S.C.C. FILE NO. 38304

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

BETWEEN:

LANDON WILLIAMS

APPELLANT
(Respondent/
Appellant in cross-appeal)

- and -

HER MAJESTY THE QUEEN

RESPONDENT
(Appellant/
Respondent in cross-appeal)

- and –

BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION and
INDEPENDENT CRIMINAL DEFENCE ADVOCACY SOCIETY

INTERVENERS

FACTUM OF THE INTERVENER
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(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I – CONCISE OVERVIEW OF POSITION WITH RESPECT TO THE QUESTIONS ON WHICH THE INTERVENER HAS INTERVENED AND CONCISE STATEMENT OF FACTS

1. In the present case, the Ontario Court of Appeal majority observed that "[t]he absence of a set location in a dial-a-dope scheme presents challenges to the existing entrapment framework."[1] In light of that challenge, the majority set out to expand the exceptions to the common law protections, articulated by this Court in *Mack*[2] and *Barnes*[3] some years ago. In so doing, the majority insufficiently protected the right to be left alone in a virtual location when weighed against the need for the effective investigation of crime.

2. This Court, in *Mack*, explained two ways in which entrapment may be established. This appeal concerns only the first category of entrapment.

3. The basic rule under the first branch of entrapment 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.[4]

4. In *Barnes*, this Court recognized an exception to this rule that arises when the police undertake a *bona fide* investigation directed at a physical area where it is reasonably suspected that criminal activity is occurring.[5] The majority held that two factors must inform the inquiry into whether the police are undertaking a *bona fide* investigation: (a) the motivation of the police must be for the genuine purpose of investigating and repressing criminal activity,[6] and; (b) the police must have reasonable grounds for believing the crime in question is occurring in the location in question.[7] Thus, the *Barnes* exception was never designed to encompass all forms of criminal activity, no matter where and how it was undertaken. Instead, it was designed to capture only street-level crime, occurring in person, in high-crime areas.

5. Despite this, the Ontario Court of Appeal majority held that the absence of a set physical location should not foreclose the possibility of police providing opportunities to commit offences absent a reasonable suspicion that the individual is already engaged in the particular criminal

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[1] *R. v. Ahmad*, 2018 ONCA 534 [**ONCA Reasons**], para. 54
[2] *R. v. Mack*, [1988] 2 SCR 903 [***Mack***]
[3] *R. v. Barnes*, [1991] 1 SCR 449 [***Barnes***]
[4] *Barnes*, p. 463 b-f
[5] *Barnes*, p. 463 d-e
[6] *Barnes*, p. 460 i-j
[7] *Barnes*, p. 461 a-b

activity.[8] The majority held that when the police have a reasonable suspicion that a phone line is being used in a dial-a-dope scheme, they should be allowed to provide opportunities to any person who answers that phone line, even if they do not have a reasonable suspicion that the person is himself or herself engaged in drug-related activity. Just as in *Barnes*, to constitute a *bona fide* inquiry, the majority held the investigation must be "motivated by the genuine purpose of investigating and repressing criminal activity" and in this context that it must be "directed at a phone line reasonably suspected to be used in a dial-a-dope scheme."[9]

6. The facts of the present case involve a cell phone but the analytical framework developed by this Court could apply equally to any digital and/or virtual location, such as an internet chat room. The position of the CDAS is that the *Barnes bona fide* investigation exception already operates in problematic ways in the physical sphere because it results in discrimination. It should not be expanded to include digital and/or virtual locations because of that concern and its negative impact on free speech. In the alternative, if this Court is satisfied that it should be so expanded, the two factors set out for consideration by this Court in *Barnes* and by the Ontario Court of Appeal majority in this case provide insufficient protection to individuals' interests in being left alone, free from state intrusion. CDAS therefore proposes a more robust set of considerations to inform the analysis.

PART II - CONCISE OVERVIEW OF INTERVENER'S POSITION WITH RESPECT TO THE APPELLANT'S QUESTIONS ON WHICH INTERVENER HAS INTERVENED

7. **Do Police Officers Require Reasonable Suspicion Before Offering Opportunities to Commit Crimes Over the Phone?** Yes. Absent such reasonable suspicion *about an individual*, CDAS argues that: (a) the *bona fide* investigation exception should not be expanded to include digital and/or virtual locations; and (b) in the alternative, if this Court is satisfied that it should be so expanded, the two factors set out for consideration by this Court in *Barnes* and by the Ontario Court of Appeal majority in this case provide insufficient protection to individuals' interests in being left alone, free from state intrusion. A more robust set of considerations is required to inform the analysis.

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[8] ONCA Reasons, para. 55
[9] ONCA Reasons, para. 58

PART III - STATEMENT OF ARGUMENT

B. The *Bona Fide* Investigation Exception Should Not be Expanded

8. The *bona fide* investigation exception should not be expanded to include digital and/or virtual locations for two reasons: (a) the risk of discrimination and the chilling effect on expressive freedom that inheres in targeting digital and/or virtual locations; and (b) people have an enhanced privacy interest in digital and/or virtual locations that augurs against expanding the *bona fide* investigation exception to these locations.

i. Risk of Discrimination/ Chilling Effect of Surveillance

9. The doctrine of entrapment is based on the recognition that limits must be imposed on the ability of the police to intrude on people's lives, deceive them, and participate in the commission of an offence. It is expected in our society that the police will direct their attention towards uncovering criminal activity that occurs without their involvement.[10]

10. Even at the time *Barnes* was decided, Justice McLachlin, as she then was, dissenting, recognized the risks of creating a geographic exception to the requirement that police have a reasonable suspicion that a person is already engaged in the particular criminal activity prior to offering that person an opportunity to commit an offence. In her dissent, she held that the "risk inherent in overbroad undercover operations is that of discriminatory police work, where people are interfered with not because of reasonable suspicion but because of the colour of their skin or, as in this case, the quality of their clothing and their age."[11]

11. In the wake of *Barnes*, as the appellant points out at paragraphs 43-45 of his factum, there is reason to believe that this risk has materialized. Professor Tanovich has convincingly documented how, particularly with respect to the *bona fide* investigation exception, McLachlin J. was right to be concerned about the discriminatory effects of the techniques in question and that the "effects of racial profiling are substantial and cannot be ignored".[12]

12. In many cases, the issue of whether an individual was inappropriately profiled in a *bona fide* investigation will be difficult to prove absent an admission. Being realistic, it is unlikely that a police witness will volunteer that there was inappropriate profiling, and the defence will

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[10] *Barnes*, p. 459 g-j
[11] *Barnes*, pp. 481 i to 482 a
[12] David M. Tanovich, "Rethinking the Bona Fides of Entrapment" (2011), 43 UBCL Rev 417 [**Tanovich**] at 432, see also 433-438

have a hard time proving that to be the case. In *Barnes*, the accused person was described by the officer as "dressed scruffy". Where the location is digital or virtual, an officer's decisions will not be made upon physical appearance but could and would likely be made on the basis of name, voice, accent, or (non-criminal) ideas that are expressed in the case of an internet chat room. Selection may no longer be based upon scruffy physical appearance but upon such other factors that may be related to race or religion, for example. And again, such profiling will be hard to prove but deleterious in its effects.

13. Increasingly, people turn to online communities to affirm their identity and find community. Thus, digital and/or virtual locations are often organized along lines that are markers for discrimination (e.g. race, faith-based, gender, age, politics, etc.). The same risks that were predicted by McLachlin J., are likely to arise if police are allowed to target digital and/or virtual spaces. There is a further risk that such investigative tactics will chill valuable online communication and lead people to self-censor their expression.[13]

14. As Wagner C.J. and Karakatsanis J. recently recognized in *Mills*, "many individuals engage in extensive, private online conversations with people they have not previously met in person" and the internet "empowers individuals to exchange much socially valuable information".[14] Given the importance of virtual locations, the risk of policing, which is based on an improper or discriminatory targeting of these locations suggests, first, that the exception should not be expanded, and second, that if it is to be so expanded, the *Barnes* criteria insufficiently protects the right to be left alone and fails to ensure that the right balance is struck between policing and individual rights.

ii. Enhanced Privacy Interest in Digital and/or Virtual Locations

15. People have an enhanced privacy interest in digital and/or virtual locations. Choosing to participate or interact in an online community, for example, is fundamentally different than being a pedestrian who is passing through a public physical location, which the police regard as suspicious.

16. First, not all digital or virtual spaces are "public". Calling a private number, or posting on a private Facebook profile is very different from walking through a public square. It is for

[13] *R. v. Mills*, 2019 SCC 22 [***Mills***], para. 99, see also paras. 84, 96, 98
[14] *Mills*, para. 59

this reason that the Canadian Radio-television and Telecommunications Commission regulates unsolicited telecommunications. It is also for this reason that the law of evidence does not treat all information found online as "public" and, therefore, producible. For example, courts have recognized privacy interests in Facebook posts and refused to require parties to produce them.[15]

17. Further, and unlike, for example, the Granville Mall area in Vancouver, without adequate privacy protections in virtual locations, there is a real threat of significant state surveillance. It is far easier for a state agent to conceal their true identity, and to target a significant number of people when operating in digital or virtual spaces than in physical spaces.[16]

18. Third, when individuals communicate in virtual spaces, as opposed to physical spaces, significant volumes of data about them are created and stored, which creates real privacy risks. A police officer can print off a conversation with someone they spoke to online (or via text message) – which differs significantly from the type of evidence the officer would get in an oral conversation. As Martin J. recently held, dissenting, "[i]n our current communications environment, we are wiretapping ourselves".[17] People should not be forced to abstain from communicating in these spaces in order to protect their privacy.[18]

19. Finally, anonymity is a key element of privacy. A pedestrian in a public downtown location may expect to be observed and might even expect to have some brief interactions. This is different than a person who chooses to enter and participate in a virtual location of like-minded people. Telephone and internet communications allow people to remain anonymous in a way that in person communications do not, which raises heightened privacy concerns. This privacy interest augurs against expanding the *bona fide* investigation exception to these locations.[19]

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[15] Gerald Chan and Nader R. Hasan, *Digital Privacy: Criminal, Civil and Regulatory Litigation*, 1st ed (Toronto: LexisNexis Canada, 2018), paras. 7.67-7.72
[16] David Lyon, Surveillance After Snowden, 1st ed (Cambridge: Polity Press, 2015) at p. 47; *Mills*, paras. 72-73, 103-108, 133 per Martin J.
[17] *Mills*, para. 141
[18] *Mills*, paras. 96-99, 141 per Martin J. See also *R. v. Jones*, 2017 SCC 60, [2017] 2 SCR 696, at para. 45; Janis, L. Goldie, "Virtual Communities and the Social Dimension of Privacy", 3 U. Ottawa L. & Tech J. 133 at p. 142-149; Jonathon W. Penney, "Internet surveillance, Regulation, and Chilling effects Online: a Comparative Case Study", online: Internet Policy Review 6(2)
[19] *R. v. Spencer*, 2014 SCC 43, at paras. 41-51

20. One of the distinguishing features between the majority and dissenting judgments of this Court in *Barnes* was McLachlin J.'s heightened concern that the approach endorsed by the majority in *Barnes* represented "endorsing a measure of state intrusion into the private affairs of citizens greater than any heretofore sanctioned by this Court under the *Canadian Charter of Rights and Freedoms*…".[20] She held: "[t]he significance of the individual interest at stake here must not be underestimated, nor should the adverse effect that police investigatory techniques can have on this interest be overlooked."[21] She noted: "[t]he restraints imposed on government to pry into the lives of the citizen go to the essence of a democratic state" and that our society is one which "sets a premium on being left alone."[22]

21. While the majority of this Court found that s. 8 was not engaged on the particular facts of *Mills*, and therefore no prior authorization was required for police officers to pose as a child and catch people engaged in child luring, Wagner C.J. and Karakatsanis J. specifically cautioned:

> 60 …However, this conclusion in no way gives the police a broad license to engage in general online surveillance of private conversations. Both s. 8 of the *Charter*, as outlined in *TELUS*, *Marakah* and *Jones*, as well as the common law doctrines of abuse of process and entrapment place limits on the ways police can use electronic communications in the course of an investigation.
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> …
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> [63] If such cases arise, where police impersonation tactics offend society's notions of decency and fair play, courts should invoke existing common law mechanisms to regulate undercover police investigations, including those conducted online. The abuse of process doctrine guards against coercive police conduct, such as preying on an accused's vulnerabilities, which threatens trial fairness and the integrity of the justice system: *Hart*, at paras. 111-18. In addition, if police go beyond providing an opportunity to commit an offence and actually induce its commission, the entrapment doctrine applies: *Mack*, at pp. 964-66. Indeed, courts have used the entrapment doctrine to scrutinize sting operations similar to the one used here: see *R. v. Chiang*, 2012 BCCA 85, 286 C.C.C. (3d) 564, at paras. 14-21; *R. v. Bayat*, 2011 ONCA 778, 108 O.R. (3d) 420, at paras. 15-23. In such circumstances, trial judges have "wide discretion to issue a remedy — including the exclusion of evidence or a stay of proceedings": *Hart*, at para. 113; see also *R. v. Babos*, 2014 SCC 16, [2014] 1 S.C.R. 309, at paras. 30-47 and 53-57. [23]

22. The individual's interest in being left alone in a public space is attenuated when compared with the individual's interest in being left alone in a digital and/or virtual space. Many

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[20] *Barnes*, p. 479 e-g
[21] *Barnes*, p. 481 d-f
[22] *Barnes*, p. 481 f-h
[23] *Mills*, paras. 60 and 63

virtual locations are not, in any way, analogous to the town square. Police intrusion by telephone call, over the dinner hour at home with ones' family, and/or police infiltration and deception in an online platform organized to build community, is more objectionable than police intrusion on a cross-walk on a public street. With virtual locations, police should be required to have a reasonable suspicion about the particular individual in question before intruding into these areas of people's lives.

23. In the wake of *Mills*, if this Court expands the *bona fide* investigation exception to include digital and/or virtual locations, very significant and unsupervised powers will be handed to law enforcement. This common law doctrine will no longer be able to fill the gap left by this Court's conclusion that prior judicial authorization is not required before police engage in these type of investigative techniques.

C. The *Barnes* Factors are Insufficient

24. In the alternative, if this Court is persuaded that the *bona fide* investigation exception should be expanded to include digital and/or virtual spaces, a more robust set of factors should inform the inquiry.

25. In *Hunter*,[24] this Court held that s. 8 *Charter* interests are protected through the requirement of prior authorization, granted by a person who is an independent, judicial officer, and on the standard that "[t]he state's interest in detecting and preventing crime begins to prevail over the individual's interest in being left alone at the point where credibly-based probability replaces suspicion."[25] This standard may not be constitutionally required whenever a s. 8 interest is engaged but in *Hunter*, the Court recognized the importance of "protect[ing] individuals from unjustified state intrusions upon their privacy" and, that it is important to prevent unjustified intrusions "before they happen" rather than "after the fact."[26]

26. Similarly, in *Mack*, limits were placed upon the circumstances and the manner in which police are permitted to deal with people within Canada for the purpose of investigating a crime. The Court held: "It is a deeply ingrained value in our democratic system that the ends do not justify

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[24] *Hunter et al. v. Southam Inc.*, [1984] 2 SCR 145 [***Hunter***]
[25] *Hunter*, p. 167
[26] *Hunter*, p. 160

the means. In particular, evidence or convictions may, at times, be obtained at too high a price."[27] Similarly: "It is my view that in criminal law the doctrine of abuse of process draws on the notion that the state is limited in the way it may deal with its citizens."[28]

27. The difficulty with entrapment is that it is an after-the-fact review of police conduct and the intrusions upon the right to be left alone are determined by the police themselves rather than independent judicial officers.

28. In *Barnes*, the majority held that two factors must inform the *bona fide* investigation exception inquiry (a) the motivation of the police must be for the genuine purpose of investigating and repressing criminal activity,[29] and (b) the police must have reasonable grounds for believing the crime in question is occurring in the location in question.[30] This was essentially the formulation adopted by the Ontario Court of Appeal majority except that instead of requiring grounds to believe crime is occurring in the *location* in question, the majority focused on the *phone line*.[31]

29. In the wake of *Barnes*, lower courts have struggled to define a meaningful boundary for this exception.[32] Some of these judgments describe the *bona fide* investigation exception as meaning any generally legitimate investigation. Such an interpretation is inconsistent with *Barnes* and *Mack,*[33] and would render the entrapment test meaningless, as presumably most investigations that might otherwise amount to entrapment could be viewed as *bona fide* in an everyday sense. What these cases reveal is that more rigour is required in the formulation of the exception so that the exception does not swallow the defence.

30. Determining whether police are acting pursuant to a *bona fide* investigation of a digital and/or virtual space requires consideration of more factors aimed at more fully understanding the difficulties faced by the police in investigating the particular crime in question, and the particular privacy interests enjoyed by the individual in the space in question.

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[27] *Mack*, p. 938 i-j
[28] *Mack*, p. 939 g-h
[29] *Barnes*, p. 460 i-j
[30] *Barnes*, p. 461 a-b
[31] ONCA Reasons, para. 58
[32] See e.g. *R. v. O'Connor*, 2014 ONCJ 768, ¶¶17-19
[33] See e.g. *Barnes*, ¶¶23-24

31. These additional factors should be drawn from a number of sources.

32. In *Barnes*, McLachlin J. proposed additional factors relevant to balancing individual interests against society's interest in protection from crime, such as (a) the likelihood of crime at the particular location targeted, (b) the seriousness of the crime in question, (c) the number of legitimate activities and persons who might be affected, and (d) the availability of less intrusive investigative techniques.[34]

33. Professor Tanovich has argued that McLachlin J.'s formulation of the test is the "essence of the 'reasonable justification' test from the common law ancillary powers doctrine.[35] He argues that balancing the factors suggested by McLachlin J. is now constitutionally mandated in all entrapment cases following a series of decisions from this Court concerning the ancillary powers doctrine. This doctrine recognizes that where a police power interferes with liberty or freedom, including privacy and equality, and is grounded in the execution of police duties, the lawful exercise of that power requires some justification. Specially, it requires demonstration that the intrusion is both reasonable and necessary.[36] *Bona fide* investigations interfere with liberty in that they threaten an individual's privacy and right to be free from arbitrary state interference and free from state tempting to commit an offence.[37] Such investigations also impact upon liberty and equality because it can place a neighbourhood, phone line, or virtual space under the watchful eye of the state subjecting the users to over-policing.[38] In those circumstances, a more robust balancing test than applied by the majority in Barnes is called for.

34. Many of these factors suggested by McLachlin J. resonate with statutory requirements enacted by Parliament after *Mack* and *Barnes* were decided, aimed at ensuring the state's interest in detecting crime are proportionately balanced against the individual's interest in being left alone. Specifically, guidance can be gleaned from ss. 487.01 and 25.1 of the *Criminal Code* and s. 55(2) and (2.1) of the *Controlled Drugs and Substances Act* that require consideration of (a) the likelihood of crime being committed, (b) the likelihood that the investigatory technique in question will detect that crime, (c) the best interests of the administration of justice, (d) the

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[34] *Barnes*, p. 483 a-d
[35] Tanovich, p. 431
[36] Tanovich, p. 438, 442-443; citing, among others, *R. v. Kang-Brown*, 2008 SCC 18 and *R. v. Clayton*, 2007 SCC 32
[37] Tanovich, p. 441
[38] Tanovich, p. 442

proportionality between the police conduct and the nature of the criminal activity being investigated, and (e) the reasonable availability of other means of carrying out the public officer's law enforcement duties.

35. Because deception by police, and their infiltration of digital and/or virtual spaces may also negatively affect expressive freedoms, considerations that flow from s. 2 jurisprudence may also be informative and specifically (a) the nature of the digital and/or virtual space in question (private or personal platforms or telephone numbers, for example, may be entitled to greater protection that public ones), and (b) the importance of the space to the community who accesses it in light of principles and values including the search for and attainment of truth, participation in social and political decision-making and the opportunity for individual self-fulfillment through expression.[39]

36. A balancing process where conflicting interests are articulated and weighed against each other allows for more meaningful judicial review and is more consistent with the jurisprudence that has evolved not only under the *Charter* but in many areas of public law.

PART IV - ORDERS SOUGHT

37. CDAS seeks no order as to costs and asks that no costs be made against it.

38. CDAS takes no position on the outcome of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: 10 May 2019

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[39] *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 SCR 927 at 976; *Ford v. Quebec (Attorney General)*, [1988] 2 SCR 712 at 765-66

PART V - TABLE OF AUTHORITIES