bona fide* inquiry;
> (b) although having such a reasonable suspicion or acting in the course of a bona fide inquiry, they go beyond providing an opportunity and induce the commission of an offence.

However, the Supreme Court also indicated that the police are entitled to "considerable latitude" in their investigations, "such that a finding of entrapment should issue only in the 'clearest of cases.'…The doctrine thus strives to balance competing imperatives: 'The rule of law, and the need to protect privacy interests and personal freedom from state overreach' on the one hand, and 'the state's legitimate interest in investigating and prosecuting crime' on the other" (*para*. 33-34).

The lead decision was rendered in *Ramelson*. The remaining three appeals were decided based on the principles enunciated in *Ramelson*.

## R. V. RAMELSON

In this case, the charges against the accused were stayed by the trial judge. The Ontario Court of Appeal set aside the stay. The accused was granted leave to appeal to the Supreme Court of Canada.

The accused in this case "was among those arrested in 2017. On March 27, he messaged 'Michelle', aged 18, who was described as a 'Tight Brand NEW girl . . . who is sexy and YOUNG with a tight body', with a 'YOUNG FRIEND if your [sic] interested too.'…The ad featured three faceless photographs of an undercover officer in her 30s, wearing a t-shirt from a local high school. After 27 minutes of somewhat sporadic conversation, and having agreed to a transaction, the undercover officer (UC) revealed their 'true' ages" (*para*. 16):

> *[UC]: Just so you know we under 18. Some guys freak out and I don't want problems. We are small and it's obvious.*
> *[Ramelson]: I'm cool with it. I'll be gentle as long as you're sexy and willing*
> *[UC]: We are both willing. We're 14 but will both be turning 15 this year. That cool? We are buddies and very flexable [sic]??*
> *[Ramelson]: Should be lots of fun.*

Ramelson was arrested when he arrived at the hotel room. He was charged with three offences:

- Telecommunicating with a person he believed was under the age of 16 years for the purpose of facilitating the commission of an offence, contrary to section 152 of the *Criminal Code of Canada*;
- Communicating for the purpose of obtaining for consideration the sexual services of a person under the age of 18 years, contrary to section 286.1(2) of the *Criminal Code*; and
- Telecommunicating to make an arrangement with a person to commit an offence under s. 152 (invitation to sexual touching) contrary to s. 172.2(1)(b) of the *Criminal Code*.

**"Even tailored online investigations may represent a broad and profound invasion into peoples' lives . . . the nature of those impacts deserve scrutiny."**

## THE APPEAL

The Supreme Court indicated that the appeal raised "two broad issues" (*para*. 26):

- How does the *bona fide* inquiry prong of the entrapment doctrine apply in the context of online police investigations?
- Did the application judge err in concluding that Mr. Ramelson was entrapped?
  (i) Did the police have reasonable suspicion that the s. 286.1(2) offence was occurring in a space defined with sufficient precision?
  (ii) If so, were the police entitled to offer the opportunity to commit child luring offences under ss. 172.1 and 172.2 of the *Criminal Code*?

The Supreme Court indicated that the "central issue on appeal is whether Project Raphael was a *bona fide* inquiry. This has two criteria: the police must have had (1) reasonable suspicion over a sufficiently precise space; and (2) a genuine purpose of investigating and repressing crime.…Satisfying those criteria entitles the police to present 'any person associated with the area with the opportunity to commit the particular offence'—even without individualized suspicion in the person investigated" (*para*. 35).

The Court noted that "reasonable suspicion is not onerous; it requires only the reasonable possibility, not probability, that crime is occurring.…Yet it still subjects police actions to 'exacting curial scrutiny', to ensure they were founded on objective evidence rather than on profiling, stereotyping or other improper grounds.…As an objective standard, it 'protects everyone from random testing', whether they are tempted to commit crimes in the space or not" (*para*. 53).

As regards how the doctrine of entrapment applies to online investigations, the Supreme Court indicated that "courts assessing whether an online police investigation was *bona fide* must pay close attention to the space's functions and interactivity—that is, to the permeability, interconnectedness, dynamism and other features that make the Internet a distinctive milieu for law enforcement. Even tailored online investigations may represent a broad and profound invasion into peoples' lives. Given the potential of online investigations to impact many more individuals than an equivalent investigation in a physical space, the nature of those impacts deserve scrutiny. How the police act on the Internet may matter as much or more as where they act" (*para*. 35).

As a result, the Supreme Court indicated that online police investigations will "require the police to focus on more carefully delineated spaces and target their opportunities to particular sub-

**" . . .online police investigations will 'require the police to focus on more carefully delineated spaces and target their opportunities to particular subspaces or to particular ways in which users engage with the space.'"**

spaces or to particular ways in which users engage with the space. This is especially true in places frequented by vulnerable groups, such as racial, religious or sexual minorities, or in spaces whose use carries important rights implications, where the need for precision is particularly critical" (*para*. 3).

## THE DECISION

The Supreme Court indicated that it agreed "with the Court of Appeal for Ontario that the application judge erred by failing to consider factors beyond the number of people affected by the police investigation. On the correct analysis, the police had reasonable suspicion over a sufficiently precise space and the offences the police offered were rationally connected and proportionate to the offence they reasonably suspected was occurring. Mr. Ramelson was therefore not entrapped" (*para*. 6).

The Supreme Court held that the evidence established that police had reasonable suspicion to believe that the offence of communicating for the purpose of obtaining the sexual services of a person under the age of 18 years was "occurring in the space" they placed their advertisements. The Court concluded that "[i]f the [police] were to address offences related to juvenile sex work, ads in the York Region escort subdirectory of Backpage for the youngest sex workers were places to do so" (*para*. 3).

The Supreme Court also concluded that the trial judge "failed to properly consider the entire context—in particular, the seriousness of the crimes and the difficulty investigating them via alternative techniques. Like the Court of Appeal, a review of the full context leads me to conclude that the online space in which Project Raphael offered opportunities was defined with sufficient precision to ground the police's reasonable suspicion. I begin with the virtual space's definition, which must be carefully delineated, including, as I have explained, with a view to the space's functions and interactivity" (*para*. 78).

Finally, the Supreme Court pointed out that it was "when the police mentioned the sex worker's age—that they provided him with the opportunity to commit the offences under ss. 286.1(2), 172.1 and 172.2.…By agreeing to proceed with the transaction, all the elements of the offences were satisfied…[s]ting operations have become 'an important tool—if not the most important tool—available to the police in detecting offenders who target children and preventing them from doing actual harm to children.'…Given the 'considerable latitude' police are owed in their investigations…, sting operations like Project Raphael should not be foreclosed lightly" (*paras*. 84, 92).

## R. V. JAFFER

In this case, the accused's application for a stay of proceedings to be entered was denied by the trial judge and he was convicted of the offences of telecommunicating with a person he believed to be under the age of 18, contrary to section 172.1(1)(a) of the *Criminal Cod*e, and communicating to obtain for consideration the sexual services of a person under 18, contrary section 286.1(2)). His appeal from conviction was dismissed by the Ontario Court of Appeal. He was granted leave to appeal to the Supreme Court of Canada.

## THE CIRCUMSTANCES INVOLVED

While "browsing the escort subdirectory of Backpage.com, Mr. Jaffer messaged 'Kathy', aged 18, who was described as a 'Tight Brand New girl' who is 'sexy and young with a tight body'…The posting listed a phone number and an email address titled 'kathyblunt16@gmail.com'. Communicating by text with Mr. Jaffer, the undercover officer (UC) eventually revealed to him that 'she' was 15 years old" (*para*. 2):

*[UC]: . . . how old r u*
*[Jaffer]: 22*
*[UC]: . . . well im not quite 18 yet r u ok with that*
*[Jaffer]: Yeah I'm ok . . . but how much younger are u? 17?*
*[UC]: im turning 16 on sunday but I look 18*
*[Jaffer]: Um . . . ok but how do I know you're not a cop?*
*[Jaffer]: I really don't want to get in trouble ya know*
*[UC]: and i definitely don't want trouble*
*[Jaffer]: Ok can I ask why you're escorting if it's ok with u? Usually people your age don't know about this industry*
*[Jaffer]: Just curios*
*[UC]: my friend got me into it . . . i just need the money i dont do this all the time its my second time honestly i need the money.*
*[Jaffer]: I see . . . I like that you're honest. I can trust u then. So I'll come then but please please let's keep this between ourselves.*

## THE SUPREME COURT'S DECISION

The appeal was dismissed and the convictions affirmed. The Supreme Court indicated that the accused adopted "the arguments raised in the companion appeals as they concern opportunity-based entrapment, adding that the police lacked reasonable suspicion over him personally. I have addressed these points in my reasons in *Ramelson*, where I concluded that Project Raphael was a bona fide inquiry. For the reasons given in that case, I would not accede to these grounds of appeal" (*para*. 7).

However, Mr. Jaffer also raised an additional argument. He argued that the trial judge erred "in failing to take his personal circumstances into account when assessing whether he was induced. Mr. Jaffer acknowledges that the police could not have known that he was living with undiagnosed Asperger's Syndrome, but submits that such personal circumstances are relevant and ought to be considered in the analysis of inducement-based entrapment. Mr. Jaffer explains that the common symptoms of his condition—in particular, a difficulty socializing and rigid rule compliance—put him at a heightened risk for being induced. In addition, that condition, and an earlier interaction he had with police, where he had agreed to provide information about a particular sex worker and her pimp, lent credence to his explanation that he had planned to meet 'Kathy' only to gather information and alert the authorities" (*para*. 8).

The Supreme Court indicated that the entrapment excuse allows a trial judge to consider judge whether the police "appear to have exploited a particular vulnerability of a person such as a

mental handicap or a substance addiction." However, the Court declined to deal with this issue, holding that there was no evidence "that the police 'employed means which go further than providing an opportunity' to commit the offences" (*para.* 9-10):

> The inducement branch of the entrapment doctrine provides that even if the police have reasonable suspicion over an individual or act under a bona fide inquiry, they cannot "emplo[y] means which go further than providing an opportunity" to commit a crime (*R. v. Mack*, [1988] 2 S.C.R. 903, *at p.* 966). That assessment may include looking at "whether an average person, with both strengths and weaknesses, in the position of the accused would be induced into the commission of a crime" or whether the police "appear to have exploited a particular vulnerability of a person such as a mental handicap or a substance addiction", among other factors (*id.*). But the assessment is objective and focuses on the police's conduct, not on that conduct's effect "on the accused's state of mind" (*id. at* 965).
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> In my view, the issue of whether that framework ought to be revised is better left for another case. Whatever the merit of Mr. Jaffer's legal arguments—a point I do not decide here—the jury, in full knowledge of Mr. Jaffer's circumstances, rejected his evidence that he had intended to visit the hotel room solely to gather information. In convicting him, the jury did not have a reasonable doubt about the purpose for which he arranged the meeting. Echoing that conclusion, the application judge found that Mr. Jaffer had been intent on a sexual transaction, even after learning the sex worker's age. No error in those findings has been demonstrated. Nor has Mr. Jaffer pointed to any indication that the police "employed means which go further than providing an opportunity" to commit the offences (*Mack*, *at p.* 966). Even if Mr. Jaffer's subjective circumstances were considered under the legal framework for inducement, then, they could not affect the result. I would not accede to this ground of appeal.

## R. V. HANIFFA

In this case, the accused's application for a stay of proceedings to be entered was denied by the trial judge and he was convicted of the offences of telecommunicating with a person he believed to be under the age of 18 years for the purpose of committing an offence, contrary to section 172.1(1)(a) of the *Criminal Code*; telecommunicating with a person he believed to be under the age of 16 years for the purpose of committing an offence under section 152 (invitation to sexual touching), contrary to s. 172.1(1)(b); and communicating to obtain sexual services for consideration from a person under 18 years, contrary to s. 286.1(2). His appeal from conviction was dismissed by the Ontario Court of Appeal. He was granted leave to appeal to the Supreme Court of Canada.

## THE CIRCUMSTANCES INVOLVED

While "browsing the escort subdirectory of Backpage.com, Mr. Haniffa responded to an ad purportedly placed by 'Jamie'. The ad indicated she was 18 years old (the minimum age allowed by the website), and described her as 'YOUNG Shy FRESH and NEW', 'super new to this and pretty shy' and as having a friend who is 'young like me'. Communicating with Mr. Haniffa by text, the undercover officer (UC) eventually revealed to him that 'she' was 15 years old" (*para.* 3):

> *[Haniffa]: U busy?*
> *[UC]: im free tn after school*
> *[Haniffa]: What time is school done?*
> *[UC]: 330*
> *[UC]: r u ok if im not quite 18 yet?*
> *[Haniffa]: Is this like a cop thing or something?*
> *[Haniffa]: Can u call u?*
> *[UC]: .no silly*
> *[Haniffa]: How old r u?*
> *[UC]: im 15 to be hones but I look older hun*
> *[Haniffa]: Mm*
> *[Haniffa]: Ok so where will u be working?*
> *[UC]: why the mm babe*
> *[Haniffa]: As in mm ok.*

**". . . the entrapment doctrine provides that even if the police have reasonable suspicion over an individual or act under a bona fide inquiry, they cannot employ means which go further than providing an opportunity to commit the offenses."**

## THE SUPREME COURT'S DECISION

The accused in this case raised the same arguments presented in *Ramelson*. For the reasons provided in that decision, the appeal was dismissed (*para.* 7):

> In this appeal, Mr. Haniffa adopts the questions in issue as set out in the appellant's factum in *Ramelson*, and acknowledges that "the facts of the present case are sufficiently similar, so that the same conclusions must follow.

However, the accused in this appeal raised an additional ground of appeal. He argued that the evidence of the primary investigator (Inspector Truong), upon whom the Crown relied to establish a *bona fide* investigation, "was insufficient to ground reasonable suspicion: it was based too heavily on his personal experiences, failed to show the targeted offences were prevalent, and failed to explain how a user would actually locate a juvenile sex worker through the website, given its parameters. And given the potential breadth of investigations into spaces, the police should be limited, in the context of *bona fide* inquiries, to offering the same offences they suspect are occurring; they should not be entitled to offer those that are only rationally connected and proportionate" (*para.* 7).

The Supreme Court indicated that "[f]or the reasons given in *Ramelson*, I would not accede to these arguments. As I explained there, the police had reasonable suspicion over a sufficiently precise space and the *Mack* standard of 'rationally connected and proportionate' applies and was satisfied. Project Raphael was thus a *bona fide* inquiry. I conclude that Mr. Haniffa was not entrapped" (*para.* 8).

## R. V. DARE

Finally, in this case, the accused's application for a stay of proceedings to be entered as a result of being entrapped was denied

**". . . the entrapment inquiry requires a consideration of whether in offering an opportunity to a person to commit an offense, the police were involved in a *bona fide* inquiry."**

and he was convicted of the offences of telecommunicating with a person he believed to be under the age of 18 years for the purpose of committing an offence, contrary to section 172.1(1)(a) of the *Criminal Code*; telecommunicating with a person he believed to be under the age of 16 years for the purpose of committing an offence under section 152 (invitation to sexual touching), contrary to section 172.1(1)(b); and communicating to obtain sexual services for consideration from a person under 18 years, contrary to section 286.1(2). His appeal from conviction was dismissed by the Ontario Court of Appeal. He was granted leave to appeal to the Supreme Court of Canada.

## THE CIRCUMSTANCES INVOLVED

While "browsing the escort subdirectory of Backpage.com, Mr. Dare responded to an ad purportedly placed by 'Kathy'. The ad indicated she was 18 years old (the minimum age allowed by the website), described her as a 'Tight Brand New girl who is sexy and young with a tight body', and stated that she had a 'YOUNG FRIEND'. Communicating with Mr. Dare by text, the undercover officer (UC) eventually revealed to him that 'she' was 15 years old" (*para*. 3):

> *[UC]: You cool with young?*
> *[Dare]: Yes*
> *[Dare]: Am also young*
> *[UC]: Ok cool. I'm 15 but look bit older.*
> *[UC]: How old are you if don't mind me asking?*
> *[Dare]: Ok am 22.*

## THE SUPREME COURT'S DECISION

In dismissing the appeal, the Supreme Court noted that Mr. Dare adopted "the appellant submissions made in *Ramelson* and *Haniffa*, stating that 'the facts in the present case are sufficiently similar, so that the same conclusions ought to follow.'" The Supreme Court held that for the reasons given in *Ramelson*, where it was held "that Project Raphael was a bona fide inquiry, I would not accede to Mr. Dare's grounds of appeal. He was not entrapped. I would therefore dismiss the appeal" (*para*. 7).

## CONCLUSION

These four decisions have not radically changed the law of entrapment in Canada. The Supreme Court referred extensively to its earlier decisions in *Mack* and *Ahmad*. The Court confirmed that the entrapment inquiry requires a consideration of whether in offering an opportunity to a person to commit an offence, the police were involved in a *bona fide* inquiry. The Court reiterated its conceptualization of what this means as set out in *Ahmad* by stating that this requires that the police "(1) reasonably suspect that crime is occurring in a sufficiently precise space; and (2) have a genuine purpose of investigating and repressing crime" (*Ramelson*, para. 4).

What distinguishes this series of decisions from earlier Supreme Court of Canada entrapment decisions is the online element. In each instance, the police had no basis to believe that the person they were communicating with intended to commit a criminal offence. The initial contact was non-criminal. It was when the police provided the unknown individuals with the opportunity to engage in criminal conduct that things changed. Some individuals (these four and others) pursued the opportunity. Some did not.

All four appeals involved the accused communicating with undercover police officers through an online escort service. In each case, the undercover officers indicated that they were children. In each case, the accused, despite this information, agreed to meet the children at a hotel room. All four went to the designated room where they were arrested and charged with various offences. Based upon this scenario, it is hardly surprising that the entrapment defence was rejected.

The police involved in the appeals that were heard by the Supreme Court of Canada provided a clear opportunity to unknown individuals to commit a sexual offence involving a child, but they did not, even in the slightest fashion, induce any of the individuals to visit a hotel room where they expected to meet a child. As noted in *Berrios* by the United States Court of Appeals, Seventh Circuit (*at p.* 12):

> Sadly, these circumstances are "run-of-the-mill": Carter as Alexis furnished Mercado the chance to commit this crime on customary terms—a text conversation on a hook-up website followed by a meeting—and Mercado did so.[3]

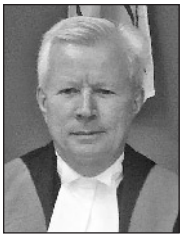
In *Kureembokus, R. v* [2021] EWCA Crim 828, the Court of Appeal for England and Wales considered an appeal where entrapment was raised. In that case, the accused "had entered into a conversation on the Grindr app with a user who gave the name 'Seb'. That was, in fact, a profile created by an undercover police officer. At the outset of the conversation 'Seb' said that he was only 14. The applicant replied, 'That's cool. I'm 27, not too old for you?' At 'Seb's' suggestion they left the Grindr site and began to exchange messages and photos on WhatsApp. 'Seb' repeated that he was a 14 year old schoolboy and said that he did not have a lot of sexual experience. They arranged to meet. When asked by 'Seb' what he wanted to do, the applicant said that he wanted to kiss and to engage in oral and anal sex. 'Seb' said that was 'cool' and he was glad the applicant did not mind his age" (*para*. 2).

The Court of Appeal summarily dismissed the entrapment

3. In *Berrios*, the accused "used an Internet application to meet 'Alexis,' a profile operated by a trained FBI agent conducting an undercover investigation of adults with sexual interest in children. After a few minutes of texting, 'Alexis' told Mercado she was 15 years old. For the next five days they texted, exchanged photos, and once spoke by phone" (*at p.* 6). He was charged with attempted enticement of a minor in violation of 18 U.S.C. § 2422(b).

argument, characterizing it as "misconceived." The Court of Appeal indicated that "there was no basis for an application to stay the proceedings as an abuse of the process. It is not arguable that the undercover officer did anything more than present the appellant with an unexceptional opportunity to commit a crime, which he chose to do" (*para*. 28).

Finally, as judges, we now routinely see the Internet being used for the commission of offences against children. This does not mean that the police have a *carte blanche* authority to provide random opportunities to unknown individuals to commit offences through online investigations. However, these four decisions do mean that in Canada, the police can do so when they have grounds to suspect (a low threshold) that offences are being committed in a defined portion of the Internet. In such cases, it appears that in Canada, the United States, and England and Wales, entrapment will be a difficult defence to establish.



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