Court of Queen's Bench of Alberta

Citation: R v Leskosky, 2020 ABQB 517

Date: 20200908
Docket: 180656522Q1
Registry: St. Paul

Between:

Her Majesty the Queen

Crown

- and -

John Charles Leskosky

Accused

Reasons for Ruling on Entrapment Application
of the
Honourable Mr. Justice W.N. Renke

[This decision was delivered orally, in abbreviated form. I reserved the right to add headings and a table of contents, complete citations and quotations, add supplemental doctrinal elaborations and explanations, and make minor grammatical and stylistic changes.]

[1] Following trial, on August 25, 2020, I found Mr. Leskosky guilty of one count of child luring under s. 172.1(1)(b) of the *Criminal Code*. My reasons are reported at 2020 ABQB 502.

[2] Mr. Leskosky has applied for a stay of conviction on the basis of entrapment.

[3] By way of general background, in January 2018, the Boise, Idaho City Police contacted the Wainwright Detachment of the RCMP, advising that Mr. Leskosky, a Wainwright resident,

was the subject of a "lewd conduct" complaint. This complaint concerned communications through Facebook Messenger with a 14-year old girl resident in Boise. The report stated that the conduct "does not rise to the level of a criminal act." Wainwright RCMP passed on the information to the Northern Alberta Internet Child Exploitation (ICE) team. ICE investigated. Constable Natalie Tung was the lead investigator. Detective Steven Horchuk was the undercover manager. Then-Constable (now Detective) Heather Morrison was tasked with contacting Mr. Leskosky through Facebook. Constable Morrison adopted the *persona* of a 13-year old girl and initiated contact with Mr. Leskosky through Facebook. What began as an apparently misaddressed message to Mr. Leskosky on March 12, 2018 by 13-year old "Emily Parks" progressed through a series of communications continuing until about May 16, 2018.

[4] On May 29, 2018, Mr. Leskosky was arrested at his Wainwright residence and charged. He provided a *Charter*-compliant statement to ICE-team member Det. Ian McFatridge. I ruled that the statement was voluntary in a separate decision, reported at 2020 ABQB 129.

[5] Counsel had agreed that evidence in the trial would be admissible in the entrapment phase of proceedings, should Mr. Leskosky be found guilty. Three witnesses were called by the Crown in the trial, Cpl. Mark Harboway, Det. Horchuk, and Cst. Morrison. The key exhibits reproduced Facebook Messenger conversations between Mr. Leskosky and Emily. I will cite messages by reference to the last three digits of the exhibit page number. Transcript references shall be to the transcript of the March 2, 2020 proceedings, prefaced by "T".

[6] One additional witness was called in the entrapment phase of proceedings, Dale Myggland. Mr. Myggland has been a friend of and employer of Mr. Leskosky. Mr. Leskosky has been very fortunate to have had Mr. Myggland's support. Mr. Myggland is obviously a decent and caring individual. He has looked out for Mr. Leskosky for many years. His testimony, though, did not add much to the evidence already on the record. Neither counsel referred to his testimony in submissions.

[7] I will address entrapment principles, then assess whether, on the evidence, Mr. Leskosky was entrapped and a stay is warranted.

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I. Entrapment

[8] I will provide an overview of entrapment doctrine, the concepts of reasonable suspicion, *bona fide* inquiry, and their relationship to opportunity, and the relationship between opportunity and investigation and opportunity and inducement.

A. Overview

[9] The Ontario Court of Appeal described the foundations of entrapment doctrine in ***R v Ahmad***, 2018 ONCA 534, revd in part 2020 SCC 11 at paras 30 and 31(CA):

> [30] The seminal authority on the modern law of entrapment is the Supreme Court's decision in ***R. v. Mack***, [1988] 2 S.C.R. 903. In setting out the contours of the entrapment doctrine, Lamer J., as he then was, sought to balance two competing objectives. On the one hand, he recognized that the police must be given considerable latitude in their investigation of crime, especially consensual crimes such as drug trafficking where traditional investigative techniques may be ineffective: ***Mack***, at pp. 916-17; ***R. v. Imoro***, 2010 ONCA 122, 251 C.C.C. (3d) 131, at para. 8, affirmed: 2010 SCC 50, [2010] 3 S.C.R. 62. On the other hand, he acknowledged that the police do not have unlimited power to randomly test the virtue of individuals and manipulate them to obtain convictions: ***Mack***, at pp. 941, 959; ***Imoro***, at para. 9.
>
> [31] Entrapment is a variant of the abuse of process doctrine. If an accused can show that the strategy the state used to obtain a conviction exceeded permissible limits, "a judicial condonation of the prosecution would by definition offend the community" and the accused is entitled to a stay of proceedings: ***Mack***, at p. 976. However, given the serious nature of an entrapment allegation and the substantial leeway given to the state to develop techniques to fight crime, a finding of entrapment and a stay of proceedings should be granted only in the "clearest of cases": ***Mack***, at pp. 975-76. The accused must establish the defence on a balance of probabilities: ***Mack***, at p. 975.

See also ***Ahmad*** (SCC) at paras 15, 18; ***R v Gladue***, 2012 ABCA 143 at para 9; ***R v Ndahirwa***, 2018 ABCA 359 at para 2; ***R v Pearson***, [1998] 3 SCR 620 at para 12.

[10] Entrapment occurs in two main ways. Entrapment occurs when either

> (a) the authorities provide a person with an opportunity to commit an offence without
>
> > (i) acting on a reasonable suspicion that this person is already engaged in criminal activity, or
> >
> > (ii) acting pursuant to a *bona fide* inquiry; or
>
> (b) although having such a reasonable suspicion or acting in the course of a *bona fide* inquiry, the authorities go beyond providing an opportunity and induce the commission of an offence: ***Mack*** at 964-965; see ***Ahmad*** (SCC) at para 15 and ***Ahmad*** (CA) at para 49.

[11] Both branches of entrapment serve features of the rule of law in liberal democracies, as described by the Court of Appeal in ***R v Pucci***, 2018 ABCA 149 at para 4:

> [The doctrine] operates to serve two key but distinct goals of our legal order: (a) protecting individuals from groundless and standardless state agent investigations that are in the form of random virtue testing and (b) discouraging the creation of crime by the conduct of state agency.

See ***Ahmad*** (SCC) at para 16. Entrapment doctrine is linked to the fundamental principle that an individual has the right to be left alone by agents of the State unless, in the particular circumstances, the State has a compelling reason for limiting the liberty of the individual: see ***Hunter v Southam Inc***, [1984] 2 SCR 145, Dickson J, as he then was, at 159; ***Ahmad*** (SCC) at para 17.

[12] The burden of establishing entrapment lies on the accused. The accused has the burden of establishing that a stay of proceedings is the appropriate remedy. The accused must establish that the entry of the conviction "would amount to an abuse of the judicial process by the state." In ***Mack***, Justice Lamer confirmed that a stay should be entered only in the "clearest of cases:" at 977.

B. Reasonable Suspicion, *Bona Fide* Inquiry, and Opportunity

[13] Before providing a suspect with an "opportunity" to commit an offence, the police must have a reasonable suspicion that the accused has committed this type of offence or the police must be engaged in a *bona fide* inquiry: ***Ahmad*** (SCC) at para 19. "The offer of an opportunity to commit a crime must always be based upon a reasonable suspicion of particular criminal activity, whether by a person, in a place defined with sufficient precision, or a combination of both:" ***Ahmad*** (SCC) at para 20.

1. Reasonable Suspicion

[14] In ***R v Barnes***, [1991] 1 SCR 449 at 463, Chief Justice Lamer clarified that "[t]he 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" [emphasis added]. This clarification was warranted. It could not be that reasonable suspicion of *any* sort of criminal activity, without limitation, could justify putting an opportunity to offend to a person. That would amount to random virtue testing ("we suspect you've done one sort of crime, let's see if you'll do another").

[15] The concept of "reasonable suspicion" in entrapment doctrine relies on the elaboration by Justice Karakatsanis in ***R v Chehil***, 2013 SCC 49; see ***Ahmad*** (SCC) at para 24; ***Ahmad*** (CA) at para 41. In ***Chehil*** at para 3, Justice Karakatsanis explained that reasonable suspicion is "a robust standard determined on the totality of the circumstances, based on objectively discernible facts, and is subject to independent and rigorous judicial scrutiny." "Reasonable suspicion" has three aspects.

[16] First, reasonable suspicion involves "suspicion." Suspicion is an inference of the possibility rather than the of probability of guilt. It is more than a mere hunch or intuition but less than a belief based on probable grounds.

[17] Second, reasonable suspicion is founded on objective grounds, the facts or evidence supporting the inference of the possibility of guilt. The existence of objective grounds not only anchors the reasonableness of the suspicion but provides a foundation for judicial review of the legitimacy of State action: ***Ahmad*** (SCC) at paras 24, 45.

[18] Third, whether a suspicion is reasonable is determined in the "totality of the circumstances," in all the relevant circumstances. The Court of Appeal explained in ***Pucci*** at para 5 that

> [5] .... At risk of over-simplification, this basis amounts (as in para 30 of ***Chehil***) to "a sufficiently particularized constellation of factors" that brings home against the target of the investigation a reasonable suspicion that the person is engaged in crime: compare *R v Urban*, 2017 ABCA 436 at paras 41 to 42, [2017] AJ No 1393 (QL).

The assessment of the totality of circumstances requires consideration of the evidence collectively, not piecemeal: see ***R v Tetreault***, 2016 ABQB 373 at para 45 (and for a general discussion of "reasonable suspicion," see paras 33 – 51).

[19] Further, as part of the totality of the circumstances, officer training or experience is relevant: "an officer's training or experience can make otherwise equivocal information probative of the presence of criminal activity …:" ***Ahmad*** (SCC) at para 47. And further, the totality of circumstances includes not merely language used during a conversation but the circumstances preceding and including that conversation: ***Ahmad*** (SCC) at para 61.

[20] In ***Ahmad*** at para 82, the Supreme Court confirmed that "police officers must be able to rely on the investigative work of other officers and it is not necessary for the particular officer making the call to personally have all the information that supports reasonable suspicion …. Police work often relies on multiple officers conducting individual parts of an investigation."

2. *Bona Fide* Inquiry

[21] Historically, the "*bona fide* inquiry" branch has tended to focus on physical locations. If the authorities have a reasonable suspicion that a criminal activity is occurring in a location or area – defined with reasonable precision – the authorities may provide a person in that area with an opportunity to commit an offence: ***Ahmad*** (SCC) at paras 20-21; ***Ahmad*** (CA) at para 50; ***Barnes*** at 463; ***R v Le***, 2016 BCCA 155, app for leave to appeal dismissed 2016 CanLII 72705 (SCC) at para 78 (CA). The primary link is between the offence and the location rather than between an individual and the location.

[22] However, the "*bona fide* inquiry" branch also applies to Internet locations: ***R v Faroughi***, 2020 ONSC 407, Leibovich J at paras 8-11 (Backpage.com linked to child prostitution). The Supreme Court cautioned in ***Ahmad*** that "entire websites or social media platforms will rarely, if ever, be sufficiently particularized to support reasonable suspicion:" at para 43 (SCC).

[23] In ***Ahmad***, the Supreme Court confirmed that a phone number can qualify as a "place" or "location" for the purposes of entrapment doctrine: at para 34 (SCC). It is a "precisely and narrowly defined" place, an "individual or well-defined virtual space," a space defined with "sufficient precision:" ***Ahmad*** (SCC) at paras 35, 40, 41 (SCC).

3. Preceding Opportunity

[24] Reasonable suspicion or *bona fide* inquiry must precede provision of opportunity. The Court of Appeal emphasized this relationship of reasonable suspicion and opportunity in ***Pucci*** at paras 9 and 10:

> [9] .... The point in ***Gladue*** was whether the reasonable suspicion was pre-existing to the opportunity to commit the crime in that case not whether there had to be reasonable suspicion pre-existing to any investigation at all ....
>
> [10] For its part, the defence position is that the ***Gladue*** has not created any uncertainty in the law. We agree. The important thing in ***Gladue*** was that the reasonable suspicion had to exist or to come into existence before the opportunity to offend is provided ....

[25] Reasonable suspicion may be formed before an individual is contacted (e.g. by a phone call or message) or after contact but before an opportunity is provided: ***Ahmad*** (SCC) at paras 51, 52, 54, 69. The Court of Appeal wrote in ***Gladue*** at para 9 that

> [9] .... Although a reasonable suspicion that a person is engaged in criminal activity can be developed during the course of an investigation of a tip, it must exist before the opportunity to commit an offence is provided: ***R v Imoro*** ....

[26] Establishing reasonable suspicion prior to contact is, according to the Supreme Court, the preferable approach: ***Ahmad*** (SCC) at para 62. In contacting a suspect without reasonable suspicion, the police are "walking on thin ice, having already intruded upon the private life of their interlocutor:" ***Ahmad*** (SCC) at para 54; see para 52.

[27] Because reasonable suspicion must be formed before an opportunity is given, circumstances that follow the provision of an opportunity are irrelevant to the formation of reasonable suspicion: ***Ahmad*** at paras 59, 60.

C. Opportunity, Investigation, and Inducement

[28] Providing an opportunity must be distinguished from investigation on the one hand, and inducement on the other.

1. Opportunity

[29] What is an "opportunity"?

[30] The Supreme Court wrote in ***Ahmad*** at para 64 that "an officer's action - to constitute an offer of an opportunity to commit a crime - must ... be *sufficiently proximate* to conduct that would satisfy the elements of the offence."

[31] In Justice Trotter's formulation adopted by the Supreme Court, an offer is made "when the officer says something to which the accused can commit an offence by simply answering 'yes':" ***Ahmad*** at para 64; see para 66. An offer to purchase provides an opportunity to sell to the offeree.

[32] I take Defence counsel's point that this approach works more easily in the drug trafficking context than in the context of child luring investigations. Online sexual misconduct investigations can involve more nuanced communications.

[33] Again, what is an "opportunity"? The *Oxford English Dictionary*, 3rd ed (June 2004) provides as its first definition (I.1.a) "a time, condition, or set of circumstances permitting or favourable to a particular action or purpose."

[34] I will consider the meaning of "opportunity" in the context of an investigation of an online sexual offence like child luring, with an undercover officer posing as a child.

[35] To say that an officer has "provided an opportunity" to a suspect to commit an online sexual offence implicates five considerations.

[36] First, the opportunity would be made out through a "set of circumstances," in this context, communications. Communications could be by words or acts, but in the online environment, the set of circumstances would be only words.

[37] Second, those words must show that a "particular action or purpose" is permitted or the achievement of the action or purpose is favourable.

[38] Third, the "particular action or purpose" is a specific online sexual offence.

[39] Fourth, to show permission or favourability for the specific criminal purpose, the words must show permission, acceptance, or willingness to engage in the specific online sexual offence.

[40] Fifth, the demonstration of permission or favourability must be by the ostensible victim, the undercover officer. If the suspect acts or seeks to achieve his or her purposes without receiving relevant communications from the officer, it could not be said that the officer provided the opportunity. As Justice Rosenberg wrote in ***R v Bayat***, 2011 ONCA 778 at para 21, "if it is the accused who takes the lead in directing the conversation, the element of offering an opportunity to commit the offence of child luring is not made out."

[41] For an officer to provide an opportunity, then, the officer, in his or her role as a child, must be the person who took the lead or the initiative to communicate to the suspect that the child permits the achievement of the suspect's criminal purposes with that child.

[42] My approach, I suggest, is consistent with the approach to opportunity set out by Justice Miller in ***R v Ghotra***, 2020 ONCA 373 at para 23: "The narrow conception of 'providing an opportunity' excludes investigative techniques where the originating criminal spark comes from the accused" [emphasis added]. See also para 23.

[43] I add that I entirely agree with Justice Miller in ***Ghotra*** that the mere fact of an initial investigatory step, whether it is by an undercover police officer making a call to a suspected drug trafficker or opening a conversation with a suspected online sexual offender, does not amount to opportunity. Opportunity is not decided by a "but-for" test. Justice Miller wrote the following at para 29: "Providing an opportunity is not established by but-for causation – that but for the presence of the investigating officer posing as a 14-year-old girl, the appellant would not have had the opportunity to commit the offence." I agree with Justice Miller that "If such a broad conception of 'providing an opportunity' were to be adopted, the distinction [between investigation and opportunity] would collapse."

2. Providing an Opportunity vs. Investigation

[44] Reasonable suspicion or *bona fide* inquiry must precede the provision of an opportunity, but not the commencement of an investigation or first contact with a target. In entrapment doctrine, providing an "opportunity" to commit an offence is distinguished from investigative steps: ***Bayat*** at para 2; ***Imoro*** at para 15; ***Ahmad*** (CA) at para 38; ***Ahmad*** (SCC) at para 66. Investigation, that is, mere contact, communication, or conversation by an officer with an individual, the gathering of information by an officer about an individual, does not amount to providing an opportunity.

[45] In the online context, following the approach of Justice Rosenberg in ***Bayat*** at para 21, it is necessary to distinguish an offer to chat from an offer to commit an offence.

3. Providing an Opportunity vs. Inducing

[46] If acting pursuant to a reasonable suspicion or a *bona fide* inquiry, the police are entitled to provide a suspect with an opportunity to commit an offence. The police, though, are not entitled to "induce" the commission of an offence. When does an opportunity shade into an inducement?

[47] In ***Mack***, a "modified" objective test was established for assessing whether the conduct of the police "exceeded permissible limits." Overall, the inquiry concerns whether the police went beyond providing an opportunity to "manufacturing" the crime: at 962.

[48] The focus of the inquiry is "on police conduct with accused persons generally." The question is whether "viewed objectively, the police conduct is improper:" ***Mack*** at 953 and 954-955.

[49] Consideration must be given, though, not only to the average or reasonable person. The "hypothetical or average person model is [not] the only relevant method of analysis:" ***Mack*** at 961. Rather, consideration must be given to the "average person in the position of the accused." The question is not simply whether "anyone would have been induced by the police conduct," but whether "anyone in the position of the accused would have been induced by the police conduct:" ***Mack*** at 959-960.

[50] In particular, if an accused suffered from a "vulnerability such as a mental handicap … [or] an addiction," the inquiry should concern whether a vulnerability was "exploited" by the police:" ***Mack*** at 960; see 963.

[51] At 966 of ***Mack***, Justice Lamer provided a non-exhaustive list of factors relevant to whether the police went beyond providing an opportunity to inducing or manufacturing an offence, that is, whether the police went beyond the permissible limits of investigation. The inquiry into permissible limits must be considered in light of the totality of the circumstances:

- the type of crime being investigated and the availability of other techniques for the police detection of its commission;

- whether an average person, with both strengths and weaknesses, in the position of the accused would be induced into the commission of a crime;

- the persistence and number of attempts made by the police before the accused agreed to committing the offence;

- the type of inducement used by the police including: deceit, fraud, trickery or reward;

- the timing of the police conduct, in particular whether the police have instigated the offence or became involved in ongoing criminal activity;

- whether the police conduct involves an exploitation of human characteristics such as the emotions of compassion, sympathy and friendship;

- whether the police appear to have exploited a particular vulnerability of a person such as a mental handicap or a substance addiction;

- the proportionality between the police involvement, as compared to the accused, including an assessment of the degree of harm caused or risked by the police, as compared to the accused, and the commission of any illegal acts by the police themselves;

- the existence of any threats, implied or express, made to the accused by the police or their agents;

- whether the police conduct is directed at undermining other constitutional values.

II. Assessment

[52] I will address whether the investigation involved a *bona fide* inquiry, the Boise PD Report, and the investigation of Mr. Leskosky, with reference to how it was designed, what occurred, and when reasonable suspicion was claimed to have been formed. I will then address whether or not the investigation entrapped Mr. Leskosky. I will consider some preliminary issues, whether reasonable suspicion preceded the provision of opportunity, and whether the opportunity provided was inducement, with particular regard to Mr. Leskosky's vulnerabilities.

A. *Bona Fide* Inquiry

[53] The investigation of Mr. Leskosky was not a *bona fide* inquiry investigation.

[54] The investigation of Mr. Leskosky did not involve a website notoriously linked to sexual communications with underage victims. The foundation for the investigation was not that Mr. Leskosky had frequented an internet "location" that itself raised a reasonable suspicion that users were involved in offences involving underage victims. (In such a case, the site and use of the site are the foundation for the reasonable suspicion rather than evidence peculiar to an individual user.) See ***Faroughi*** at paras 9-10.

[55] Instead, the investigation focused on Mr. Leskosky personally. The reasonable suspicion, then, had to attach to Mr. Leskosky himself.

B. The Boise PD Report

1. The Boise Complaint

[56] In January 2018, Boise PD received a "lewd conduct" complaint. Following investigation, a report containing screenshots of Facebook Messenger communications was sent by Boise PD to Wainwright RCMP. The report disclosed that in mid-September 2017, a young woman in Boise received a Facebook Messenger message from the account of Trevor Leskosky, who "lives in Wainwright, Alberta." In the ensuing Messenger conversation, the young person stated she was 14. Boise PD checked the Facebook account of the (apparent) sender that linked him to Wainwright.

[57] Some messages by the sender captured in the screenshots were as follows:

- Let's go Broncos
- Are u boise state football fan
- How old are u

- I am true boise state football fan
- I am 41 is that's okay by u
- Is it okay that I am 41
- I am single
- Are u single
- (in response to the reply, "No I have a girlfriend") Are u lesbian
- (in response to the reply, "No pan, I like girls, guys, and gender neutral/queer") Cool
- Can we talk about it / If that's okay
- I am slow learner
- I like pansexual and bisexual girls
- I trying not to get hard.

[58] The complaint was made by the young person's father on January 8, 2018. The report was sent by Boise PD to Wainwright RCMP on January 10, 2018 (the Boise PD Report).

2. Receipt and Review of the Boise PD Report by ICE

[59] Wainwright RCMP forwarded the Boise PD Report to ICE.

[60] Detective Horchuk received the report. He double-checked the Facebook information about Mr. Leskosky but sought no further information before starting the investigation.

[61] Detective Horchuk believed that the Boise information supported a reasonable suspicion that the sender, Mr. Leskosky (the person to whom the Facebook messages were linked), was involved in a child luring offence involving the Boise child: T28-29, 30, 31. That would justify an undercover operation. A 41-year old had communicated with a 14-year old about sexual topics. The individual specifically stated "I try not to get hard."

[62] Detective Horchuk put the file into the queue of files, ordered by risk assessment priority.

[63] The file came up for action in the second week of March. Detective Horchuk assigned the file to one of the undercover operators, Cst. Morrison.

[64] Cst. Morrison also had reasonable suspicion based on her assessment of the Boise PD Report: "after reading everything and discussing it with Detective Horchuk ... we decided that we had reasonable suspicion ... to engage in an undercover operation:" T76.32-37.

C. The Investigation

[65] All of the Alberta-based investigatory steps respecting Mr. Leskosky took place in 2018.

1. The Boise PD Report and Confirming Reasonable Suspicion

[66] While Det. Horchuk believed that the Boise information supported a reasonable suspicion that Mr. Leskosky had committed a child luring offence, he considered the Boise information to be problematic in that it had been sent from another jurisdiction. Were it to be relied on, there could be logistical issues around obtaining witness participation. Moreover, since the

investigation was not by ICE, Det. Horchuk could not be sure whether the information was misleading or involved miscommunication.

[67] Detective Horchuk decided *not* to rely on the Boise information as providing the only reasonable suspicion to support the investigation. Instead, ICE would "parallel source" its information. It would rely on information it collected and evaluate that information separately from the Boise information. ICE would develop its own reasonable suspicion. Detective Horchuk testified that

> we would form our own reasonable suspicion based on our own communication with the suspect and we would base our investigation on that, which would negate the necessity of having to call witnesses up from Idaho. It would also afford a safety net in case there was a misrepresentation or miscommunication along the way, we would play the investigation slower and safer and draw our own conclusions based on the evidence we collected: T29.13-18.

[68] Constable Morrison confirmed that "we like to re-establish the grounds of suspicion ... just to make sure that ... they were there:" T77.28-30.

[69] Detective Horchuk testified that operators were encouraged to form their own assessments of reasonable suspicion: T31.37-38, 32.4-5. A process was in place in case a cover manager and operator disagreed about whether reasonable suspicion was made out.

2. Pre-Contact

(a) Manner of Approach

[70] As described by Det. Horchuk, the plan devised was to "mirror the circumstances" of the Boise incident, using the same platform (Facebook Messenger), contacting the same target account (Mr. Leskosky's), by another young female of about the same age as the Boise young person. Cst. Morrison pointed out that the contact would not be made through an "active account" (e.g. the Boise young person's account).

[71] The contact would not immediately afford an opportunity to commit an offence. The aim was to "slow it down," to "cautiously engage in communication" with Mr. Leskosky so that reasonable suspicion could be developed (if at all) through ICE's own efforts.

[72] Contact would be initiated, then withdrawn. Mr. Leskosky would receive the equivalent of a "wrong number" call. Cst. Morrison referred to this tactic as a "cold bump."

(b) The *Persona*

[73] The *persona* constructed for Emily Parks requires some attention.

[74] Emily would be young, 13. She would also display vulnerability as a type of marginalized young person, one with diminished social supports.

[75] The thinking was that this is a common victim for online predators. Predators choose children with fewer social supports because they have "less oversight" than other children. Vulnerable children would be less supervised in their online activities and would have fewer adults to go to or have less inclination to go to adults than children with better social supports.

[76] Emily would appear to be an attractive victim for a predator.

[77] This *persona* was conveyed in Emily's first message (001), sent at 4:34 p.m. on March 12. This was the "wrong number" message:

> Hey Trev, I am so sorry about the other night with my dad. I am so tired of his rules! Like honestly I cant wait till i turn 14 because my Aunt said she will give me some money. When I get that im fucking gone hahah SEE YAH! lol-anyways thanks again for being a shoulder to cry on (smiley face).

The diminished social support for Emily (or perhaps her rebellious nature) is made out through her claimed difficulties with her father and her plan to leave her family when she was just 14 (at that point, she would be on her own). Her age, 13, was also established.

3. Contact

[78] Mr. Leskosky received the March 12, 4:34 p.m. message from Emily.

[79] Before he responded, she sent another message:

> OMG! this is the wrong Trevor! I am so sorry!
>
> Im so embarrassed!!!: 002-003.

[80] At 4:50 p.m., Mr. Leskosky sent an innocent response: "It is okay i understand:" 003.

[81] That was all for March 12.

4. March 13

[82] On March 13 at 7:53 a.m., Emily wrote back to Mr. Leskosky: "hahaha well my face is red! thank you for being so nice about it…:" 003. A conversation ensued. Mr. Leskosky mentioned not sleeping the night before. Emily commented that she hadn't slept because she'd had a test: 004. This bit of the conversation was capped at 9:08 a.m. (005):

> Trevor: Just relax
> Hugs
>
> Emily: aww that really nice of you (smiley face) I think I get test anxiety …

[83] Emily's last message was followed by Trevor at 9:09 a.m. (005-006):

> Trevor: Your very welcome how old are u
>
> Emily : Im 13 (smiley face icon) and you?
>
> Trevor: 41
>
> Emily: that's not that old…
>
> Trevor: Thanks

[84] Mr. Leskosky significantly accelerated the intensity of the development of the relationship in the following minutes. At 9:11 a.m., the following messages passed (006-007):

> Emily: im just going into class … chat later?
>
> Trevor: Do u like me a lot

Ooxoxoxoxox

Emily: Im not sure hahah you seem nice but I don't really know you yet!! hahaha

At 9:12 a.m., Mr. Leskosky wrote:

I like u
Do u like older men: 007-008.

5. Cst. Morrison – Reasonable Suspicion

[85] At this point, 9:12 a.m. on March 13, Cst. Morrison stated that she had re-established reasonable suspicion on the following basis. She had established that Emily was 13 and Mr. Leskosky said he was 41. He asked "Do you like me a lot," followed by the x's and o's which meant hugs and kisses. He said "I like u." He then asked "Do u like older men:" T88.34-89.22.

[86] Detective Horchuk reviewed the conversations on March 14. He also considered reasonable suspicion to have been established on March 13: T34.2-4, 15-16. Detective Horchuk referred to similar factors as Cst. Morrison, but appears to have fixed his formation of reasonable suspicion a little later, by 10:20 a.m. (008-009): "So at this point I would say I'm very strong in my reasonable suspicion that the suspect is now committing the offence of child luring:" T49.40-41.

[87] Detective Horchuk's reasonable suspicion, I note, was not in real time, but after-the-fact, at least after completion of the March 13 communications.

6. March 13 (continued)

[88] At 9:29 a.m., Emily said "I have never been with an older man before hahha." At 10:20 a.m., Mr. Leskosky said "Awesome/Do u want to try." After Emily asked "try what? lol," Mr. Leskosky said "I never been with 13 girl before/To be with a older man:" 008-009.

[89] Mr. Leskosky asked Emily for a photo twice, at 9:29 and 10:29 on March 13: 008, 009. Emily did not provide a photo. Mr. Leskosky provided two photographs of himself: 012-016.

[90] At 10:32 a.m., Mr. Leskosky said "I want to date u:" 018 (he asked if Emily wanted to "date" him again on April 17 (065)). At 10:35 a.m. he asked Emily "do u want to make out with me:" 021. He told Emily "Making out is kissing and touching:" 022. At 10:52 he asked "Do u want me to kiss u all over?:" 025.

[91] At 10:55 a.m., his query was clear – "Do u want to have sex with me:" 026. He went on to confirm at 11:04-07, "So u want to have sex with older man:" 028. Emily asked at 11:15 a.m. "Do you want to have sex with me?" Mr. Leskosky said "I want to:" 029. He did go on to say, "If u aren't ready for sex we don't have to do it." Emily said "Im ready / how would it feel tho ...:" 029.

7. March 14-16 and 27-April 5

[92] Conversation of a non-sexual nature occurred later on March 13 and on March 14-16 and March 27.

[93] On March 15, Mr. Leskosky said (047)

I am slow learner

I have specking problems

I can't say words right

He repeated "I am slow learner" after the incident that occurred on April 17: 076. He had first said "I have specking problems" on March 13: 024.

[94] On March 29, Mr. Leskosky said "I want u:" 055, but that was the only concerning comment.

[95] Nothing sexual was said on March 28, 29, 31, April 3 or 4.

[96] On April 5, Mr. Leskosky repeated his "I want u" language, starting at 3:41 a.m.: 059, 060.

[97] A gap in communications followed (except for a "hey" from Mr. Leskosky on April 16).

8. April 17

[98] On April 17, 2018, Mr. Leskosky told Emily he wanted to "cuddle" (063, 064) and that he wanted to "hold u in my arms:" 065. He asked "Do u want to date me:" 065.

[99] He then asked Emily if she was in the bathroom.

[100] She told him she was in the bathroom and asked "what now?": 067.

[101] He said "I am scare if I say thing bad to u and I will get in trouble," to which she responded "what can you say that will be bad?": 067.

[102] He said "Naughty stuff:" 067.

[103] Emily reassured him. She said she won't show her mom. And "haha I wont silly … and its password protected:" 067-068. Shortly afterward, he said "U won't reported me:" 069. Later, after the event I will next describe, he said "It is our secret:" 078.

[104] Mr. Leskosky indicated he wished to "play" and that Emily should "touch" herself: 066. He directed her to "Put your hand between your legs:" 070. He asked if she had put her hand inside her pants (071) and whether she was touching herself: 070, 073. His texts show that he claimed to have masturbated to orgasm during this exchange: 069, 073.

9. April 18

[105] On April 18, Mr. Leskosky repeated "I want I / I want u": 081, stated "I want to share my love with you:" 082; and referred to "lips" and "hugs:" 082-083; and "hugs and kisses:" 085.

[106] On April 18, Emily sent him a photograph of "herself." This was not obviously a 13-year old, but Emily explained that she looked mature for her age and was wearing makeup: 089.

[107] Nothing significant was captured in the records from 086-097.

10. April 19

[108] On April 19, following some innocent conversation about Mr. Leskosky's ambitions, he said "Do u and your friend talk bout sex." He then asked "Do both of u get wet when u and her bout sex:" 100-101. He then asked whether Emily and her friend touch each other, and whether Emily wanted to touch her friend. Emily said "If you wanted me to i could." Mr. Leskosky responded "Sure / Would she let u / Is she with u:" 101-102. She was not with Emily. Mr. Leskosky said "Ask her:" 102. After some further sexual conversation, he asked "Is she close by

to u" and wrote "As her to come to the bathroom:" 103-104. Emily asked what would occur if "we went to the bathroom." Mr. Leskosky said "Kiss her and pull your pants down front of her … Feel her up:" 104.

[109] After some yet further sexual conversation, on confirmation that Emily was in the bathroom, Mr. Leskosky directed her to "touch your self and think bout girls:" 110. He followed up by asking whether she was touching herself, and thinking "bout girls:" 111-112.

11. April 19 and 24

[110] Also on April 19, Mr. Leskosky asked Emily whether she'd had sexual contact with a "guy" before. She described an incident: 113-114.

[111] He then asked "Do u want a guy touch u" and "Is there a boy around u:" 114. He directed Emily to "Check to see if there is a boy in hallway" and repeated "Did u check:" at 115. Emily said there was no one around, but asked "what if there was"? Mr. Leskosky said "I want him to feel u up:" 115. He confirmed that Emily was touching herself: 116-117. Some further graphic sexual talk followed: 117-121.

[112] On April 24, Mr. Leskosky asked Emily "Have u been touch yet:" 121. He said "You can be touch by a kid in school … I like when u been touch:" 122. He said

> Get a kid In your school
> Please p
> And take him to the bathroom: 122-123.

He said

> Have him feel you up and pull your pants down
> Are u ready
> Did u find one: 123

He asked again, "Did u find one" and

> Did u find a boy
> Hello
> Tell me
> Did u find one
> What is going on
> Is he with u
> Are u going talk to me: 124.

He then directed Emily to "Have a older guy try to touch u:" 125. This was followed by further directions: "I want to u to have phone sex with older men;" "I want u to be touch by a guy:" 125, 130.

[113] Later, in the course of further sexual conversation, Mr. Leskosky returned to this theme: "Are u around with a boy …. I want him touch u …. your pussy …. Any other boy there / I want him to feel u up and have sex:" 132.

[114] This was followed by a direction to Emily to touch herself: 134.

[115] Aside from some communications relevant to Mr. Leskosky's knowledge of Emily's age later that day (137-138) nothing further occurred on April 24.

12. April 25 to the close of the investigation

[116] From April 25 (aside from Mr. Leskosky's comment about wanting to "take this slow" and wanting to "know everything bout u before we meet" (143)), to mid-May when the investigation closed, nothing significant passed between Mr. Leskosky and Emily.

[117] Mr. Leskosky was arrested at his home in Wainwright shortly before 7 a.m. on May 29.

[118] I will begin the entrapment analysis by considering two preliminary issues – whether the police failed to investigate Mr. Leskosky properly before commencing the investigation and whether the investigation was invalidated by delay in its commencement. I will then consider whether Cst. Morrison provided an opportunity for Mr. Leskosky to offend *before* she had reasonable suspicion to believe he was engaged in a child luring offence, and whether Cst. Morrison, with Det. Horchuk, went beyond providing opportunities to Mr. Leskosky to offend and induced him to offend.

D. Preliminary Issues

1. Steps not taken after the Boise PD Report

[119] A preliminary argument raised by the Defence was that the police failed to take any reasonable steps to investigate Mr. Leskosky prior to commencing the online investigation. Little more was done than to check Mr. Leskosky's public Facebook account and confirm that the Facebook account used in the Boise incident was his account. In particular, the police failed to pursue any investigation relating to Mr. Leskosky's cognitive challenges, despite having notice of those challenges.

[120] The Boise PD Report did contain suggestions of Mr. Leskosky's cognitive challenges. At page 003, Mr. Leskosky referred to himself as a "slow learner." The diction employed in his messages was – to use a term employed in these proceedings – juvenile.

[121] Mr. Leskosky lived in a small community. It would have been simple to make inquiries about him. We learned from Mr. Myggland that Mr. Leskosky was active with two sports organizations in the Town and was a volunteer with the local Stampede. The extent of his disabilities could have been ascertained.

[122] Properly speaking, these concerns fell outside the entrapment application. The concerns are in the nature of allegations of inadequate investigation or tunnel vision on the part of the police. There are four responses to the concerns.

[123] First, respecting inadequate investigation claims, Justice Veldhuis wrote as follows in ***R v Malley***, 2017 ABCA 186 at para 53:

> [53] Although courts sometimes refer to the "defence" of inadequate investigation, this nomenclature is misleading. It suggests the Crown must establish that the police conducted a proper investigation in order to meet its burden of proof. Merely suggesting that if the police had conducted their investigation differently some exculpatory evidence *might* have turned up is, without more, pure speculation. Reasonable doubt must be rooted in the evidence or the lack of evidence, not speculation. A deficient investigation may sometimes

> influence whether the trier of fact has a reasonable doubt, but the trier of fact should focus on the quality of the evidence, not the quality of the police investigation. [emphasis in original]

Inadequate investigation is a defect that may lead to acquittals based on reasonable doubt left outstanding. True, it may also lead to wrongful convictions, as when a potential perpetrator is overlooked in an investigation. Trial is behind us and there is no new evidence showing the deficiency of evidence at trial, particularly as regards a third-party perpetrator. This aspect of the preliminary argument goes no further.

[124] Second, the inadequate investigation concerns turn on the proposition that the police owed a positive duty to Mr. Leskosky to carry out preliminary investigations or more extensive preliminary investigations than they did. The police, though, are not obligated to conduct investigations that assist the Defence. In ***R v Darwish***, 2010 ONCA 124, Justice Doherty wrote as follows at para 30:

> [30] An accused also does not have a constitutional right to direct the conduct of the criminal investigation of which he or she is the target. As Hill J. put it in *R. v. West*, [2001] O.J. No. 3406, [2001] O.T.C. 711 (S.C.J.), at para. 75, the defence cannot … "conscript the police to undertake investigatory work for the accused"; see, also, *R. v. Schmidt*, [2001] B.C.J. No. 3, 151 C.C.C. (3d) 74 (C.A.), at para. 19. That is not to say that the police and the Crown should not give serious consideration to investigative requests made on behalf of an accused. Clearly, they must. However, it is the prosecutorial authorities that carry the ultimate responsibility for determining the course of the investigation. Criminal investigations involve the use of public resources and the exercise of intrusive powers in the public interest. Responsibility for the proper use of those resources and powers rests with those in the service of the prosecution and not with the defence.

The police owed no positive obligation to make additional investigations on Mr. Leskosky's behalf.

[125] Third, as the Crown pointed out, further investigation would have accomplished little. The members of the local RCMP Detachment who testified in the proceedings had no information about Mr. Leskosky. A Subject Profile (dated March 13, 2018) was prepared by an ICE analyst and made an exhibit in the proceedings. It disclosed nothing significant.

[126] Further, Det. Horchuk testified that making inquiries in Wainwright could have alerted Mr. Leskosky about the investigation. ICE did not know "who knows who" in Wainwright.

[127] Fourth, if the inadequate investigation concerns are bent towards the entrapment issue by the argument that the failure to perform reasonable background inquiries about Mr. Leskosky prevented the police from forming reasonable suspicions about Mr. Leskosky, the concerns are met by Justice Karakatsanis' observation in ***Chehil*** at para 34:

> [34] ... the obligation of the police to take all factors into account does not impose a duty to undertake further investigation to seek out exculpatory factors or rule out possible innocent explanations ....

2. Delay in Proceeding

[128] There was about a three month delay in the commencement of the ICE investigation after Wainwright RCMP delivered the Boise PD Report. Boise PD sent its report about two months after the events occurred, although the complaint was made by the Boise complainant's father only on January 8, 2018. Boise PD acted quickly in the circumstances.

[129] It is true that a factor referred to in ***Mack*** is the "timing of the police conduct." Timing is relevant to the formation of reasonable suspicion, since if information about a suspect is dated it may no longer have much probative value on whether the suspect currently remains involved in criminal activity – hence, "the conduct must not be too remote in time:" at 958.

[130] Whether the delay was three months (the most fair assessment, in my view) or five months, in my opinion, the delay did not affect the probative value of the information in the Boise PD Report. The Crown pointed out that sexual preferences and practices tend to be long-standing. Put another way, substantial change in sexual preferences and practices would not likely have occurred within three to five months. The law enforcement concerns raised by the Boise PD Report remained valid in March 2018. Further, given the need for resource allocation to high priority, high risk matters, ICE was justified in delaying the start of its investigation for a few months.

E. Reasonable Suspicion Preceding Opportunity

1. The Boise PD Report

[131] In my opinion, Cst. Morrison, Det. Horchuk, and the Crown were correct that the Boise PD Report, by itself, set out information that supported a reasonable suspicion that Mr. Leskosky was involved in online child sexual offences.

[132] The report is hearsay, but hearsay may be considered in forming reasonable suspicion. The report is from another policing agency. The ultimate source of the information is the complainant and her father. The accuracy of the matters reported is supported by the screen shots of the messages attached to the report. There is corroboration of the contents of the messages by the links established to the putative sender, Mr. Leskosky, and by Mr. Leskosky's connections to the Boise State football team. Those connections were supported by both photographs and statements in evidence in these proceedings.

[133] The messages show that Mr. Leskosky initially referred to Boise State football, but rapidly pivoted to sexual talk. The young person's age of 14 was confirmed. He confirmed his age of 41. He said he was single. He inquired about private sexual matters. He said he had to "try not to get hard." The messages show that he was seeking to establish a relationship with the young person and he was interested in talking about sex. This young person was a stranger to him. The football talk was a pretext to move to sexual talk. All of this in one brief set of messages. The messages raised the reasonable suspicion that Mr. Leskosky would continue to proceed toward the commission of online sexual offences.

[134] Because the young person was a stranger and because Mr. Leskosky used football as a pretext for initiating a personal connection, a reasonable suspicion was also supported that this tactic could be employed again.

[135] The report concerned events that were relatively recent.

[136] While Det. Horchuk and Cst. Morrison sought to establish their own reasonable suspicion respecting Mr. Leskosky, neither disavowed the Boise information. Neither claimed that they did *not* have a reasonable suspicion based on this information. They sought their own reasonable suspicion to *confirm* reasonable suspicion, to have their own reasonable suspicion basis for their investigation, in case problems with the Boise information developed.

[137] Because Cst. Morrison and Det. Horchuk had reasonable suspicion based on the Boise information, the investigation of Mr. Leskosky and providing opportunities to offend to Mr. Leskosky were justified.

[138] In any event, the Boise information prevented the investigation of Mr. Leskosky from being a "random virtue check." The Boise information provided a good reason for ICE to investigate Mr. Leskosky. Not following-up on the Boise information would have been improper.

[139] As Cst. Morrison and Det. Horchuk also relied on reasonable suspicion generated through their own efforts, I will assess whether they succeeded.

2. March 12 and 13

[140] The critical dates for assessing whether Cst. Morrison provided an opportunity for Mr. Leskosky to offend *before* she had reasonable suspicion to believe he was engaged in a child luring offence are March 12 and 13. I will assume for the following, *arguendo*, that the Boise information did not provide reasonable suspicion for proceeding with the ICE investigation of Mr. Leskosky.

[141] Two issues arise. First, did Cst. Morrison and Det. Horchuk proceed without any reasonable suspicion, by beginning with an opportunity rather than with investigation? Second, did Cst. Morrison's claim to have formed reasonable suspicion precede extending an opportunity to offend to Mr. Leskosky?

(a) Did ICE begin with opportunity?

[142] "Mirroring the circumstances" of the Boise incident made sense. ICE was investigating an offence that involved contact through Facebook with an underage person. A practical and relevant way of making contact, then, was through Facebook. There were no obvious alternatives to this approach. While Justice Lamer referred to this factor as going to inducement rather than reasonable suspicion, the "type of crime being investigated and the availability of other techniques for the police detection of its commission" is relevant to whether first contact, by itself, was licit: ***Mack*** at 966.

[143] The contact was set up as a misdirected communication.

[144] The *persona* crafted by Det. Horchuk was effective. It certainly met the parametres of the online luring investigation. By statute, the offence involves telecommunications and persons communicated with under age 16.

[145] But was the *persona* too effective? One might say that it was just the right bait. In Defence counsel's language, the police "knew which buttons to push." But does trolling with just the right bait entrap the person who strikes at that bait? Did contact by that *persona* constitute an opportunity or an inducement before reasonable suspicion had been obtained?

[146] In my opinion, the design of the *persona* did not transform a wrong number into an opportunity.

[147] First, at this point, the police had done nothing besides make the wrong-number-contact. It may be that for certain types of offenders any type of contact at all by a preferred type of victim may be perceived as the presentation of an opportunity. However, the orientation of the entrapment analysis is objective not subjective. Justice Lamer wrote in ***Mack*** at 965 that

> the focus should not be on the effect of the police conduct on the accused's state of mind. Instead, it is my opinion that as far as possible an objective assessment of the conduct of the police and their agents is required …. While predisposition of the accused is, though not conclusive, of some relevance in assessing the initial approach by the police of a person with the offer of an opportunity to commit an offence, it is never relevant as regards whether they went beyond an offer, since that is to be assessed with regard to what the average non‑predisposed person would have done.

While Justice Lamer was dealing with the distinction between an opportunity and an inducement, the objective focus should also be employed in determining whether a contact is only a contact and not an opportunity.

[148] In ***Mack***, Justice Lamer was at pains to reject a model of entrapment doctrine that turned on whether an accused was predisposed to engage in an offence, as that would immunize some excessive police conduct from judicial review ("he would have done it anyway") and would put some individuals at enhanced risk of being subjected to excessive police conduct (they would be swept up as the "usual suspects"). This protection of individuals from excessive police conduct despite any predisposition should not be transformed into extra protection from legitimate police investigation just because of predisposition.

[149] Objectively, a reasonable person would not perceive a wrong number to be an opportunity to offend.

[150] This conclusion follows even if the reasonable person is modified to take into account Mr. Leskosky's particular challenges. It cannot be that just because an individual faces cognitive challenges, the person has no control of sexual desire relating to young people. The moral fault does not follow from the intellectual impairment. The Supreme Court has warned us against illegitimate generalizations. To assume that cognitive deficits correlate with pedophilia would truly be an invidious and unjustified generalization.

[151] Further, these reflections go to the contention that the police failed to perform sufficient investigations respecting Mr. Leskosky. Knowledge of his cognitive challenges could in no way have influenced the crafting of Emily's *persona*. His cognitive challenges were simply irrelevant to her construction.

[152] Second, the initial contacts by Emily with Mr. Leskosky lacked the features of an opportunity. Emily's language did not display any indication of a willingness on her part to participate in sexual transactions with Mr. Leskosky.

[153] To suggest otherwise is to suggest that the mere virtual contact of a child with an adult somehow imports an invitation to sexual connection. That cannot be. I agree with Justice Miller in ***Ghotra*** at para 30: Such an argument "could only succeed … in a world where any 14-year-

old girl who agrees to chat on-line with an adult male in a general interest chat room thereby communicates that she is potentially receptive to a sexual encounter. That is not our world."

[154] It would not be unfair to suggest that the contrary view would re-deploy implied consent for virtual appearance, a result not countenanced by the law: ***R v Ewanchuk***, [1999] 1 SCR 330, Major J at para 31; ***R v Barton***, 2019 SCC 33, Moldaver J at para 118.

(b) Formation of Reasonable Suspicion

[155] Cst. Morrison testified that she had re-established reasonable suspicion by 9:12 a.m. on March 13. Detective Horchuk referred to similar factors as Cst. Morrison, but appears to have fixed his point of reasonable suspicion a little later, by 10:20 a.m. I entirely accept Cst. Morrison's testimony that subjectively she believed she had reasonable suspicion. Whether her subjective suspicion was objectively reasonable is for the Court to decide.

[156] If Cst. Morrison did not have reasonable suspicion by 9:12 a.m. and if shortly after that time, before a reasonable basis for the suspicion was established, she had provided an opportunity to offend to Mr. Leskosky, Cst. Morrison would have entrapped Mr. Leskosky.

[157] I note that for March 13, it is Cst. Morrison's reasonable suspicion that is at issue, since Det. Horchuk was not directly participating in the investigation at this time and he was not consulting with Cst. Morrison in real time.

[158] Two questions then: Did Cst. Morrison have reasonable suspicion by 9:12 a.m.? Did Cst. Morrison provide an opportunity to offend to Mr. Leskosky before reasonable suspicion was established?

(i) Reasonable Suspicion by 9:12 a.m.

[159] The morning of March 13 was the first time Emily and Mr. Leskosky had an e-conversation. Cst. Morrison had established that Emily was 13 and Mr. Leskosky said he was 41. He had asked her age before providing his own. By 9:08 a.m. he had said "Hugs" to her. At 9:11 a.m. he says "Do u like me a lot / Ooxoxoxoxox," those last symbols meaning hugs and kisses. At 9:12 a.m. he said "I like u / Do u like older men."

[160] In my opinion, Cst. Morrison was right. She had established reasonable suspicion by 9:12 a.m.

[161] Mr. Leskosky was driving the conversation with Emily to physicality, despite their established age difference. He repeated, in effect, that he wanted to hug her. He was asking about being liked – although by this time the conversation with Emily, a stranger, had only stretched over about an hour. He raised the question, "Do u like older men." That question makes no sense outside a romantic context. One would not ask, e.g., "do you like your math teacher even though he is old?" if the context were non-romantic. The "like" Mr. Leskosky is employing here is the "like" between persons in intimate relationships or embarking on intimate relationships. The "criminal spark," the driving of the conversation, the lead, was all provided by Mr. Leskosky.

[162] My conclusion is not affected by Det. Horchuk setting his reasonable suspicion at a somewhat later time on some additional evidence. Because we are dealing with reasonableness, there is no bright line, binary, in/out test. Reasonableness falls along a range. Different individuals can set their determinations of reasonable suspicion at different points within that range. I cannot say that Cst. Morrison's assessment of reasonable suspicion falls outside that range.

(ii) An Early Opportunity?

[163] The reason for the concern about the early formation of reasonable suspicion is that at 9:29 a.m., Emily said "I have never been with an older man before hahha:" 008.

[164] That comment, the Defence appeared to suggest, ignited what followed.

[165] Emily's "been with" comment, the Defence contended, was sexual in nature. This prompted Mr. Leskosky to respond immediately with "Awesome / Do u want to try:" 009. When Emily asked "try what? lol," he said "I never been with 13 girl before / To be with older man:" 009. Mr. Leskosky's responding comments are, in my view, indisputably sexual in connotation. But if his use of "been with" is sexual, so must be Emily's. He is only repeating her words.

[166] Since I have found that Cst. Morrison had reasonable suspicion before the 9:29 a.m. comment, whether this comment amounted to an opportunity is moot. She was entitled to provide an opportunity.

[167] But even if Cst. Morrison did not have reasonable suspicion by 9:29 a.m., in my opinion, that statement did not amount to an opportunity. She was responding to Mr. Leskosky's question, "Do u like older men." She was saying, in effect, I don't know, ha-ha-ha. That was not the equivalent of saying, "I have never had sexual relations with an older man but I would entertain having sexual relations with you." To this point, Emily had said nothing sexual. Her interventions were carefully neutral, seeking clarification from Mr. Leskosky. He did interpret her remark as having a sexual connotation, but that is because that was what he was looking for. He was continuing to drive the conversation towards sexual matters.

[168] I accept Det. Horchuk's characterization of Emily's remark. It is a "deliberately open ended and somewhat ambiguous" statement. The statement is "vague:" T49.19-26.

[169] Further, the Supreme Court has confirmed that the police require some latitude in the investigation of crimes like the crimes Cst. Morrison was investigating. In context, one ambiguous term cannot transform a comment into an opportunity. The context is, again, that Mr. Leskosky was driving the conversation towards sexualized matters.

(c) Conclusion

[170] Commencing at around 10:35 a.m. on March 13, Emily's messages could be understood as providing opportunity to Mr. Leskosky. He asked her if she'd "cuddle:" 021-022. She said she would. When he said he would "kiss u all over," she said "that would feel really good! I would probably want more tho!:" 025. Mr. Leskosky then advanced to asking whether Emily would have sex with him: 026. The s. 172.1(1)(b) offence was established.

[171] Subsequently, Emily said "I have actually never had sex," with some further elaboration: 027. She expressly asked Mr. Leskosky at about 11:15 a.m. "Do you want to have sex with me?:" 029. She said she was "ready" for sex: 029.

[172] These explicit comments by Emily followed, in my view, the establishment of reasonable suspicion that Mr. Leskosky was engaged in an offence under s. 172.1(1)(b). Insofar as these comments constituted opportunities, the provision of opportunities was preceded by the formation of reasonable suspicion.

[173] In any event, Cst. Morrison certainly had reasonable suspicion by 10:20 a.m., when Mr. Leskosky said that he had never been with a 13-year old girl before. Again, in my opinion, no opportunity was provided before that time.

F. Opportunity or Inducement?

[174] I must consider whether Cst. Morrison, with Det. Horchuk, went beyond providing opportunities to Mr. Leskosky to offend and induced him to offend, whether, in light of the ***Mack*** factors, they overstepped in their investigation of Mr. Leskosky and either "manufactured" his offending or used excess and improper investigative tactics. The totality of the circumstances must be considered.

[175] In my view, some of the ***Mack*** factors have no significant bearing on the investigation of Mr. Leskosky. I will review these factors before considering whether the evidence shows that Mr. Leskosky took the initiative in offending, and whether his particular vulnerabilities were exploited by the police.

1. No Significant Bearing

[176] Some of the ***Mack*** factors manifestly do not assist Mr. Leskosky.

[177] ICE was investigating a potential offender who communicated with underage individuals online. The approach taken, by having Emily "accidentally" contact Mr. Leskosky through Facebook Messenger, was appropriate to the type of crime being investigated and the availability of other techniques for the detection of offences. No other means of investigating was available. There was no reasonable prospect of obtaining a warrant, e.g., to monitor his Facebook usage. Even if there were, that sort of surveillance would have been far more intrusive than monitoring a single thread of communication between Mr. Leskosky and Emily.

[178] It is true that Cst. Morrison contacted Mr. Leskosky. Mr. Leskosky did not initiate contact with Emily. Again, no other means of investigating was available.

[179] ICE's stratagem relied on deceit, on Cst. Morrison's presentation as Emily, but again, that was an appropriate investigatory technique for the type of crime in question.

[180] The approach taken by ICE did not undermine constitutional values and there was no such argument.

[181] Certainly there was nothing threatening in Emily's communications.

[182] Mr. Leskosky's communications were not dragged from him through police persistence. After March 13, he was the more frequent messenger, nearly always contacting Emily rather than Emily contacting him. Emily engaged in nothing like pressing and persistent importuning.

[183] Emily did make some communications of a sexual nature, but in nature and number dwarfed by Mr. Leskosky's sexual communications. I do not find that Emily's participation was disproportionate as compared to Mr. Leskosky's wrongdoing.

[184] Mr. Leskosky may have believed that Emily was his friend. Emily, however, was a 13-year old stranger to Mr. Leskosky when he committed his first offence on March 13. The police could not be said to have "exploited" friendship or any relationship of significant duration. Mr. Leskosky did not act to somehow protect or promote Emily's interests. He sought to promote his own interests through her.

2. Initiative or Inducement

[185] Before considering whether Mr. Leskosky acted on his own, at his own initiative, in the exercise of his own agency, or was induced to act by the police, some of his conduct in April should be recalled.

(a) April Events

[186] Mr. Leskosky's most serious conduct occurred on April 17, 19, and 24. The conduct is set out in detail in the trial judgment and will not be repeated at this point.

[187] The April 17 incident was preceded by some conversation between Emily and Mr. Leskosky. Most of the messages were from Mr. Leskosky. Up until Mr. Leskosky asked Emily whether she was in the bathroom, none of the messages were particularly graphic (Mr. Leskosky had repeated his desire (e.g.) to "cuddle" with Emily and to date her).

[188] Mr. Leskosky had Emily confirm that she would not turn him in.

[189] He then got to the "naughty stuff:" 067. There was nothing in anything Emily said that could be construed as suggesting the conduct and communications that Mr. Leskosky embarked on.

[190] The April 19 conduct was preceded by some communication about Mr. Leskosky's career goals. Out of the blue, without having led up to it himself and without Emily having made any sort of gesture in this direction, Mr. Leskosky began the sexual communications about Emily and her female friend. Again, he acted wholly on his own initiative.

[191] Later that day, after Mr. Leskosky concluded the friend theme, he embarked on communications about Emily and a guy. Emily did play along, describing an incident. Mr. Leskosky, then, moved to directing her to engage in sexual touching with a "boy in the hallway." He returned to this theme, directing Emily to have contact with a boy, on April 24. Emily did not suggest this in any way. She said, at one point, "I dont want to be touched by some random person hahah…I want you lol:" 122. Emily did not in any way make overtures respecting male third parties.

(b) Comments

[192] What the April incidents, in particular, demonstrate, is that nothing in Emily's messages to Mr. Leskosky induced him to say what he said. Emily was receptive but not suggestive. Mr. Leskosky initiated all of the concerning messages. His sexualized forays often had little or nothing to do with the conversations that preceded.

[193] In my view, the police only brought Emily to Mr. Leskosky. What he did arose from his own desires that existed independently and that he released in her virtual presence. What the Facebook messages record is not conduct elicited by Emily but conduct emanating from Mr. Leskosky himself.

3. Exploitation of Vulnerability

[194] Mr. Leskosky was not coerced. He did not act under duress. He did not do what he did not want to do because he had no real choice.

[195] But if he were exploited, what he wanted to do could have been induced by someone else. His choice to do what he wanted to do would be a choice set in motion by another. What he believed he wanted to do would be what someone else wanted him to do.

[196] According to the OED, "to exploit": is "[t]o take advantage of in an unfair or unethical manner; to utilize for one's own ends" (definition 5, transitive).

[197] The most concerning ***Mack*** factor in this case is whether the police "exploited a particular vulnerability of a person such as a mental handicap."

[198] These proceedings have made clear that Mr. Leskosky has cognitive challenges. His messages were those of an individual functioning at a much lower intellectual level than a 41-year old. That is, his messages by themselves suggested low cognitive functioning. Mr. Leskosky expressly referred to his challenges. In the Boise PD Report, a screen shot showed that he had said that he was a "slow learner." On March 15, Mr. Leskosky said to Emily (047)

> I am slow learner
>
> I have specking problems
>
> I can't say words right

He repeated "I am slow learner" after the incident that occurred on April 17:076. He had first said "I have specking problems" on March 13: 024.

[199] Mr. Myggland, although no psychiatrist, was certainly confirmed that Mr. Leskosky suffered from cognitive challenges.

[200] In my opinion, however, Cst. Morrison and Det. Horchuk did not take advantage of Mr. Leskosky, they did not manipulate him for their own ends, they did not cause him to choose what they wanted but not what he truly wanted.

[201] First, the police knew little about Mr. Leskosky's mental condition. That was a Defence complaint. They could not have taken advantage of a condition unknown to them.

[202] The Boise PD Report gave some clues, but what those clues meant was not obvious. Detective Horchuk commented that Mr. Leskosky's form of diction could have been a tactic or ploy to disarm potential victims and induce sympathy: T36. Det. Horchuk testified that self-deprecation is often a technique used by offenders. The poor diction could also have been caused because the writer was rushed, e.g., because messages were sent at work or when a spouse was nearby: T37.13-26. Another explanation could be that the writer's first language was not English.

[203] Detective Horchuk confirmed that he did not presume illegal conduct, but took steps to ensure that his assessment of the evidence was objective, free from bias: T37.12-17.

[204] Second, as Det. Horchuk and Cst. Morrison learned about Mr. Leskosky, they sought to make accommodations. Detective Horchuk and Cst. Morrison did take into account the implications of Mr. Leskosky's professed speaking problems. They structured the interactions to "be on the cautious side." The pace was slowed down. They attempted to keep the interactions simple and to look for clarification from Mr. Leskosky. Mr. Leskosky was given gaps in the interaction so he could decide whether or not he wished to reengage. The time gaps allowed the police to "test his persistence." And Mr. Leskosky did persist.

[205] Detective Horchuk did consider whether Mr. Leskosky was in a group home or in another sort of institution. There was no such indication. Had there been, the police could have intervened with staff: T55.11-26.

[206] Third, the police did not need to exploit or take advantage of Mr. Leskosky's condition to cause him to offend. He was not led to offend. He offended on Emily's coming into his orbit, without the need for any inducement besides her virtual presence. He began to drive their conversation in sexual directions very shortly after they began to converse. Mr. Leskosky was not taken advantage of. That line of thinking gets what occurred backwards. He tried to take advantage of Emily.

[207] Fourth, there was no argument that Mr. Leskosky lacked capacity for criminal responsibility. He knew that what he was doing was criminal. On April 17, he was cautious before moving to "naughty stuff." He got Emily's confirmation that she would not report him. He confirmed his understanding of his legal position in the interview with Det. McFatridge, as reviewed in the voluntariness decision.

[208] Fifth, Mr. Leskosky's conduct did not result from his being too eager to have a friend, too eager to have a girlfriend, too quick to share his dreams with someone he did not know. His crime was to send messages on Facebook that facilitated sexual offences against what he believed was a 13-year old girl. His desire for a relationship and the content of his communications with Emily have no necessary link.

D. Conclusion

[209] Mr. Leskosky was required to establish that he was entrapped on the balance of probabilities. Having considered the totality of the evidence, I find that Mr. Leskosky was not entrapped.

[210] Mr. Leskosky's application for a stay of his conviction is denied.

[211] I had found Mr. Leskosky guilty of Count 1 of the Indictment, that Mr. Leskosky committed the offence described as child luring under s. 172.1(1)(b) of the *Criminal Code*. A conviction shall therefore be entered.

Heard on February 6, 7, and 14, March 2 and 3, and August 24-27, 2020.
Delivered at the Town of St. Paul the 28th day of August, 2020.
Dated at the Town of St. Paul, Alberta this 8th day of September, 2020.

W.N. Renke
J.C.Q.B.A.

Appearances:

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Alberta Justice
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