

R. v. Barnes, [1991] 1 S.C.R. 449

Philip Ben Barnes

Appellant

v.

Her Majesty The Queen

Respondent

Indexed as: R. v. Barnes

File No.: 21956.

1990: October 31; 1991: February 28.

Present: Lamer C.J. and Wilson, La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin and Stevenson JJ.

on appeal from the court of appeal for british columbia

Criminal law -- Defences -- Entrapment -- Drug-trafficking -- "Buy-and-bust" program in area of city with trafficking problem -- Accused in this area -- Undercover police officer approached accused on hunch that he would have drugs -- Whether entrapment through random virtue-testing.

Courts -- Appeal -- Jurisdiction -- Crown appealing finding of entrapment which resulted in stay but not findings of guilt -- Appeal allowed by Court of Appeal and new trial ordered -- This Court finding conditions for entrapment not met -- Crown asking for convictions to be entered in place of order for new trial -- Whether

this Court has jurisdiction to replace order for new trial with convictions -- Criminal Code, R.S.C., 1985, c. C-46, s. 686(4)(b)(ii), 695(1).

The Vancouver Police were conducting a "buy-and-bust" operation in an area -- the Granville Mall -- considered to have a drug trafficking problem. In a "buy-and-bust" operation, undercover police officers attempt to buy illicit drugs from individuals who appear, in the officers' opinion, to be inclined to sell drugs. The appellant, who in the words of a police officer was "dressed scruffy", was in the Granville Mall area when approached on a "hunch" by an undercover police officer. The officer asked him if he had any "weed". Despite a negative answer, the officer asked the question again and persisted until the appellant agreed to sell a small amount of cannabis resin. Another officer arrested the appellant shortly afterwards.

The appellant was found guilty of trafficking in cannabis resin, of the included offence of possession of cannabis resin for the purpose of trafficking, and of possession of marijuana. The trial judge found, however, that the police officer had engaged in "random virtue testing" and granted a judicial stay for entrapment. The British Columbia Court of Appeal allowed the Crown's appeal of the finding of entrapment and ordered a new trial. The issues before this Court were: (1) whether appellant was subjected to random virtue-testing; and, (2) whether this Court, absent a cross-appeal by the Crown, has jurisdiction to modify the court of appeal's decision allowing the Crown's appeal from the judicial stay of proceedings and enter three convictions.

Held (L'Heureux-Dubé J. dissenting in part, McLachlin J. dissenting): The appeal should be dismissed.

Per Lamer C.J. and Wilson, La Forest, Sopinka, Gonthier, Cory and Stevenson JJ.: The police may only present the opportunity to commit a particular crime to an individual who arouses a suspicion that he or she is already engaged in the particular criminal activity. An exception to this rule arises when the police undertake a *bona fide* investigation directed at an area where it is reasonably suspected that criminal activity is occurring. When such a location is defined with sufficient precision, the police may present any person associated with the area with the opportunity to commit the particular offence. The notion of being "associated" with a particular area for these purposes does not require more than being present in the area. Such randomness is permissible within the scope of a *bona fide* inquiry.

Random virtue-testing only arises when a police officer presents a person with the opportunity to commit an offence without a reasonable suspicion that: (a) the person is already engaged in the particular criminal activity, or (b) the physical location with which the person is associated is a place where the particular criminal activity is likely occurring.

The police officer here did not have a "reasonable suspicion" that the appellant was already engaged in unlawful drug-related activity. The factors drawing her attention to the appellant -- his manner of dress, the length of his hair -- were not sufficient to give rise to a reasonable suspicion that criminal acts were being committed. The subjectiveness of her decision to approach the appellant, based on a

"hunch" or "feeling" rather than extrinsic evidence, also indicated that the appellant did not arouse a reasonable suspicion as an individual. The appellant, however, was presented with the opportunity to sell drugs in the course of a bona fide inquiry. The officer's conduct was motivated by the genuine purpose of investigating and repressing criminal activity and the investigation was directed at a suitable area within Vancouver. Although the size of the area itself may indicate that the investigation is not *bona fide*, it was reasonable for the Vancouver Police Department to focus its investigation on the Granville Mall.

The appellant, when he was in the Granville Mall, was in a location where it was reasonably believed that drug-related crimes were occurring. The officer's conduct was therefore justified.

Section 695(1) does not allow this Court to make, in all circumstances, a decision that in its opinion the Court of Appeal could have and should have made. This Court has jurisdiction under s. 695(1) to modify an order at the request of the Crown when there is an appeal by the Crown making such a request. When there is no appeal by the Crown, an appellant cannot leave this Court with less than what he gained from the Court of Appeal.

In the absence of an appeal by the Crown, this Court has no jurisdiction to allow the Crown's request that the order below be modified. To hold otherwise would allow the Crown to appeal to this Court where such an opportunity has not been provided by the *Criminal Code* or the *Supreme Court Act*. The Crown is not given by statute the ability to appeal to this Court a decision which allowed its appeal from an

acquittal or judicial stay of proceedings, but which gave the Crown less than what had been requested. As a result, there is no statutory provision which would allow the Crown to appeal from the Court of Appeal's judgment. Absent a statutory right of appeal, there is no right of appeal.

Per L'Heureux-Dubé J. (dissenting in part): The appeal on the entrapment issue should be dismissed for the reasons given by Lamer C.J.

As a general rule, an appellate court cannot disturb a verdict of acquittal or modify an order directing a new trial, absent an appeal by the Crown asking it to do so. Appellate jurisdiction is conferred entirely by statute. The rationales underlying the general rule, however, become inoperative in certain situations. One such situation deals with circumstances where the *Kienapple* principle is triggered.

Due to the operation of the rule against multiple convictions, an exception to the general rule regarding Crown appeals and appellate jurisdiction has been formulated. The general rule has little meaning in a situation where the *Kienapple* principle applies. The continued effect of the "acquittal" is lifted and the conviction is reinstated should the Crown's appeal of the stay, by appealing the application of the rule itself, be successful or should the accused successfully appeal one of the convictions. There is really nothing of substance for the Crown to appeal.

No "live" issue regarding the second branch of the entrapment test existed. In this light, it is as unreal to entertain arguments of prejudice to the accused in entering convictions as it is to order a new trial in such circumstances. The lack of

adjudication by the trial judge regarding the second branch of the entrapment test can neither prevent the entering of a conviction nor justify the order for a new trial on that issue. Accordingly, the Court of Appeal erred in ordering a new trial on this second branch of the test of entrapment.

While not laying waste to the general rule, the present case offers convincing reasons for treating it in the same fashion as a situation falling more squarely within the *Kienapple* exception. Like the situation in a *Kienapple* context, the full force of the general rule obliging the Crown to appeal is avoided in an entrapment situation because of the nature of the proceedings and the underpinnings of the "acquittal" entered in such situations. The Crown's position, after an appeal by the accused in an entrapment situation, is closely analogous to that in a *Kienapple* context: there is nothing meaningful for the Crown to appeal. If the Crown's appeal is successful and the entrapment arguments of the accused are unsuccessful on appeal, the stay will be set aside and the convictions will stand. As in a *Kienapple* situation, the "acquittal" fails to remain relevant after the entrapment issue is dispensed with and an accused cannot ignore that necessary result. Requiring the Crown to appeal the "acquittal" in order to formalize this necessary consequence is a meaningless formality easily dispensed with in a *Kienapple* situation. The same result should also obtain in an entrapment situation.

Per McLachlin J. (dissenting): Determination of entrapment must involve a balancing between the individual interest in being left alone and the state's interest in the repression of crime. Only where considerations such as fairness, justice and the

need for protection from crime tip the balance in favour of the state will police conduct which offends the individual interests at stake be acceptable.

The significance of the individual interest at stake here must not be underestimated and the adverse effect that police investigatory techniques can have on this interest should not be overlooked. Limits must be placed on the state's ability to intrude into the daily lives of its citizens. A further 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 the quality of their clothing and their age.

The test for entrapment must permit the measuring of relative harms. In determining whether there was a *bona fide* inquiry, the court must consider not only the motive of the police and whether there is crime in the general area, but also other factors relevant to the balancing process, such as the likelihood of crime at the particular location targeted, the seriousness of the crime in question, the number of legitimate activities and persons who might be affected, and the availability of other less intrusive investigative techniques. The question is whether the interception at the particular location was reasonable having regard to the conflicting interests of private citizens in being left alone from state interference and of the state in suppressing crime. If the answer to this question is yes, then the inquiry is *bona fide*. This test offers sufficient guidance to the police.

That crime may be said to occur generally within a given area does not suffice to establish a *bona fide* inquiry, given proper police motives. Other factors

must be considered. The first is the likelihood of crime in the particular area targeted. The fact that trafficking occurred at different locations in the six-block area of the mall does not establish that trafficking was likely to occur at the time and place where the appellant was intercepted. The second relates to the possibility that this undercover operation would interfere with the legitimate activities of law-abiding citizens. This factor, while not in itself conclusive, weighed against the right of undercover police to intercede at will. On the other side of the balance must be weighed the seriousness of the criminal activity which the police have targeted. The offence here in question, while not to be condoned, could not be considered as one of the most serious and alternative investigatory techniques were available to detect it.

The individual interest in being left alone and free to pursue one's daily business without being confronted by undercover police operatives vastly outweighs the state interest in the repression of crime. The police officer here, therefore, was not acting pursuant to a *bona fide* inquiry.

Cases Cited

By Lamer C.J.

Applied: *R. v. Mack*, [1988] 2 S.C.R. 903; **referred to:** *R. v. Jewitt*, [1985] 2 S.C.R. 128; *Guillemette v. The Queen*, [1986] 1 S.C.R. 356.

By L'Heureux-Dubé J. (dissenting in part)

R. v. Mack, [1988] 2 S.C.R. 903; *Rickard v. The Queen*, [1970] S.C.R. 1022; *Guillemette v. The Queen*, [1986] 1 S.C.R. 356; *R. v. Provo*, [1989] 2 S.C.R. 3; *Kienapple v. The Queen*, [1975] 1 S.C.R. 729; *R. v. Prince*, [1986] 2 S.C.R. 480; *R. v. Terlecki* (1983), 4 C.C.C. (3d) 522 (Alta. C.A.), aff'd [1985] 2 S.C.R. 483; *Amato v. The Queen*, [1982] 2 S.C.R. 418; *R. v. Cassidy*, [1989] 2 S.C.R. 345; *R. v. Jewitt*, [1985] 2 S.C.R. 128.

By McLachlin J. (dissenting)

R. v. Mack, [1988] 2 S.C.R. 903; *R. v. Dymont*, [1988] 2 S.C.R. 417; *R. v. Duarte*, [1990] 1 S.C.R. 30; *R. v. Kokesch*, [1990] 3 S.C.R. 3; *R. v. Wong*, [1990] 3 S.C.R. 36.

Statutes and Regulations Cited

Criminal Code, R.S.C., 1985, c. C-46, ss. 686(4)(b)(ii), 691(2)(a), 693(1)(a), (b), 695(1).
Supreme Court Act, R.S.C., 1985, c. S-26, s. 40(3).

Authors Cited

Jordan, James C. "Application and Limitations of the Rule Prohibiting Multiple Convictions: *Kienapple v. The Queen* to *R. v. Prince*" (1985), 14 *Man. L.J.* 341.

APPEAL from a judgment of the British Columbia Court of Appeal (1990),
54 C.C.C. (3d) 368, allowing an appeal, setting aside a stay granted by Leggatt Co. Ct.

J. and ordering a new trial. Appeal dismissed, L'Heureux-Dubé J. dissenting in part, McLachlin J. dissenting.

Peter M. Kendall, for the appellant.

S. David Frankel, Q.C., for the respondent.

//Lamer C.J.//

The judgment of Lamer C.J. and Wilson, La Forest, Sopinka, Gonthier, Cory and Stevenson JJ. was delivered by

LAMER C.J. -- This case involves a consideration of the defence of entrapment as set out by this Court in *R. v. Mack*, [1988] 2 S.C.R. 903. In particular, this Court is asked whether the accused was subjected to random virtue-testing by an undercover police officer in the city of Vancouver. This case also raises the question of whether this Court, at the request of the Crown, has jurisdiction to modify the decision of a court of appeal which has allowed an appeal by the Crown from a judicial stay of proceedings entered at trial.

Facts

On January 12, 1989, the appellant sold one gram of hashish to an undercover police officer near the Granville Mall area of Vancouver. The parties do not dispute the facts surrounding the sale, which are as follows.

The undercover officer was involved in a "buy-and-bust" operation conducted by the Vancouver Police Department. In a buy-and-bust operation, undercover police officers attempt to buy illicit drugs from individuals who appear, in the opinion of the officers, to be inclined to sell such drugs. If an officer is successful, the individual is immediately arrested for trafficking.

This particular operation was undertaken by the Department with respect to the Granville Mall area in the city of Vancouver, which covers a six-block section of Granville Street. On the day of the arrest, the undercover officer approached the accused, Philip Barnes, and his friend, as they were walking towards Granville Street. The officer testified at trial that she approached the accused and his friend because she had "a hunch, a feeling that they'd -- possibly might be in possession". She believed that he and his friend fit the description of persons who possibly had drugs in their possession and who would be willing to sell to her: "I had a feeling. They fit my general criteria. I look for males hanging around, dressed scruffy and in jeans, wearing a jean jacket or leather jacket, runners or black boots, that tend to look at people a lot." The officer indicated that there was nothing else that aroused her suspicions.

The officer approached the accused and asked him if he had any "weed". He said "no", but his friend repeated to him: "She wants some weed." The accused again responded negatively. The officer persisted and the accused then agreed to sell a small amount of cannabis resin to the officer for \$15. Shortly afterwards, the accused was arrested by another officer and small amounts of cannabis resin and marijuana were seized from his person.

The accused was tried in the County Court of Vancouver before Leggatt Co. Ct. J., and was found guilty of trafficking in cannabis resin, of the included offence of possession of cannabis resin for the purpose of trafficking, and of possession of marijuana. The accused conceded that he sold illicit drugs to the officer, but argued that a judicial stay for entrapment should be directed. He claimed that he had no intention of selling drugs on the day in question, but felt sorry for the undercover officer; he agreed to sell only because he believed that his friend wanted to meet a woman and that this was a way of gaining an introduction. The trial judge held that the police officer had engaged in "random virtue testing", which was unacceptable according to the judgment of this Court in *Mack, supra*, and therefore ordered a judicial stay of the proceedings.

The British Columbia Court of Appeal allowed the Crown's appeal and ordered a new trial.

Judgments Below

County Court of Vancouver (Leggatt Co. Ct. J.)

On the basis of the judgment of this Court in *R. v. Mack, supra*, Leggatt Co. Ct. J. of the County Court of Vancouver held that the undercover officer had engaged in "random virtue testing" and therefore directed the entry of a judicial stay on the charges.

The trial judge based his decision on two principal conclusions. First, he believed that the police investigation failed to target a sufficiently specific physical area where it was suspected that crimes would be committed. The accused was approached some distance from the specific area where drug trafficking was taking place most frequently. Secondly, he found as a question of fact that the police officer did not have a reasonable suspicion that the accused was likely to traffic in illicit drugs. The trial judge stated:

The Granville Mall, which is known as an area of considerable drug activity, is also known in Vancouver as Theatre Row. I have described it as being in the centre of Vancouver, and it contains a broad cross-section of commercial activity, a lot of it oriented to the entertainment industry. Many movie theatres are contained in the mall area.

When one examines the criteria used by this undercover officer as to who to approach to try to induce a drug transaction, she is describing a very high percentage of young citizens who are there for perfectly legitimate reasons. No conduct was observed on the part of the [accused] or his companion prior to the drug purchase which would provide a reasonable suspicion that they were already engaged in criminal activity. The specific area of the purchase was a distance from the area described by the staff sergeant as the most heavily frequented area for drug traffickers, which was the sky train Granville Street entrance area. There was no evidence that the [accused] or his companion were observed engaging in conduct which would lead to any suspicion.

Leggatt Co. Ct. J. did not believe it was necessary to inquire as to *mala fides* on the part of the officer, since he found that she had engaged in random virtue testing:

Now, I make no finding of mala fides, but it is not reasonable on the facts at bar to suspect that each person who matches the general criteria provided by the undercover officer for her targets is engaged in drug trafficking. In my view, given this very general criteria, given the fact that the individual was not at the immediate centre of drug trafficking, and given the fact there was no prior observation of conduct which leads to a

reasonable inference of guilt, I am of the view that this particular undercover officer was conducting a random virtue test as described by Mr. Justice Lamer, and clearly on the authorities this is not acceptable.

British Columbia Court of Appeal (Hinkson J.A. for the Court)
(1990), 54 C.C.C. (3d) 368

The Court of Appeal overturned the judgment of the County Court, deciding the question of law that the facts did not give rise to a reasonable inference of entrapment.

Hinkson J.A. rejected the accused's contention that the police department was required to limit its investigation to "specific targeted areas of the mall" where drug-related crimes were most likely to be committed. The police were entitled, in his opinion, to carry out an investigation that focused on the whole of the Granville Mall. He stated at pp. 372-73:

In my opinion, the decision in *Mack* does not support that contention. The evidence at trial disclosed that sales of narcotics took place up and down the mall and it was for that reason that the undercover officer walked up and down the mall approaching persons and providing an opportunity to sell illicit drugs to her.

In reaching his conclusion that the undercover officer had entrapped the accused into trafficking in *cannabis* resin, the trial judge rested his decision upon the fact that the undercover agent did not have a reasonable suspicion that the accused was selling drugs. But he overlooked the fact that the undercover officer was engaged in a *bona fide* investigation of criminal activity involving the area of the Granville Mall and that she was entitled, therefore, to offer to the accused an opportunity to sell drugs to her. In doing so, she was not engaged in random virtue-testing as described by Lamer J. in *Mack*.

The Court accordingly ordered a new trial, at p. 373, to be held in order to determine whether there had been entrapment under the second branch of the test in

Mack, namely, "to consider whether or not the conduct of the undercover agent went beyond providing an opportunity and induced the commission of the offence."

Analysis

Did the police officer engage in random virtue-testing?

To resolve this appeal, this Court must consider whether the conduct of the undercover police officer was acceptable in light of the guidelines set out in *Mack, supra*. In *Mack*, I attempted to define the circumstances in which police conduct in the course of investigating and uncovering criminal activity ceases to be acceptable and, instead, amounts to the unacceptable entrapment of individuals. The defence of entrapment is based on the notion that limits should be imposed on the ability of the police to participate in the commission of an offence. As a general rule, it is expected in our society that the police will direct their attention towards uncovering criminal activity that occurs without their involvement.

As I summarized in *Mack*, at pp. 964-65, there are two principal branches of the test for entrapment. The defence is available when:

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

...

The absence of a reasonable suspicion or a *bona fide* inquiry is significant in assessing the police conduct because of the risk that the police will attract people who would not otherwise have any involvement in a crime and because it is not a proper use of the police power to simply go out and test the virtue of people on a random basis.

It is apparent that the police officer involved in this case did not have a "reasonable suspicion" that the accused was already engaged in unlawful drug-related activity. The factors that drew the officer's attention to this particular accused -- his manner of dress, the length of his hair -- were not sufficient to give rise to a reasonable suspicion that criminal acts were being committed. Furthermore, the subjectiveness of the officer's decision to approach the accused, based on a "hunch" or "feeling" rather than extrinsic evidence, also indicates that the accused did not, as an individual, arouse a reasonable suspicion.

Consequently, the police conduct in this case will amount to entrapment unless the officer presented the accused with the opportunity to sell drugs in the course of a bona fide inquiry. In my opinion, the police officer involved in this case was engaged in such a *bona fide* investigation. First, there is no question that the officer's conduct was motivated by the genuine purpose of investigating and repressing criminal activity. The police department had reasonable grounds for believing that drug-related crimes were occurring throughout the Granville Mall area. The accused was not, therefore, approached for questionable motives unrelated to the investigation and repression of crime.

Secondly, the police department directed its investigation at a suitable area within the city of Vancouver. As I noted in *Mack, supra*, the police may present the

opportunity to commit a particular crime to persons who are associated with a location where it is reasonably suspected that criminal activity is taking place. I stated, at p. 956:

Of course, in certain situations the police may not know the identity of specific individuals, but they do know certain other facts, such as a particular location or area where it is reasonably suspected that certain criminal activity is occurring. In those cases it is clearly permissible to provide opportunities to people associated with the location under suspicion, even if these people are not themselves under suspicion.

The police department in this case focused its investigation on an area of Vancouver, a section of Granville Street covering approximately six city blocks, where it was reasonably suspected that drug-related crimes were occurring. In my opinion, they would not have been able to deal with the problem effectively had they restricted the investigation to a smaller area. Although there were particular areas within the Granville Mall where drug trafficking was especially serious, it is true that trafficking occurred at locations scattered generally throughout the Mall. It is also true that traffickers did not operate in a single place. It would be unrealistic for the police to focus their investigation on one specific part of the Mall given the tendency of traffickers to modify their techniques in response to police investigations. The trial judge admitted that the Mall was "known as an area of considerable drug activity". Similarly, the Court of Appeal found support in the evidence given at trial by Staff Sergeant Davies of the Vancouver City Police. In discussing the police department's activities in 1988, Staff Sergeant Davies indicated, at p. 370, that:

- (a) Of the 2,294 persons charged with drug offences, approximately 22% were from incidents in the Granville Mall area;

- (b) 506 arrests were made on the mall resulting in 659 charges -- 289 for trafficking, 199 for possession for the purpose of trafficking;
- (c) 315 arrests were made in "buy and bust" operations resulting in 475 charges.

The Court of Appeal concluded, at p. 372:

The evidence at trial disclosed that sales of narcotics took place up and down the mall and it was for that reason that the undercover officer walked up and down the mall approaching persons and providing an opportunity to sell illicit drugs to her.

It is, therefore, my opinion that the police department was engaged, in these circumstances, in a *bona fide* inquiry.

I note that in many cases, the size of the area itself may indicate that the investigation is not *bona fide*. This will be so particularly when there are grounds for believing that the criminal activity being investigated is concentrated in part of a larger area targeted by the police. In this case, however, for the reasons discussed above, it was reasonable for the Vancouver Police Department to focus its investigation on the Granville Mall.

The accused argues that although the undercover officer was involved in a *bona fide* inquiry, she nevertheless engaged in random virtue-testing since she approached the accused without a reasonable suspicion that he was likely to commit a drug-related offence. She approached the accused simply because he was walking near Granville Street.

In my respectful opinion, this argument is based on a misinterpretation of *Mack*. I recognize that some of my language in *Mack* might be responsible for this misinterpretation. In particular, as noted above, I stated, at p. 956:

In those cases [where there is a particular location where it is reasonably suspected that certain crimes are taking place] it is clearly permissible to provide opportunities to people associated with the location under suspicion, even if these people are not themselves under suspicion. This latter situation, however, is only justified if the police acted in the course of a *bona fide* investigation and are not engaged in random virtue-testing.

This statement should not be taken to mean that the police may not approach people on a random basis, in order to present the opportunity to commit an offence, in the course of a *bona fide* investigation. The basic rule articulated in *Mack* is that the police may only present the opportunity to commit a particular crime to an individual who arouses a suspicion that he or she is already engaged in the particular criminal activity. An exception to this rule arises when the police undertake a *bona fide* investigation directed at an area where it is reasonably suspected that criminal activity is occurring. When such a location is defined with sufficient precision, the police may present any person associated with the area with the opportunity to commit the particular offence. Such randomness is permissible within the scope of a *bona fide* inquiry.

Random virtue-testing, conversely, only arises when a police officer presents a person with the opportunity to commit an offence without a reasonable suspicion that:

- (a) the person is already engaged in the particular criminal activity, or

(b) the physical location with which the person is associated is a place where the particular criminal activity is likely occurring.

In this case, the accused was approached by the officer when he was walking near the Granville Mall. The notion of being "associated" with a particular area for these purposes does not require more than being present in the area. As a result, the accused was associated with a location where it was reasonably believed that drug-related crimes were occurring. The officer's conduct was therefore justified under the first branch of the test for entrapment set out in *Mack*.

For these reasons, it is my opinion that the officer did not engage in random virtue-testing in this case. I would, therefore, dismiss the appeal and uphold the decision of the Court of Appeal ordering a new trial.

Does this Court have jurisdiction, as a result of the finding that the police officer did not engage in random virtue-testing, to enter convictions with respect to the three charges?

As noted above, the accused was found guilty at trial of trafficking in cannabis resin, of the included offence of possession of cannabis resin for the purpose of trafficking, and of possession of marijuana. The trial judge entered a judicial stay with respect to the three offences on the grounds that the accused was entrapped. The Crown appealed to the Court of Appeal, arguing that the Court should overturn the trial judge's decision and enter convictions with respect to the three charges. The Court of Appeal allowed the Crown's appeal, but ordered a new trial to determine whether there had been entrapment pursuant to the second branch of the *Mack* test. Entrapment occurs under the second branch if the police go beyond providing the

opportunity for a person to commit an offence and induce the commission of the offence.

The Crown now submits that this Court, having found that there was no entrapment under the first branch of the *Mack* test, should enter convictions with respect to the three offences. This submission turns on the assumption that it cannot be reasonably inferred from the evidence adduced at trial that the police officer induced the commission of the offence. The accused submits that this Court should not accede to the Crown's request, since the Crown did not cross-appeal the portion of the Court of Appeal's order directing that a new trial be held.

In my opinion, this Court does not have jurisdiction to vary the Court of Appeal's order at the request of the Crown, in the absence of an appeal by the Crown. The Crown had no ability to appeal, by right or by leave, the decision of the Court of Appeal to this Court. Section 693(1) of the *Criminal Code*, R.S.C., 1985, c. C-46, sets out the situations when the Crown may appeal to this Court:

693. (1) Where a judgment of a court of appeal sets aside a conviction pursuant to an appeal taken under section 675 or dismisses an appeal taken pursuant to paragraph 676(1)(a), (b) or (c) or subsection 676(3), the Attorney General may appeal to the Supreme Court of Canada

(a) on any question of law on which a judge of the court of appeal dissents; or

(b) on any question of law, if leave to appeal is granted by the Supreme Court of Canada.

The Court of Appeal in this case allowed an appeal by the Crown from a judicial stay of proceedings ordered at trial. As noted by this Court in *R. v. Jewitt*, [1985] 2 S.C.R.

128, at p. 148, a stay of proceedings is, for all practical purposes, "tantamount to a judgment or verdict of acquittal". As a result, the Crown, under s. 693(1), neither had a right to appeal nor to apply for leave to appeal the Court of Appeal's decision to this Court. Furthermore, the Crown was unable to apply for leave to appeal under the *Supreme Court Act*, R.S.C., 1985, c. S-26, by virtue of s. 40(3) of the Act.

The Crown submits that the decision by the accused to appeal to this Court invokes the application of s. 695(1) of the *Criminal Code*. Section 695(1) provides as follows:

695. (1) The Supreme Court of Canada may, on an appeal under this Part, make any order that the court of appeal might have made and may make any rule or order that is necessary to give effect to its judgment.

The Crown argues that since the Court of Appeal had jurisdiction under s. 686(4)(b)(ii) to enter convictions with respect to the three charges, s. 695(1) gives this Court jurisdiction to do the same. With respect, I disagree with the Crown's contention. Section 695(1) does not allow this Court to make, in all circumstances, a decision that we believe the Court of Appeal could have and should have made. As was held in *Guillemette v. The Queen*, [1986] 1 S.C.R. 356, this Court has jurisdiction under s. 695(1) to modify an order at the request of the Crown when there is an appeal by the Crown asking us to do so. I stated in *Guillemette*, at p. 364:

Where there is no appeal by the Crown asking us to do so, this Court cannot, in place of the Court of Appeal, make the order which we might feel it should have made

When there is no appeal by the Crown, an accused cannot leave this Court with less than what he gained from the court of appeal.

In the absence of an appeal by the Crown, this Court has no jurisdiction to allow the Crown's request that the order below be modified. To hold otherwise would allow the Crown to appeal to this Court where such an opportunity has not been provided by the *Criminal Code* or the *Supreme Court Act*. The Crown is not given by statute the ability to appeal to this Court a decision which allowed its appeal from an acquittal or judicial stay of proceedings, but which gave the Crown less than what had been requested. As a result, there is no statutory provision which would allow the Crown to appeal from the Court of Appeal's judgment. Absent a statutory right of appeal, there is no right of appeal.

Disposition

For the reasons given above, I would dismiss the accused's appeal and uphold the decision of the Court of Appeal ordering a new trial.

//L'Heureux-Dubé J.//

The following are the reasons delivered by

L'HEUREUX-DUBÉ J. (dissenting in part) -- I have had the benefit of the reasons of the Chief Justice but am nevertheless compelled to reach a different conclusion concerning the jurisdiction of this Court to enter convictions regarding the

three charges stayed by the trial judge. As the Chief Justice's resolution of the entrapment issue commends itself to me, I will only address the second issue raised by this case, the jurisdiction issue.

Proceedings

As the Chief Justice has set out the facts and summarized the judgments of the courts below, it is not necessary to refer to them at length. For ease of reference, however, I will set out a brief summary of the proceedings in this case.

At trial, the accused was charged with: (1) trafficking in cannabis resin, (2) possession of cannabis resin for the purpose of trafficking, and (3) possession of marijuana. He was found guilty of counts (1) and (3) and of the included offence of possession regarding the second count. The issue at trial, then, was whether or not a stay should be directed, on the ground that the accused had been entrapped. The trial judge held that Barnes had indeed been entrapped and directed the entry of a stay on the three counts.

The Crown appealed. The Court of Appeal allowed the appeal, concluding that entrapment did not lie on the facts of the case, and, in spite of vigorous contrary arguments by the Crown, ordered a new trial on the issue of whether the "defence" of entrapment, on the second branch of the test set out in *R. v. Mack*, [1988] 2 S.C.R. 903, could be made out on the facts.

Barnes appealed to this Court, "as of right" that is, under the statutory direction of s. 691(2)(a) of the *Criminal Code*, R.S.C., 1985, c. C-46. As the Chief Justice states, at p. 000, "[t]he Crown had no ability to appeal, by right or by leave, the decision of the Court of Appeal to this Court." Thus, there is no Crown appeal as such arising for consideration in this case.

Analysis

At the outset, we must be clear that the appeal presently before this Court was instituted by Barnes, the accused. He is appealing from the judgment of the Court of Appeal allowing the Crown's appeal of the stay and ordering a new trial. The Crown did not appeal the order for a new trial to this Court since the *Criminal Code* does not provide for such an appeal by the Crown. Given that, in my respectful opinion, the accused's appeal to this Court must fail on the issue of entrapment, the remaining question is whether the order for a new trial by the Court of Appeal can be set aside, and convictions entered, absent an appeal by the Crown.

The General Rule Regarding Appellate Jurisdiction

As the Chief Justice rightly points out, the general rule is that an appellate court cannot disturb a verdict of acquittal or, in any other respect, modify an order such as the one made here directing a new trial, absent an appeal by the Crown asking it to do so. Appellate jurisdiction is conferred entirely by statute. This general rule regarding appellate court jurisdiction has been affirmed in a number of recent cases from this Court. The reasons for such a rule are obvious -- in most circumstances, to

proceed otherwise would expose the accused to unfairness and prejudice, due to the lack of notice regarding the scope of the appellate proceedings and the lack of prior warning as to the degree to which the accused has been placed in jeopardy.

In *Rickard v. The Queen*, [1970] S.C.R. 1022, Ritchie J., for the majority, held that whether or not the Crown can in fact appeal in the circumstances of a particular case is irrelevant, but rather, the "controlling factor" is merely whether the Crown has appealed the acquittal or order.

Lamer J. (as he then was), reiterated the general rule in *Guillemette v. The Queen*, [1986] 1 S.C.R. 356, when, speaking for the Court, he stated at p. 361:

In ordering a new trial on the original charge of second-degree murder, the Court of Appeal in the same breath set aside the acquittal implicitly made by the jury on that charge. Where there has been no appeal by the Crown, to allow this result, which only the Crown was entitled to seek, constitutes an error of law.

See also *R. v. Provo*, [1989] 2 S.C.R. 3, at p. 21.

That this is a rule of general application is beyond dispute. There are situations, however, in which the laudable rationales underlying this rule are inoperative and, as such, these situations are treated differently in terms of the application of the general rule. One such situation, already recognized by this Court, deals with circumstances where the rule against multiple convictions, or the *Kienapple* principle, is triggered.

The Rule Against Multiple Convictions

Before considering the so-called *Kienapple* exception to the general rule regarding appellate court jurisdiction, it may be helpful to briefly recall the nature of the *Kienapple* principle itself. The doctrine of *res judicata*, which has evolved alongside other doctrines designed to prevent unfairness to the accused, has a long history in the criminal law. These doctrines prohibit the trying of an accused twice for the same offence. The decision of this Court in *Kienapple v. The Queen*, [1975] 1 S.C.R. 729, extended the traditional formulation of *res judicata* to cover situations where an accused is charged with offences having a close factual and legal relationship. Simply stated, the rule against multiple convictions, or the *Kienapple* principle, "proposes that an individual should not be subjected to more than one conviction arising out of the same "cause or matter" or the same "delict", consisting of a single criminal act committed in circumstances where the offences alleged are comprised of the same or substantially the same facts and elements", (see Jordan, "Application and Limitations of the Rule Prohibiting Multiple Convictions: *Kienapple v. The Queen* to *R. v. Prince*" (1985), 14 *Man. L.J.* 341).

As Laskin J. (as he then was), for the majority, in *Kienapple v. The Queen*, *supra*, pointed out, the rule formulated in that case is a logical application of *res judicata*. He noted that other concepts such as *autrefois convict* and issue estoppel are, as they have been traditionally construed, inappropriate in dealing with the cases envisaged by the rule against multiple convictions. Laskin J. framed the relevant inquiry in these terms, at p. 750:

. . . whether the same cause or matter (rather than the same offence) is comprehended by two or more offences.

In *R. v. Prince*, [1986] 2 S.C.R. 480, at p. 486, this Court comprehensively reexamined the "nature and scope of the principle of *res judicata* articulated for the majority by Laskin J." While the rule itself remained intact, Chief Justice Dickson, for the Court, set out at length the nature of the questions to be asked in a determination of the application of the rule. The focus of an inquiry into the proper application of the rule must be guided by discussions going to the factual and legal nexus between the offences.

In order to give practical effect to the rule against multiple convictions, the courts in this country have devised a procedure wherein a judicial stay of the convictions is entered in order to avoid contravention of the rule. This will be discussed in more depth below, along with the effect this procedure has on the general rule regarding appellate jurisdiction. What is more at issue here is the effect of such a procedure as regards appellate jurisdiction. Parliament has not chosen to provide a rule accommodating this situation, so we have to turn to the methods devised by the courts to meet the problems created by this rule.

The Procedure Implementing the Rule Against Multiple Convictions and its Effect on the General Rule Regarding Appellate Jurisdiction

Due to the operation of the rule against multiple convictions, an exception to the general rule regarding Crown appeals and appellate jurisdiction has been formulated. This exception was first implicitly recognized in *R. v. Terlecki* (1983), 4

C.C.C. (3d) 522 (Alta. C.A.), aff'd [1985] 2 S.C.R. 483, and then later, explicitly, in *Provo, supra*. This exception was recognized in order to "accommodate the special relationship between offences which arise out of the same delict and are subject to special treatment under the rule against multiple convictions." (See *R. v. Provo, supra*, at p. 21).

In *Terlecki, supra*, the Alberta Court of Appeal set out the procedure to be followed in a *Kienapple* situation. They also noted that, in the context of the rule against multiple convictions, an exception should be made regarding the necessity of a Crown appeal from the stayed charges, or "acquittals". According to the Alberta Court of Appeal, guilt or innocence regarding the various charges giving rise to the *Kienapple* principle should be determined at the outset. If the accused is found guilty of the charges, a conditional stay is entered on the less serious charge, in order to avoid running afoul of the principle. If the accused successfully appeals the conviction, the appellate court is able, absent an appeal by the Crown, to remit the matter back to the trial judge for the entry of a conviction on the charge conditionally stayed but upon which the trial judge has previously determined guilt. In upholding the judgment of the Court of Appeal, this Court generally approved of the procedure set out by the Alberta Court of Appeal.

In *Provo, supra*, Justice Wilson, for the Court, discussed the practical and policy reasons for the use of a conditional stay in these circumstances but also explicitly approved of the "*Kienapple* exception" to the general rule respecting appellate court jurisdiction due, as set out previously, to the nature of the relationship between the offences in such a situation.

Where the rule against multiple convictions is operative, the general rule is inapplicable. The "acquittal" on one or more of the charges is not an acquittal in the sense that the accused has not been found guilty, i.e., "that the state had not met its burden of proving the elements of the offence" -- see *Provo, supra*, at p. 17 -- but only in the sense that there exists an overriding rationale, discussed above, for staying the charges. The general rule has little meaning in a situation where the *Kienapple* principle applies, as the accused must be taken to be cognizant of the fact that the continued effect of the "acquittal", is lifted and the conviction reinstated should the Crown's appeal of the stay, by appealing the application of the rule itself, be successful or should the accused successfully appeal one of the convictions. An "acquittal", that the general rule would require the Crown to appeal, is contingent upon the Crown's successful appeal of the stay or upon the successful appeal by the accused of the conviction. Upon a successful appeal of the stay or conviction, understandably, the "acquittal" is no longer meaningful or effective, as the reason for its existence in the first place, the *Kienapple* principle, is gone. There is really, nothing of substance for the Crown to appeal. In these circumstances arguments about prejudice and fairness to the accused have little merit.

How does an entrapment situation, as in the case here, relate to a *Kienapple* situation? Before answering this question I will examine the nature and scope of an entrapment inquiry and determine whether, in the present instance, either of the two branches of an entrapment inquiry have been satisfied. Further, was the Court of Appeal justified in ordering a new trial on the second branch of the inquiry?

Entrapment

Though this Court's first notable examination of entrapment took place in *Amato v. The Queen*, [1982] 2 S.C.R. 418, the leading authority is *Mack, supra*, wherein Lamer J. (as he then was), for a unanimous Court, articulated the rationales for and the parameters of what is now known as the "defence" of entrapment. It is within this discussion that he sets out the two branches of an entrapment inquiry, at p. 959:

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

As I stated earlier, I agree fully with the Chief Justice's disposition of the entrapment issue in the present case. Before going to the issue of jurisdiction, however, I will briefly discuss the second arm of the entrapment inquiry since it is at the heart of the Court of Appeal's order for a new trial.

In *Mack, supra*, what constitutes "inducing" the commission of an offence, is distinguished from the permissible provision of a mere opportunity, and, thus, defines what will constitute entrapment on the second arm of the test. The central question in this form of entrapment is "have the police gone further than providing an opportunity and instead employed tactics designed to induce someone into the commission of an offence?" (see p. 959.) In considering this question, Lamer J. cautions that it must be answered in light of "the average person in the position of the accused" and sets out a non-exhaustive list of factors that will assist in formulating the answer. This list includes, among others, such factors as the persistence of the police,

whether rewards, deceit or exploitation are employed, disproportionate involvement of the police as compared to the accused and the existence of threats, veiled or otherwise.

Prior to applying this test, it should be noted that the trial judge, in the present case, did pursue the "preferable and safe course of making findings on all the counts charged" (*Provo, supra*, at p. 17). That there was no realistic debate about the guilt of the accused is apparent from the record and from the fact that the accused raised no "defence" other than one of entrapment. As regards entrapment, the trial judge did not need to determine whether entrapment on the second branch of the test, as set out in *Mack, supra*, was satisfied here, since he found entrapment based on the first branch of the test. He did, however, clearly set out that portion of the transaction relevant to this question in the following extract of his reasons:

The female undercover officer was part of a buy-and-bust operation conducted by the Vancouver Police Department. She saw the Accused at the northwest corner of Georgia and Granville, waiting for the light to change. . . . The undercover officer approached the Defendant and asked, "Got any weed?" He answered no. His partner then said to him, "She wants some weed." The Defendant then looked over the undercover officer and again said no. She then said, "Come on, what have you got?" He said, "Hash. It's gold." She said, "How much?" He said, "15." "Okay." The three went into a doorway. He pulled out a small package and took a small portion from it. She gave him a marked \$20 bill, got \$4 in change, and left. That is pretty well the extent of the transaction. [Emphasis added.]

I fully agree with the Crown's description of this transaction as being of the "briefest duration" and as "providing the barest of opportunities to an individual to engage in criminal activity". It is obvious, from a discussion of the relevant legal principles applicable to entrapment going to the second branch of the test, and the

findings of fact made by the trial judge, that there is no "live" issue regarding the second branch of the entrapment test. While, admittedly, certain issues, such as issues of guilt or innocence, are fraught with difficult determinations going to the state of mind of an accused and, thus, are best left to the trial judge, this is clearly not the case here. Once this Court rejected the arguments of the accused going to the first branch of the entrapment inquiry, it is painfully clear that there was no point to the entrapment arguments of the accused. In fact, the primary, if not the sole, thrust of the accused's defence, evidenced through the proceedings at trial, was that the police had engaged in random virtue-testing not that the accused had been induced to commit a crime.

Everything I have said above makes clear why the defence proceeded in the manner it did. It appears, from the record and from the manner in which the accused conducted his defence, that, should the accused's appeal be dismissed, there was no expectation of success on any further ground or argument going to entrapment. In this light, it is as unreal to entertain arguments of prejudice to the accused in entering convictions as it is to order a new trial in such circumstances. Considering the entire set of circumstances in this case, the lack of adjudication by the trial judge regarding the second branch of the entrapment test can neither prevent the entering of a conviction nor justify the order for a new trial on that issue. Accordingly, I am respectfully of the view that the Court of Appeal erred in ordering a new trial on this second branch of the test of entrapment in the circumstances of this case.

My conclusions in this regard are supported by this Court's unanimous decision in *R. v. Cassidy*, [1989] 2 S.C.R. 345, wherein this Court considered the nature of the Court of Appeal's ability, under s. 613(4)(b)(ii) of the *Criminal Code*,

R.S.C. 1970, c. C-34, (now s. 686(4)(b)(ii)), to enter a conviction rather than order a new trial. Lamer J. (as he then was), for the Court, set out within the context of the argument advanced by the Crown, the circumstances within which a court of appeal can properly exercise such a power, at p. 354-55:

The Crown replies that the Court of Appeal may allow a Crown appeal against an acquittal entered by a trial judge and substitute a verdict of guilty where the Crown establishes that an error of law was committed at trial, satisfies the Court of Appeal that, had there been a proper application of the law, the verdict would not have been the same, and further demonstrates that the accused should have been found guilty but for the error of law. In this respect, the principle that has been established at common law is that all the findings necessary to support a verdict of guilty must have been made, either explicitly or implicitly, or not be in issue. [Emphasis in original.]

It is clear that these prerequisites have been satisfied in the instant case. Given that conclusion, the question remains whether this Court, in overturning the judgment of the Court of Appeal on this issue, can direct the entry of convictions, absent an appeal by the Crown from the order of the Court of Appeal.

Situations Logically Falling Within the Scope of the Kienapple Exception

As I have stated at the outset, the general rule regarding the jurisdiction of appellate courts is based on compelling rationales, largely, the potential prejudice occasioned an accused, absent an appeal by the Crown. However, as the *Kienapple* exception demonstrates, this general rule does have legitimate exceptions that fall outside of the concerns protected by it. In my view, the present case offers convincing reasons for treating it in the same fashion as one would a situation falling more squarely within this previously articulated exception. While I will attempt to clarify

how this is so, I would first like to make it plain that I do not wish to lay waste to the general rule. As I hope to show, situations of a similar nature, illustrated by this case, warrant similar treatment. An examination of the factors in the present case that lead me to this result, however, also make it plain that the result here will not lead to any significant number of inclusions in the "exceptional" category.

To begin with, the procedure in a *Kienapple* situation is similar in many respects to that in an entrapment situation. In both, a preliminary determination of guilt regarding the charge or charges is made. Subsequent to this determination, the trial judge must consider whether a stay should be entered for reason of entrapment or due to the rule against multiple convictions. If a stay is ordered, the stayed charges are treated as "acquittals" for the purpose of an appeal: see *R. v. Jewitt*, [1985] 2 S.C.R. 128. The similarity of the proceedings in a situation of entrapment and the rule against multiple convictions, and the policy considerations behind them are discussed by Wilson J., for the Court, in *Provo*, *supra*, at pp. 17-18:

The accused who would be guilty of an offence except for the application of the rule against multiple convictions is not, in my view, deserving of an acquittal in the true sense that the state had not met its burden of proving the elements of the offence. If, as is the case here, the trial court pursues the preferable and safe course of making findings on all the counts charged, it will be clear that all the elements of the offence have been proved against the accused even if the registering of a conviction is barred for the policy reasons underlying the *Kienapple* principle. The policy considerations here are analogous to those which apply when proceedings against an accused are stayed because of entrapment. They are concerned with the integrity and fairness of the administration of justice rather than with the culpability of the accused The trial judge should determine whether the accused is entitled to an acquittal before the independent policies of either the rule against entrapment or the rule against multiple convictions is applied. [Emphasis added.]

It can be seen that, like the situation in a *Kienapple* context, the full force of the general rule obliging the Crown to appeal, is avoided in an entrapment situation due, as discussed above, to the nature of the proceedings and the underpinnings of the "acquittal" entered in such situations. Further, the position in which the Crown finds itself, after an appeal by the accused in an entrapment situation, is closely analogous to that in a *Kienapple* context. There is, in most instances, nothing meaningful for the Crown to appeal. If the Crown's appeal is successful and the entrapment arguments of the accused are unsuccessful on appeal, the stay will be "lifted" or set aside and the convictions will stand. As in a *Kienapple* situation, the "acquittal" fails to remain relevant after the entrapment issue is dispensed with and an accused cannot ignore that necessary result. Requiring the Crown to appeal the "acquittal" in order to formalize this necessary consequence is nothing more than a meaningless formality, a formality easily dispensed with in a *Kienapple* situation. The same result, in my view, should also obtain in an entrapment situation, both either/or situations.

Conclusion

In summary, holding to the general rule in cases of this nature smacks of formulaic justice. The analogy with *Kienapple* situations shows that similar circumstances involving similar rationales justify similar conclusions. In my respectful view, it is not possible in this particular case, to rely on the rationales underlying the general rule to support the conclusion reached by the Chief Justice. With the issue of the applicability of the general rule and prejudice to the accused fairly dispensed with, what is most compelling, in these circumstances, is to apply the logic supporting the exception made in the *Kienapple* context. Since the entrapment

issue, in the circumstances of this case, is no longer a live issue, there is no need to order a new trial, given the findings of guilt of the trial judge on all three counts charged. Consequently, the stay entered at trial should be set aside and convictions should be entered, even absent an appeal from the Crown to this Court from the Court of Appeal's order for a new trial on the second branch of the entrapment "defence".

Disposition

I would dismiss the appellant's appeal but would quash the order of the Court of Appeal for a new trial and remit the matter back to the trial judge for entry of convictions on the three counts and imposition of sentence.

//McLachlin J.//

The following are the reasons delivered by

McLACHLIN J. (dissenting) -- This appeal raises the question of when undercover police should be allowed to interfere with members of the public who are not under suspicion. This Court laid out the basic principles governing undercover intrusion into private activity in *R. v. Mack*, [1988] 2 S.C.R. 903. The present case raises issues as to the ambit of the *Mack* test and its application. With the greatest respect, I cannot agree with the application of the *Mack* test adopted in this case by the Court of Appeal and endorsed by my colleague, Chief Justice Lamer. To accept this application would, in my considered opinion, represent 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* and out of step with the philosophy and principles which guided the decisions of this Court in *R. v. Dyment*, [1988] 2 S.C.R. 417; *R. v. Duarte*, [1990] 1 S.C.R. 30; *R. v. Kokesch*, [1990] 3 S.C.R. 3; and *R. v. Wong*, [1990] 3 S.C.R. 36.

I accept the test for unlawful entrapment provided in *Mack*. Entrapment occurs where:

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

In this case we are concerned only with the latter aspect of the first branch of the test. The undercover policewoman who approached the accused had no reasonable suspicion that he was engaged in criminal activity. He was simply a not-too-well dressed young person crossing a street. This leaves only one basis on which the police can justify their activity -- that they were engaged in a *bona fide* inquiry.

Lamer C.J. finds that there was a *bona fide* inquiry in this case on the basis of two factors: (1) the officer's conduct was motivated by the genuine purpose of investigating and repressing criminal activity; and (2) the police department directed its investigation at a location where it is reasonably suspected that criminal activity is taking place. He goes on to say that, notwithstanding an apparently contrary statement in *Mack*, the presence of a *bona fide* inquiry eliminates any possibility of there being

random virtue-testing. I, on the other hand, take the view that determining whether the police were acting pursuant to a *bona fide* inquiry requires consideration of more than the two factors referred to by Lamer C.J. More particularly, it involves consideration of whether the state's interest in repressing criminal activity in the particular case outweighs the interest which individuals have in being able to go about their daily lives without courting the risk that they will be subjected to the clandestine investigatory techniques of agents of the state. I base this view on the considerations underlying the concept of unlawful entrapment, as well as the language used in *Mack*.

The reasoning in *Mack* recognizes that the law of entrapment is based on a balance between conflicting interests. On the one hand lie the individual's interests -- the interest in being left alone, free from state intrusion, and the interest in not being induced by the state to commit an offence (*Mack*, at p. 941). On the other lies the state's competing interest in protecting society from crime. Lamer J. (as he then was) puts it thus in *Mack*, at pp. 941-42:

The competing social interest is in the repression of criminal activity. Further, our dependance [*sic*] on the police to actively protect us from the immense social and personal cost of crime must be acknowledged. There will be differing views as to the appropriate balance between the concepts of fairness and justice and the need for protection from crime but it is my opinion that it is universally recognized that some balance is absolutely essential to our conception of civilized society. In deciding where the balance lies in any given case it is necessary to recall the key elements of our model of fairness and justice, as this is the only manner in which we can judge the legitimacy of a particular law enforcement technique. [Emphasis added.]

Mack therefore stands for the proposition that determination of entrapment must involve a balancing between the individual interest in being left alone and the

state's interest in the repression of crime. Only where considerations such as fairness, justice and the need for protection from crime tip the balance in favour of the state will police conduct which offends the individual interests at stake be acceptable.

The 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. This Court has frequently emphasized that limits must be placed on the state's ability to intrude into the daily lives of its citizens. As Justice La Forest stated in *R. v. Dyment, supra*, at pp. 427-28, in a passage adopted by Justice Sopinka for the majority in *R. v. Kokesch, supra*, "The restraints imposed on government to pry into the lives of the citizen go to the essence of a democratic state". Furthermore, in *R. v. Wong, supra*, at p. 53, La Forest J., for the majority, acknowledged that our society is one which "sets a premium on being left alone".

To paraphrase La Forest J. in *Wong, supra*, the notion is that individuals should be free to go about their daily business -- to go shopping, to visit the theatre, to travel to and from work, to name but three examples -- without courting the risk that they will be subjected to the clandestine investigatory techniques of agents of the state. A further 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.

It follows, from the fact that the concept of unlawful entrapment represents a balancing of conflicting interests, that the test for entrapment must likewise permit

the measuring of relative harms. A test which does not permit weighing of the infringement on individual freedom and privacy in determining whether entrapment has occurred is to that extent deficient. As Lamer J. put it in the passage cited in *Mack*, what must be determined "in any given case" is where the proper balance lies.

While comments of Lamer J. in *Mack* on what constitutes a *bona fide* inquiry leave room for consideration of the individual interest in being left alone and not being induced into crime, the application of *Mack* proposed by him in this case permits little or no recognition of the interest of the individual in being left alone. All that is required is that the police act from a proper motive and that there be a suspicion of criminal activity within a general geographic area targeted by the police. That established, there is no room for consideration of factors vital to the balancing process, for example, the size of the area, the number of innocent people going about legitimate activities who might be interfered with by the operation, and the seriousness of the crime in question.

In advocating a more refined test for *bona fide* inquiry than does Lamer C.J., I am motivated by concern for the implications of the test he proposes. That test would permit the police to extend their Granville Mall operation to all of Vancouver if statistics could be found to suggest that drug offences were occurring throughout Vancouver generally. The example is extreme. Yet it indicates the deficiency I see in the test proposed by Lamer C.J. In my view, a more sensitive test than that proposed by Lamer C.J. -- one which permits appreciation of all relevant factors -- is required.

I conclude that determination that the police were operating in the course of a *bona fide* inquiry within the meaning of *Mack* requires the Court to consider not only the motive of the police and whether there is crime in the general area, but also other factors relevant to the balancing process, such as the likelihood of crime at the particular location targeted, the seriousness of the crime in question, the number of legitimate activities and persons who might be affected, and the availability of other less intrusive investigative techniques. In the final analysis, the question is whether the interception at the particular location where it took place was reasonable having regard to the conflicting interests of private citizens in being left alone from state interference and of the state in suppressing crime. If the answer to this question is yes, then the inquiry is *bona fide*.

In proposing a test that involves the balancing of conflicting interests, I am not insensitive to the criticism sometimes made that balancing formulas may lack certainty and predictability and accord too much discretion to reviewing judges. Notwithstanding such criticisms, a balancing approach remains the only rational way to address problems such as that presented in this case. Balancing formulas provide a way of channelling diverse information into an analytic framework, a framework which, while perhaps less than precise, is far superior to voting by "gut reaction". A balancing process, where conflicting interests are articulated and weighed against each other, forces us to face squarely the real policy issues involved in the case, to make explicit what otherwise, rightly or wrongly, may be assumed. Our constitutional law is embedded in the notion of defining and balancing strongly felt interests in society. The rules which elaborate that law must address the same concerns.

In point of fact, the test which I propose offers sufficient guidance to the police, in my view. It may reasonably be predicted, for example, that where there is no evidence of the likelihood of offences being committed at the place where the undercover operative is stationed, the interception is unlikely to be *bona fide* in the absence of a countervailing state interest of compelling proportions.

Having set out the considerations which should be addressed in determining whether an inquiry is *bona fide*, I turn to the facts of this case. In my view, the factors to which I have referred negate Lamer C.J.'s conclusion that the entire Granville Mall represents a suitable area within the city of Vancouver for the carrying out of a *bona fide* police inquiry. Granville Mall, located in downtown Vancouver, occupies a six-block stretch of Granville Street, a major north-south thoroughfare running through the entire city. The diversity of the Granville Mall area -- which features theatres and restaurants, major department stores, large office towers, and within the radius of one block, the Vancouver Art Gallery, convention facilities and the Law Courts -- means that on a daily basis literally thousands of individuals will frequent the Mall and thus fall subject to the clandestine investigatory techniques of the police on the policy proposed in this case.

Lamer C.J. bases his conclusion that targeting the entirety of Granville Mall as a site for undercover operations constituted a *bona fide* police inquiry, on the absence of improper motive and the fact that it was reasonably suspected that drug-related crimes were occurring on the mall. He refers to the trial judge's observation that Granville Mall is "known as an area of considerable drug activity". With the greatest respect, I cannot agree with Lamer C.J.'s conclusion at p. 000 that "[it] would

be unrealistic for the police to focus their investigation on one specific part of the Mall". There is no evidence whatsoever that trafficking took place at the location of the undercover interception. Nor is there any evidence that traffickers systematically rotated locations to avoid detection. Indeed, the trial judge, in ordering a stay of proceedings, noted the legitimate character of much of the mall and held that the accused "was not at the immediate centre of drug trafficking". What evidence there is, established that the Granville Mall Skytrain station is known to the police as the "hub" of drug activity on the mall. That information suggests that it would be perfectly realistic for the police to focus their investigation on one specific part of the mall -- namely, the very hub of drug activity, the Skytrain station.

As indicated above, I cannot agree that the fact that crime may be said to occur generally within a given area suffices to establish a *bona fide* inquiry, given proper police motives. Other factors must be considered. The first is the likelihood of crime in the particular area targeted. There was no evidence that trafficking was likely to occur in the intersection where the accused was intercepted -- the intersection between a major hotel, an office tower and two department stores. On the contrary, as the finding of the trial judge reflects, drug trafficking was centred elsewhere on the mall. The fact that trafficking occurred at different locations in the six-block area of the mall does not establish that trafficking was likely to occur at the intersection where the accused was intercepted.

What evidence there is of drug activity on Granville Mall came from Staff Sergeant Kenneth Michael Davies, who, significantly, was called as "an expert in the areas of police enforcements [sic] practice and techniques regarding drug enforcement

in the Granville Mall area and the downtown Vancouver area and, in particular, the operation of undercover operations". Staff Sergeant Davies noted that the hub of drug activity on Granville Mall had migrated northward from the McDonald's restaurant to the Skytrain station. He also stated that recently a greater proportion of the drug trafficking has been occurring indoors, in bars and restaurants along the mall. He offered no evidence whatsoever that the particular intersection in question here -- Granville and Georgia -- had ever been a known site of drug activity. Moreover, in cross-examination, he appeared to disapprove expressly of the conduct engaged in by the undercover policewoman:

Q [The suspects] are noticed walking across the street in a crosswalk; that's it. They're not standing -- not seen standing where a bunch of people were standing. They haven't come from a place where there is any suspicion of drug trafficking. They're just walking across the street?

A If that's all there was, I personally wouldn't direct my operator to approach these people, given the very limited information you're giving me.

The statistics produced by Staff Sergeant Davies all relate to the entirety of the mall, with no attempt to discriminate between different locations where or times when the offences in question were committed. To rely on these numbers in support of the view that the police were justified in extending their operation to the entire six-block area of the mall is fraught with peril. Statistics are only as good as the questions upon which they are based. We have absolutely no idea what questions were asked in order to produce the numbers relied on by the Crown. It is entirely possible that the vast majority of the drug offences which occurred on Granville Mall took place close to the Skytrain station on Granville Street, the acknowledged hub of drug activity on Granville Mall. It is equally possible that none of the offences occurred at the

intersection where the accused was intercepted. Again, it is possible that the vast majority of the drug offences which occurred on Granville Mall occurred on certain days or at specific times of day -- weekends or late evenings, for example -- and not at 6:00 p.m. on a weekday, which is when the transaction in question here occurred. I conclude that the statistics relied on in this case fall far short of justifying granting to the police unfettered licence to carry out their operation anywhere within a six-block stretch of downtown Vancouver without restriction as to the area and the times of day to be covered. In short, it is not established that the police could reasonably have suspected trafficking at the place and time where the accused was intercepted.

A second factor relevant to determining the appropriateness of the investigation is the impact that the investigation may have on law-abiding citizens pursuing legitimate activities. Here the possibility of this undercover operation's interfering with legitimate activities was high. As already noted, the intersection in question is bounded by department stores, an office tower and a major hotel. Theatres, the Art Gallery and the Law Courts are nearby. This factor, while not in itself conclusive, weighs against the right of undercover police to intercede at will.

On the other side of the balance must be weighed the seriousness of the criminal activity which the police have targeted. It is apparent that the state interest in repressing crime may receive greater weight when the police target serious criminal offences. The offence here in question, while not to be condoned, cannot be considered as serious. In *Kokesch, supra*, Sopinka J. for the majority took judicial notice of the fact that narcotics offences involving marijuana are generally regarded as less serious than those involving "hard" drugs such as cocaine and heroin. The

same might be said of offences involving hashish, the substance involved in this case. The amount, moreover, was small. In short, this was not the sort of serious drug offence which would more readily tip the balance in favour of the state.

I turn finally to the availability of alternative investigatory techniques for detecting the sort of criminal activity at issue. There were alternative ways of apprehending drug pedlars such as the appellant. Simple observation by undercover operatives (as opposed to interception) is one. I am left with some doubt as to whether the apprehension of drug pedlars on Granville Mall requires giving the police *carte-blanche* to intercept large numbers of law-abiding citizens as these citizens visit the theatre or leave major office towers or department stores.

I arrive then at the conclusion that in the case at bar the individual interest in being left alone and free to pursue one's daily business without being confronted by undercover police operatives vastly outweighs the state interest in the repression of crime. It follows that the police officer in this case cannot be said to have been acting pursuant to a *bona fide* inquiry. Any other conclusion would be, in my respectful opinion, unfitting in a society which heralds the constitutional protection of individual liberties and places a premium on "being left alone".

I would allow the appeal and restore the stay of proceedings.

Appeal dismissed, L'HEUREUX-DUBÉ J. dissenting in part, McLACHLIN J. dissenting.

Solicitor for the appellant: Peter M. Kendall, Vancouver.

Solicitor for the respondent: The Department of Justice, Vancouver.