

r. v. mack, [1988] 2 S.C.R. 903

Norman Lee Mack

Appellant

v.

Her Majesty The Queen

Respondent

INDEXED AS: R. v. MACK

File No.: 19747.

1987: December 10; 1988: December 15.

Present: Dickson C.J. and Beetz, Estey*, McIntyre, Lamer, Wilson, Le Dain*, La Forest and L'Heureux-Dubé JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law -- Defences -- Entrapment -- Trafficking conviction -- Accused once an addict but had given up narcotics -- Police informer persistently requesting accused to sell drugs over lengthy period of time -- Informer threatening accused and offering large monetary inducement -- Whether or not stay of proceedings should issue on basis of entrapment -- Manner in which entrapment claim should be dealt with by the Courts.

* Estey and Le Dain JJ. took no part in the judgment.

Appellant testified at his trial for drug trafficking and, at the close of his defence, brought an application for a stay of proceedings on the basis of entrapment. His testimony indicated that he had persistently refused the approaches of a police informer over the course of six months, and that he was only persuaded to sell him drugs because of the informer's persistence, his use of threats, and the inducement of a large amount of money. Appellant testified that he had had a drug habit but that he had given up his use of narcotics. The application for a stay was refused and appellant was convicted of drug trafficking. The Court of Appeal dismissed an appeal from that conviction. The central issue here concerns the conceptual basis of the doctrine of entrapment and the manner in which an entrapment claim should be dealt with by the courts.

Held: The appeal should be allowed.

Entrapment occurs 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, and, (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. It is essential that the factors relied on by a court relate to the underlying reasons for the recognition of the doctrine in the first place.

The doctrine of entrapment is not dependant upon culpability and the focus, therefore, should not be on the effect of the police conduct on the accused's state of mind. As far as possible, an objective assessment of the conduct of the police and their agents is required. The predisposition, or the past, present or suspected criminal

activity of the accused, is relevant only as a part of the determination of whether the provision of an opportunity by the authorities to the accused to commit the offence was justifiable. Further, there must be sufficient connection between the accused's past conduct and the provision of an opportunity, since otherwise the police suspicion will not be reasonable. While the accused's predisposition is of some relevance, albeit not conclusive, in assessing 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.

The absence of a reasonable suspicion or a *bona fide* inquiry is significant in assessing the conduct of the police because of the risk that the police will attract people otherwise without involvement in a crime and because it is not a proper use of the police power to randomly test the virtue of people. The presence of reasonable suspicion or the mere existence of a *bona fide* inquiry will, however, never justify entrapment techniques: the police may not go beyond providing an opportunity regardless of their perception of the accused's character and regardless of the existence of an honest inquiry.

The following factors may be considered in determining if the police have gone further than providing an opportunity: (1) the type of crime being investigated and the availability of other techniques for the police detection of its commission; (2) whether an average person, with both strengths and weaknesses, in the position of the accused would be induced into the commission of a crime; (3) the persistence and number of attempts made by the police before the accused agreed to committing the offence; (4) the type of inducement used by the police including: deceit, fraud, trickery

or reward; (5) the timing of the police conduct, in particular whether the police have instigated the offence or became involved in ongoing criminal activity; (6) whether the police conduct involves an exploitation of human characteristics such as the emotions of compassion, sympathy and friendship; (7) whether the police appear to have exploited a particular vulnerability of a person such as a mental handicap or a substance addiction; (8) 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; (9) the existence of any threats, implied or express, made to the accused by the police or their agents; (10) whether the police conduct is directed at undermining other constitutional values. This list is not exhaustive.

Entrapment is not a substantive or culpability-based defence and the adoption of rules which historically, and by virtue of the *Charter*, conform to most substantive defences is neither necessary nor correct.

Objective entrapment involving police misconduct, and not the accused's state of mind, is a question to be decided by the trial judge, and the proper remedy is a stay of proceedings.

The issue of entrapment should be decided by the trial judge, as opposed to jury, for policy reasons. A judge should consider the question from the perspective of a reasonable person, dispassionate and fully apprised of all the circumstances, and the reasonable person is usually the average person in the community but only when that community's current mood is reasonable. The issue is maintaining respect for the values which, over the long term, hold the community together. One of those very

fundamental values is the preservation of the purity of the administration of justice. A judge is particularly well suited to make this determination. Then, too, the determination of whether the admission of evidence obtained in violation of a *Charter* right would bring the administration of justice into disrepute is one which should be made by a trial judge. If one of the advantages of allowing claims of entrapment is the development of standards of conduct on the part of the state, it is essential that decisions on entrapment, and those allowing the claim especially, be carefully explained so as to provide future guidance; this is not something the jury process lends itself to.

Before a judge considers whether a stay of proceedings lies because of entrapment, it must be absolutely clear that the Crown has discharged its burden of proving beyond a reasonable doubt that the accused had committed all the essential elements of the offence. If this is not clear and there is a jury, the guilt or innocence of the accused must be determined apart from evidence which is relevant only to the issue of entrapment. This protects the right of an accused to an acquittal where the circumstances so warrant. If the jury decides the accused has committed all of the elements of the crime, it is then open to the judge to stay the proceedings because of entrapment by refusing to register a conviction. Because the guilt or innocence of the accused is not in issue at the time an entrapment claim is to be decided, the right of an accused to the benefit of a jury trial in s. 11(f) of the *Charter* is in no way infringed.

The requirement that the accused prove entrapment on a balance of probabilities is not inconsistent with the requirement that the Crown prove the guilt of the accused beyond a reasonable doubt. The guilt or innocence of the accused is not in issue. The accused has done nothing to warrant an acquittal; the Crown, however,

has engaged in conduct, however, that disentitles it to a conviction. Requiring an accused to raise only a reasonable doubt is entirely inconsistent with a rule which permits a stay in only the "clearest of cases". More fundamentally, the claim of entrapment is a very serious allegation against the state. To place a lighter onus on the accused would unnecessarily hamper state action against crime. The interests of the court, as guardian of the administration of justice, and the interests of society in the prevention and detection of crime can be best balanced if the accused is required to demonstrate by a preponderance of evidence that the prosecution is an abuse of process because of entrapment. This is consistent with the rules governing s. 24(2) applications where the general issue is similar to that raised in entrapment cases: would the administration of justice be brought into disrepute?

The defence of entrapment is to be recognized in only the "clearest of cases": this description is preferable to the term "shocking and outrageous". Once the accused has demonstrated that the strategy used by the police goes beyond acceptable limits, a judicial condonation of the prosecution would by definition offend the community. It is not necessary to go further and ask whether the demonstrated entrapment would "shock" the community, since the accused has already shown that the administration of justice has been brought into disrepute.

The state must be given substantial leeway with drug trafficking because the traditional devices of police investigation are not effective. The police or their agents must get involved and gain the trust and confidence of the people trafficking or supplying the drugs. The social consequences of this crime are enormous and harmful.

The police here were not interrupting an ongoing criminal enterprise; the offence was clearly brought about by their conduct and would not have occurred without their involvement. Nor were they exploiting appellant's narcotics addiction. The persistence of the police requests and the equally persistent refusals, and the length of time needed to secure appellant's participation in the offence, indicate that the police had tried to make appellant take up his former life style and had gone further than merely providing him with the opportunity. The most important and determinative factor, however, was that appellant had been threatened and had been told to get his act together when he did not provide the requested drugs. This conduct was unacceptable and went beyond providing the appellant with an opportunity. The fact that the appellant eventually committed the offence when shown the money was not significant because he knew of the profit factor much earlier and still refused. The average person in appellant's position might also have committed the offence, if only to finally satisfy this threatening informer and end all further contact.

The police had reasonable suspicion that the appellant was involved in criminal conduct but they went too far in their efforts to attract him into the commission of the offence. The doctrine of entrapment was applicable to preclude appellant's prosecution and appellant met the burden of proof. The trial judge should have entered a stay of proceedings for abuse of process.

Cases Cited

Applied: *Amato v. The Queen*, [1982] 2 S.C.R. 418; *R. v. Jewitt* (1983), 34 C.R. (3d) 193 (rev'd on other grounds, [1985] 2 S.C.R. 128); **considered:** *Kirzner v. The Queen*, [1978] 2 S.C.R. 487; *Sorrells v. United States*, 287 U.S. 435 (1932);

Sherman v. United States, 356 U.S. 369 (1958); *United States v. Russell*, 411 U.S. 423 (1973), reversing 459 F.2d 671 (9th Cir. 1972); *Hampton v. United States*, 425 U.S. 484 (1976); *United States v. Bueno*, 447 F.2d 903 (5th Cir. 1971); *Greene v. United States*, 454 F.2d 783 (9th Cir. 1971); *Perka v. The Queen*, [1984] 2 S.C.R. 232; *R. v. Baxter* (1983), 9 C.C.C. (3d) 555, [1983] C.A. 412; *R. v. Gingras* (1987), 61 C.R. (3d) 361; *R. v. Dionne* (1987), 79 N.B.R. (2d) 297; **referred to:** *Mathews v. United States*, 108 S.Ct. 883 (1988); *Connelly v. Director of Public Prosecutions*, [1964] 2 All E.R. 401; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486; *R. v. Collins*, [1987] 1 S.C.R. 265; *Lemieux v. The Queen*, [1967] S.C.R. 492; *Bergstrom v. The Queen*, [1981] 1 S.C.R. 539; *R. v. Sharp*, [1987] 3 All E.R. 103; *R. v. Howe*, [1987] 1 All E.R. 771; *R. v. Fitzpatrick*, [1977] N.I. 20; *R. v. Mistrá* (1986), 32 C.C.C. (3d) 97; *R. v. Therens*, [1985] 1 S.C.R. 613; *R. v. Ashoona*, N.W.T.C.A., January 19, 1988, unreported, reversing (1987), 38 C.C.C. (3d) 163; *R. v. Biddulph* (1987), 34 C.C.C. (3d) 544; *R. v. Keyowski*, [1988] 1 S.C.R. 657.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 11(f), 24(2).

Criminal Code, ss. 7(3), 17, 605(1)(a).

Criminal Law Amendment Act, 1985, S.C. 1985, c. 19, s. 137(2).

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Rossum, Ralph A. "The Entrapment Defense and The Teaching of Political Responsibility: The Supreme Court as Republican Schoolmaster" (1978), 6 *Amer. J. Crim. Law* 287.

United States. U.S. National Commission on Reform of Federal Laws. *A Proposed New Federal Criminal Code*. (Brown Commission Final Report.)

APPEAL from a judgment of the British Columbia Court of Appeal (1985), 49 C.R. (3d) 169, dismissing an appeal from a judgment of Wetmore Co. Ct. J. (1983), 34 C.R. (3d) 228. Appeal allowed.

Sidney B. Simons and J. Douglas Jevning, for the appellant.

S. David Frankel and Patricia A. Babcock, for the respondent.

The judgment of the Court was delivered by

1. LAMER J.--

Introduction

2. The central issue in this appeal concerns the doctrine of entrapment. The parties, in essence, ask this Court to outline its position on the conceptual basis for the application of the doctrine and the manner in which an entrapment claim should

be dealt with by the courts. Given the length of these reasons due to the complexity of the subject, I have summarized my findings on pages 964 to 966 of these reasons.

The Facts

3. The appellant was charged with unlawful possession of a narcotic for the purpose of trafficking. He testified at trial and, at the close of the case for the defence, brought an application for a stay of proceedings on the basis of entrapment. The application was refused and a conviction entered by Wetmore Co. Ct. J., sitting without a jury, in written reasons reported in (1983), 34 C.R. (3d) 228. A notice of appeal from that decision was filed with the British Columbia Court of Appeal but the appeal books were not filed within the time prescribed. Counsel for the appellant sought and obtained, with the consent of Crown Counsel, an order dispensing with the requirement that transcripts of evidence be filed and permitting counsel to base their arguments solely on the reasons for judgment of Wetmore Co. Ct. J. The Chief Justice of British Columbia directed that a panel of five judges hear the appeal. For the reasons given by Craig J.A., on behalf of the Court, the appeal was dismissed. This decision is now reported at (1985), 49 C.R. (3d) 169. Leave to appeal was granted by this Court.

4. It is necessary to describe in some detail the relevant facts. In view of the particular procedural history of this appeal, I think it is appropriate to reproduce in its entirety the summary of the evidence provided for in the reasons for judgment of Wetmore Co. Ct. J. (at pp. 234-37):

Through information obtained from an officer of the Ontario Provincial Police, one Momotiuk was

brought to British Columbia. This man had apparently been dealing in narcotics in Kenora, Ontario. He was placed under police "handlers" in Vancouver, he visited the accused on a number of occasions, and eventually a transaction was set up whereby the accused would deliver cocaine to Momotiuk.

The accused testified. He first met Momotiuk in 1979 in Montreal where the accused was visiting one Franks. The accused understood Franks and Momotiuk to be associated in some clothing franchise.

The accused at this time was attempting to develop some property for sale near De Roche, British Columbia, and told Franks and Momotiuk of this and both expressed some interest in buying. Both arrived in British Columbia in October 1979. In the course of this visit the accused says that Momotiuk told him he was a drug trafficker in Kenora and wanted some "Thai pot". The accused says he had no interest.

Momotiuk, according to the accused, called later still wanting to make drug deals, and the accused told him he was interested only in real estate deals.

The accused again went to a yoga retreat near Montreal in December 1979. Franks and Momotiuk visited him there. Momotiuk produced some cocaine, which he and Franks used, and again asked the accused to become a supplier. A few days later they met again. At this time conversation was directed to show Momotiuk as an importer of drugs on a large scale, and again the accused was invited to join in and refused.

In January and February there were approximately seven telephone calls from Momotiuk to the accused soliciting his involvement. The accused says he refused.

In mid-February 1980 Momotiuk visited the accused again, asking him to supply drugs. The

accused says he told Momotiuk he was not interested and asked to be left alone. Momotiuk continued to visit two or three times and also telephoned.

In March the accused says Momotiuk arrived again. They went for a walk in the woods. Momotiuk produced a pistol and was going to show the accused his marksmanship. He was dissuaded because of the probability of startling the horses nearby. The accused says that at this remote area Momotiuk said, "A person could get lost." This the accused says was a threat. He says the matter of drugs was again raised and the accused says he was adamant that he had no knowledge of drugs sources.

The accused was asked to phone him twice and did not. One Matheson attended at the accused's residence on 13th March with a message that Momotiuk was very excited and wanted to see him at the Biltmore Hotel. The accused says he wanted nothing to do with Momotiuk but was terrified of him and agreed to go into town to the Biltmore. He also says that Matheson told him Momotiuk had some friends with him. This the accused took to be other members of this illegal syndicate.

While en route to the city he twice noted a car which seemed to be following him. This was probably so, because undercover police officers were doing a surveillance at the time.

On arrival at the hotel he met Momotiuk. Again he was informed of the syndicate. He was asked then if he wished to see the buying power. The accused agreed. He was directed to a car outside the hotel. In this car was an open briefcase with \$50,000 exposed. The custodian, unknown to the accused, was an undercover policeman.

The accused returned to the hotel, Momotiuk asked him to get a sample and gave him \$50 for this purpose.

The accused left and went to a supplier he had known of from years back. This supplier, one Goldsmith, now dead, heard the accused's story and agreed to supply "in order to get Doug (Momotiuk) off me". He obtained the sample and delivered it to Momotiuk, who tested it and said to get as much as he could. He returned to the supplier and offered \$35,000 to \$40,000 for a pound.

At the meeting the following day the accused had still not acquired the drugs and he says that at this point he was told to get his act together, in a threatening way.

I need not detail the accused's evidence of the following two days. He obtained 12 ounces of cocaine, and was to pay \$27,000 for it. This credit, he says, was extended to him by Goldsmith on the basis of payment when delivered to Momotiuk. It was in the course of this delivery that he was arrested.

It is on the basis of this testimony that the accused says he was entrapped. Momotiuk, Matheson and Franks did not testify. Neither did "Bonnie", the accused's former wife, who was apparently present at one of the Montreal meetings, where cocaine was produced and some discussion took place.

The accused has drug convictions in 1972 and 1976, two in 1978 and one in 1979. Those in 1976, one in 1978 and one in 1979 involved cocaine. He says his former use of drugs arose to relieve back pain, but in 1978 he discovered relief from yoga and gave up the use of narcotics. The offence in 1979 was a fall from grace when he met up with old friends.

Decisions of the Courts Below

5. Wetmore Co. Ct. J. held that the judgment of Estey J. in *Amato v. The Queen*, [1982] 2 S.C.R. 418, and of the British Columbia Court of Appeal in *R. v.*

Jewitt (1983), 34 C.R. (3d) 193 (rev'd on other grounds, [1985] 2 S.C.R. 128), established that entrapment is recognized as part of the abuse of process doctrine and a stay of proceedings arising from a finding of entrapment is not a "defence" in the traditional sense of that word. This distinction between a "stay" and a "defence" was important in terms of the burden and standard of proof. Wetmore Co. Ct. J. decided the evidential burden rested on the party seeking the stay to satisfy a court on a balance of probabilities that there had been entrapment which would constitute an abuse of the courts' processes. He stated at p. 232:

To ask the court to preclude either side--the state, represented by the prosecution, or the defence--from the adjudication of their differences must involve satisfying the court that its processes cannot result in the attainment of justice through the traditional avenue of a full and open trial. To make that finding, it seems fundamental to a system of justice in a free and democratic society that the court must be *satisfied* that its processes have been so abused that those very processes are precluded from attaining justice. Satisfaction in such a state of affairs existing must be more than a reasonable suspicion.

6. In Wetmore Co. Ct. J.'s view, the presumption of innocence until proven guilty beyond a reasonable doubt was not violated. He stated that this presumption applied at trial while a motion for a stay was to really determine whether the appellant would have a trial. It was not significant that in this case the motion came at the end of the proceeding: "What counsel is asking is that I stop the proceedings before a verdict. This amounts to aborting the trial" (p. 234). Wetmore Co. Ct. J.'s view of the nature of the entrapment claim may be discerned in the following passage, at p. 234:

This evidentiary burden is of great importance in the matter of entrapment because fundamental to any such finding is the conclusion that the accused had no disposition to commit the crime but succumbed to improper enticement by authorities of the state. As in all matters of the mental element in criminal matters, the state of mind usually comes from inferences from established facts. I must test those facts to say then which is more probable as to the accused's predisposition, not merely if something is rationally possible.

7. After reviewing the evidence, Wetmore Co. Ct. J. noted, at p. 237, that the appellant's evidence found support in the testimony of the police officers to some extent: "They agree that Momotiuk was difficult to `handle'" The stay was refused, however, because the appellant had not met the burden of proof. Wetmore Co. Ct. J. concluded, at p. 237:

In fairness to the accused, I should say that, if I were to decide this issue on the basis of the Crown having to negate entrapment beyond a reasonable doubt, I would have such a doubt.

I find, however, that it is far more probable that the accused became involved in this transaction for profit, rather than through persistent inducement and fear. Given his record and the alacrity with which he produced on seeing the \$50,000 in March 1980, I find it much more probable that he then saw a situation of profit and acted upon it. There is no doubt in my mind that the opportunity was made available through the tactics of the police and their agent, but that falls short of entrapping a person into the commission of an act that he had no intention of doing.

8. The British Columbia Court of Appeal held that having regard to this Court's decision in *Jewitt, supra*, and the opinion of several of the Justices in *Amato, supra*, entrapment is available in response to a criminal charge as an aspect of abuse

of process but not as a substantive defence. It was further held that the determination of the existence of entrapment is a question of law to be decided by the trial judge. The appellant bore the onus of proof on a balance of probabilities, since an accused claiming entrapment is seeking to have the case disposed of on the basis of police misconduct as opposed to the merits.

9. Having decided the applicable legal issues, the Court of Appeal referred to the trial judge's conclusion that the appellant acted out of a desire for profit. Craig J.A. then stated at p. 183: "I think that the judge was right in concluding that there was no entrapment in this case." The appeal was therefore dismissed.

Position of the Parties

10. This appeal was heard at the same time as the appeal in *R. v. Showman*, [1988] 2 S.C.R. 893. The decision in *Showman* is also being delivered today. In his written argument the appellant in the present case, in addition to his own submissions, adopted those put forward by the appellant in *Showman*. The position of the respondent in both cases is identical in all material respects.

Appellant

11. The appellant asserts that there are two types of entrapment. The first is objective and involves an evaluation of police conduct in order to determine whether prosecution of the accused would amount to an abuse of the courts' process. It is submitted that this analysis is a question of law to be addressed by the trial judge. If objective entrapment is found, the proper remedy is a stay of proceedings. This is

purely a question of police misconduct and as such is determined wholly independently of the accused's state of mind.

12. The second type of entrapment is subjective and the focus is on the accused's state of mind. The test is whether the accused possesses the necessary predisposition to commit the crime; if he or she does not, then the element of *mens rea* is missing. This can exist, in the appellant's submission, even when the police are "blameless" in terms of the character of their conduct toward the accused.

13. The appellant draws an analogy to other excusing defences, such as necessity, which focus on the accused's response to a given set of facts. The appellant asserts that in subjective entrapment where the inquiry is on the accused's state of mind, like other *mens rea* issues, the question is one of fact to be decided by the jury. The onus would lie on the Crown to prove beyond a reasonable doubt that the accused was predisposed to commit the offence. In the result, the appellant submits his conviction should be quashed as the trial judge stated he had a reasonable doubt as to whether the appellant was entrapped.

Respondent

14. The respondent asserts that there is only one conception of entrapment and it is rooted in the doctrine of abuse of process. Entrapment is not a defence since the necessary *mens rea* will be present and the conduct of the accused will be neither excused nor justified. The respondent submits, however, that the test for determining whether or not there has been unlawful entrapment is an amalgam of subjective and objective tests: the defence is limited to situations where the conduct of the police has

gone beyond permissible limits and the crime would not have been committed but for such activity. The police conduct must be, to use the respondent's phrase, the *causa sine qua non* of the offence.

15. With respect to procedural issues, the respondent asserts the question of entrapment is one of law to be decided by the trial judge. The onus would be on the accused to establish on a balance of probabilities that the proceedings amounted to an abuse of the court's processes.

Analysis

I. The Context

16. One need not be referred to evidence to acknowledge the ubiquitous nature of criminal activity in our society. If the struggle against crime is to be won, the ingenuity of criminals must be matched by that of the police; as crimes become more sophisticated so too must be the methods employed to detect their commission. In addition, some crimes are more difficult to detect. As Chief Justice Laskin in *Kirzner v. The Queen*, [1978] 2 S.C.R. 487, explained at pp. 492-93:

Methods of detection of offences and of suspected offences and offenders necessarily differ according to the class of crime. Where, for example, violence or breaking, entering and theft are concerned, there will generally be external evidence of an offence upon which the police can act in tracking down the offenders; the victim or his family or the property owner, as the case may be, may be expected to call in the police and provide some clues for the police to pursue. When "consensual" crimes are committed, involving willing persons, as is the case in

prostitution, illegal gambling and drug offences, ordinary methods of detection will not generally do. The participants, be they deemed victims or not, do not usually complain or seek police aid; that is what they wish to avoid. The police, if they are to respond to the public disapprobation of such offences as reflected in existing law, must take some initiatives.

17. The same point is made by Estey J. in *Amato, supra*, at p. 457. I would note that in addition to so-called "victimless" or "consensual" crimes, active law enforcement techniques may be used to combat crimes where there are victims, but those victims are reluctant to go to the police because of intimidation or blackmail, as may be the case with the offence of extortion. Further, some criminal conduct may go unobserved for a long time if the victims are not immediately aware of the fact that they have been the subject of criminal activity, in the case, for example, of commercial fraud and also bribery of public officials. In general it may be said that many crimes are committed in secret and it is difficult to obtain evidence of their commission after the fact.

18. Obviously the police must be given considerable latitude in the effort to enforce the standards of behaviour established in the criminal law. This has long been recognized by the common law (see R. Donnelly, "Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs" (1951), 60 *Yale L.J.* 1091, at pp. 1091-92). Laskin C.J., in *Kirzner, supra*, noted at p. 493 that with respect to consensual crimes, the police employ a number of people and techniques:

They may, for example, use a spy, either a policeman or another person, to obtain information about a consensual offence by infiltration; they may make arrangements with informers who may be parties to offences on which they report to the police to enable the other parties to be

apprehended; or the police may use decoys or themselves act under cover to provide others with the opportunity to commit a consensual offence or to encourage its commission. Going one step farther, the police may use members of their force or other persons to instigate the commission of an offence, planning and designing it *ab initio* to ensnare others.

19. There is a crucial distinction, one which is not easy to draw, however, between the police or their agents--acting on reasonable suspicion or in the course of a bona fide inquiry--providing an opportunity to a person to commit a crime, and the state actually creating a crime for the purpose of prosecution. The former is completely acceptable as is police conduct that is directed only at obtaining evidence of an offence when committed (see *Amato, supra, per Estey J.*, at p. 446). The concern is rather with law enforcement techniques that involve conduct that the citizenry cannot tolerate. In many cases the particular facts may constitute a classic example of what may be referred to as "entrapment" which has been described by an American judge as "the conception and planning of an offense by an officer, and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion, or fraud of the officer" (*Sorrells v. United States*, 287 U.S. 435 (1932), at p. 454, *per Roberts J.*, cited by Dickson C.J. in *Jewitt, supra*, at p. 145).

II. *The Jurisprudence*

20. A: Canadian Developments
21. The defence of entrapment was considered by the Court in *Amato, supra*. The accused was convicted of two counts of trafficking in cocaine. The British

Columbia Court of Appeal affirmed the convictions and a further appeal was dismissed by this Court, Laskin C.J. and Estey, McIntyre and Lamer JJ. dissenting.

22. Writing on behalf of himself, Martland, Beetz and Chouinard JJ., Dickson J. (as he then was) was of the view that assuming the defence of entrapment to be available it did not arise on the facts of the case (p. 464). He referred to the conclusions of the trial judge and the judges of the British Columbia Court of Appeal and stated, at p. 466:

The four British Columbia judges before whom the matter has come have been unanimous in concluding that, on the facts, the defence of entrapment does not arise. It does not seem to me to fall to this Court to retry the case and arrive at different findings.

23. Ritchie J., writing for himself, was of the view that entrapment was available in defence to a charge in circumstances which he describes as follows, at p. 473:

In my view it is only where police tactics are such as to leave no room for the formation of independent criminal intent by the accused that the question of entrapment can enter into the determination of his guilt or innocence.

24. Although Ritchie J. was of the view that the record disclosed the police instigated the course of events and Amato was "simply an incidental factor necessarily employed by the police" to achieve the objective of locating drug sources (pp. 467-68), he did not think the accused's evidence was sufficient to support the claim of entrapment (p. 472):

It was contended in the present case that Amato was subjected to a threat of violence against himself if he failed to cooperate with the police plan for procuring the drug. If this had in fact been the case I am satisfied that it might well have supported a defence of entrapment, but a careful study of the evidence fails to disclose to me that there was any such threat although the police officer who was allegedly seeking drugs for some "strong arm" operators from the United States did make mention of the fact that they carried firearms and this apparently made Amato nervous.

Whether the activities of the police can be said to have amounted to the "calculated inveigling or persistent importuning" by the police mentioned by Mr. Justice Laskin (as he then was) in *R. v. Ormerod*, [1969] 2 O.R. 230, at p. 238, must depend on the facts of each case and in the present case, although drug transactions were suggested to Amato by an *agent provocateur*, this is not of itself enough to invoke the defence of entrapment or to affect the fact that Amato must have known that what he was doing was wrong.

25. Estey J. writing for himself, Laskin C.J., McIntyre and Lamer JJ., also held that the defence of entrapment existed in Canadian law, not as a traditional substantive defence, but as an aspect of the abuse of process doctrine which enabled a court to enter a stay of proceedings in circumstances where allowing the accused to stand trial would offend the courts' sense of justice. On the facts, Estey J. concluded that the accused was entrapped and thus he would have allowed the appeal. Of importance for the purposes of the present appeal is the analytical approach set out by Estey J. which differs markedly from that found in the opinion of Ritchie J.
26. Estey J.'s opinion provides a summary of the doctrine of entrapment in the United States, Canada and the United Kingdom as it has emerged in the jurisprudence and as discussed in various proposals for law reform in these

jurisdictions. I will refer to some of these developments later. The key parts of the judgment of Estey J. may be found at pp. 445-47 where he outlines the rationale and criteria for the application of the defence.

27. At the outset, Estey J. explained that entrapment is not actually a "defence" in the traditional sense of the term. Earlier in his reasons, Estey J. had referred to s. 7(3) of the *Criminal Code* as a possible source for the recognition of the defence of entrapment in criminal law. Section 7(3) provides:

7. . . .

(3) Every rule and principle of the common law that renders any circumstance a justification or excuse for an act or a defence to a charge continues in force and applies in respect of proceedings for an offence under this Act or any other Act of the Parliament of Canada, except in so far as they are altered by or are inconsistent with this Act or any other Act of the Parliament of Canada.

28. It appears, however, from the following passage that Estey J. did not think the true source for recognition of the entrapment claim lay in s. 7(3) of the *Code*; rather, it arose from the inherent jurisdiction of a court to protect itself from an abuse of its own processes. As such, entrapment cannot be said to be a substantive defence (p. 445):

While it is frequently referred to in legal writings and sometimes in the courts as the 'defence of entrapment' it is not a defence in the traditional sense of that term. A successful defence leads to an acquittal on the charge, a determination that the offence has not been committed by the accused. Here, axiomatically, the crime from a physical point of view at least has

been committed. Indeed it may be that the necessary intent and act have combined to form a complete crime. The successful application of the doctrine of entrapment, if it be a defence in the ordinary sense, would support an acquittal. The *Criminal Code* authorizes acquittals in somewhat similar circumstances as in the case of the defence of duress. However, as will be seen later, the successful application of the concept of entrapment leads to a stay of prosecution, the court withholding its processes from the prosecution on the basis that such would bring the administration of justice into disrepute. This is an exercise of the inherent powers of the courts. Entrapment is not in a traditional sense a defence. For convenience and ease of reference as well as to conform to the present vocabulary of the law, I sometimes refer to the doctrine as the 'defence of entrapment' although in strict law it is not a defence. Therefore, for this technical reason, it may not be necessary to invoke s. 7(3) other than to illustrate by analogy the continuing flexibility of the criminal law within and without the *Criminal Code*. [Emphasis added.]

29. I would note at this point that I too will refer to the recognized doctrine as the 'defence of entrapment' for the same reasons given by Estey J. Later in the opinion, Estey J. stated at p. 447 that the root of the defence was the same as that for the exclusion of involuntary confessions: "The integrity of the criminal justice system demands the rule". In terms of the constituent elements of the defence, Estey J. stated at p. 446:

The principal elements or characteristics of the defence are that an offence must be instigated, originated or brought about by the police and the accused must be ensnared into the commission of that offence by the police conduct; the purpose of the scheme must be to gain evidence for the prosecution of the accused for the very crime which has been so instigated; and the inducement may be but is not limited to deceit, fraud, trickery or reward, and ordinarily but not necessarily will consist of calculated inveigling

and persistent importuning. The character of the initiative taken by the police is unaffected by the fact that the law enforcement agency is represented by a member of a police force or an undercover or other agent, paid or unpaid, but operating under the control of the police. In the result, the scheme so perpetrated must in all the circumstances be so shocking and outrageous as to bring the administration of justice into disrepute.

30. In addition, Estey J. noted that whether or not the police had a reasonable suspicion that the accused would commit the offence without inducement was relevant in the assessment of police conduct, but that "By itself and without more the predisposition in fact of the accused is not relevant to the availability of the defence" (p. 446).

31. Following a discussion of Canadian jurisprudence respecting the power of a court to control an abuse of its own processes, which discussion is now largely superceded by this Court's authoritative pronouncement in *Jewitt, supra*, Estey J. concluded that a court was entitled to enter a stay of proceedings on the basis of entrapment and this remedy was more appropriate than directing a dismissal or ordering that the charge be quashed (pp. 456-57).

32. Throughout the opinion and in particular at the conclusion, Estey J. acknowledges the role of policy in this area of law. Before turning to an application of the law to the evidence, Estey J. commented at p. 463:

The stay of proceedings in the presence of entrapment finds its way into the law or fails to do so as a matter of judicial view of the proper policy of the law in these circumstances. Which policy will produce a principle of law which will better serve the community in this area of the

criminal law has been the subject of thought and debate for a lengthy period. The considerations at play are well known and have been thoroughly analyzed and debated in the courts and by judicial writers.

...

It is clear that the need for some element of judicial control has been recognized in the common law and that the roots of the doctrine of entrapment are to be found in the common law. I am of the view that it is open to this Court and consistent with authority to recognize a defence of entrapment and to give effect to it in proper cases.

33. This Court was again faced with the issue of entrapment, in an indirect manner, in *Jewitt, supra*. In *Jewitt* the narrow issue was whether a judicially imposed stay of proceedings was tantamount to a "judgment or verdict of acquittal of a trial court" from which the Crown was entitled to launch an appeal under s. 605(1)(a) of the *Code*. This Court held that the Crown was entitled to appeal from a stay. The accused had been charged with trafficking in a narcotic but the jury found there was entrapment and the trial judge directed that the proceedings be stayed. Before the Court of Appeal, the Crown alleged the defence was not available to the accused and the trial judge erred in his instruction to the jury as to what constitutes entrapment. It was also alleged that the trial judge erred in instructing the jury that the onus lay on the Crown to establish beyond a reasonable doubt that there was no entrapment.

34. A majority of the British Columbia Court of Appeal dismissed the appeal for want of jurisdiction. Anderson J.A. thought the Court of Appeal had jurisdiction but would have dismissed the appeal in any event. In this Court it was held that firstly, a trial judge had the discretion to enter a stay of proceedings for abuse of

process and secondly, a stay in the circumstances of the case at bar amounted to a judgment or verdict of acquittal and thus was subject to appeal by the Crown pursuant to s. 605(1)(a) of the *Criminal Code*. (Section 605 has since been amended to provide expressly for this avenue of appeal, see: *Criminal Law Amendment Act, 1985*, S.C. 1985, c. 19, s. 137(2).)

35. In the course of giving reasons on behalf of a unanimous Court, Dickson C.J. explained, at p. 145, that the question of abuse of process was not one of fact alone and cited the definition of entrapment referred to earlier:

Staying proceedings on the basis of abuse of process, and in particular, on the basis of the defence of entrapment, in my view, amounts to a decision on a complex question of law and fact. Entrapment has been defined as the conception and planning of an offence by a law enforcement officer and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion or fraud of the officer; see *Sorrells v. United States*, 287 U.S. 435 (1932) at p. 454. This is more than a mere procedural defect. [Emphasis added.]

36. This Court was of the view that in determining whether a stay in such circumstances amounted to an acquittal it was important to put substance over form. Dickson C.J. referred to Anderson J.A.'s point that an absurd result would follow if a dismissal of a charge on the ground of abuse of process gave rise to an appeal, but an entry of a stay on the same basis would not. In the same manner it would not be rational to permit an appeal from a stay entered because of a *Charter* violation, but to deny an appeal for a stay arising from a finding of abuse of process because of entrapment (pp. 146-48).

37. In allowing the appeal on the ground that the British Columbia Court of Appeal erred in its decision that it lacked jurisdiction, this Court declined to address the other grounds of appeal which I referred to earlier. These arguments were remitted to the Court of Appeal for hearing and determination. I have been unable to locate any further decisions reporting those proceedings.

38. B: American Developments

39. The history of developments in the United States has been referred to by Laskin C.J. in *Kirzner, supra*, and canvassed by Estey J. in *Amato, supra*. I find it necessary however to repeat this history for the purposes of the present appeal because of the intervening event of the *Charter* in Canadian law, and because I am not sure the problems associated with the subjective or predisposition method were fully addressed earlier. Further, the emergence of the due process defence has not been explained. As a result, the decisions of the United States Supreme Court will have to be reviewed at some length. I would, however, sound a note of caution before turning to the American jurisprudence. While much of which has been said in the American courts and by academic writers is extremely useful, the context of the American experience and allocation of power between the executive and judicial branches, and between the federal and state courts, must not be ignored. Nor would it be safe to forget that the federal courts have a limited jurisdiction in the United States. The defence of entrapment is especially complicated because it is not grounded in the American Constitution and the various states are free to follow whatever approach they want. Some states adopt a subjective test while others adopt an objective one and some use a combination of the two. There is also considerable variation in the procedural rules

associated with the determination of an entrapment allegation. I have confined my summary to the decisions of the Supreme Court to avoid confusion.

40. In dealing with the issue of improper law enforcement techniques we are obviously not restricted in our analysis to the approaches followed in the American courts. Nonetheless, it would be to our own detriment not to seriously consider the jurisprudence in the United States Supreme Court as the Justices of that Court have fully engaged themselves in a vigorous debate which allows us to consider with an open mind the advantages and disadvantages of each of the approaches articulated in these judgments.

41. A review of the leading decisions of the Supreme Court of the United States indicates that there are three main approaches to the issue of impermissible law enforcement techniques. The three have been generally referred to as the "subjective", favoured by a majority of the Court; the "objective", consistently favoured by a minority; and more recently, the "due process" defence, the support for which is somewhat unclear. Each of these will be examined in turn by reference to the following decisions: *Sorrells v. United States*, *supra*; *Sherman v. United States*, 356 U.S. 369 (1958); *United States v. Russell*, 411 U.S. 423 (1973); and *Hampton v. United States*, 425 U.S. 484 (1976).

42. A successful entrapment defence under the subjective approach has two components: government inducement and a lack of predisposition on the part of the accused to engage in the criminal conduct. This view was first enunciated in *Sorrells*, *supra*, implicitly reaffirmed by the majority in *Sherman*, *supra*, and expressly reaffirmed in *Russell*, *supra*.

43. In *Sorrells, supra*, a government agent posing as a tourist visited the home of the accused. He asked twice if the accused would obtain alcohol for him, but the accused refused. The agent then engaged the defendant in a conversation relating to their shared war experiences and, after securing the accused's trust, asked again if alcohol could be obtained. The accused finally acceded to the request and was charged with a violation of the *National Prohibition Act*.

44. The Court held (McReynolds J. dissenting), that the accused had been entrapped, but the views of the majority and the minority differ sharply on the conceptual basis of the defence, and the manner in which a court should consider a claim. The same division of opinion appears in *Sherman, supra*, although again both the majority and minority agreed there had been entrapment as a matter of law. In *Sherman, supra*, a government informer came into contact with the accused at a doctor's office where the accused was being treated for a narcotic addiction. There were several accidental meetings thereafter and the two eventually began discussing their presumed common illness and efforts to be cured. The informer, asserting he was not responding to treatment, asked the accused if he knew of a source for narcotics. The accused attempted to avoid the issue but after many repeated requests predicated on the informer's alleged suffering, the accused obtained narcotics and was subsequently charged. Since the opinions of the majority and minority are similar in *Sorrells, supra*, and *Sherman, supra*, I find it convenient to deal with both decisions at the same time.

45. The majority states that the function of law enforcement does not include the manufacture of crime; rather it is to be directed at the prevention of crime

and the apprehension of criminals (*Sherman, supra*, at p. 372). To this end, the government is entitled to afford opportunities or facilities for the commission of an offence and in so doing may employ artifice, stealth and strategy. However,

A different question is presented when the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute.

46. (*Sorrells, supra*, at p. 442, cited in *Sherman, supra*, at p. 372, and again in *Russell, supra*, at pp. 434-35).

47. In *Sorrells, supra*, the majority were clearly wary of relying on any inherent jurisdiction or supervisory power which could empower the Court to shield an accused from prosecution for an offence which was the "creative activity" (p. 451) of the government. To justify the Court's interference in the prosecution they invoked a rule of statutory construction against the literal interpretation of statutes where it would result in flagrant injustice or absurd consequences. Hughes C.J., on behalf of the majority in *Sorrells, supra*, explained at p. 448:

We are unable to conclude that it was the intention of the Congress in enacting this statute that its processes of detection and enforcement should be abused by the instigation by government officials of an act on the part of persons otherwise innocent in order to lure them to its commission and to punish them. We are not forced by the letter to do violence to the spirit and purpose of the statute.

48. (See also *Sherman, supra*, at p. 372, and *Russell, supra*, at p. 435.)

49. In deciding whether an accused was "otherwise innocent" the majority in *Sorrells, supra*, stated at pp. 451-52 that the "predisposition and criminal design" of the accused were relevant:

The Government in such a case is in no position to object to evidence of the activities of its representatives in relation to the accused, and if the defendant seeks acquittal by reason of entrapment he cannot complain of an appropriate and searching inquiry into his own conduct and predisposition as bearing upon that issue. If in consequence he suffers a disadvantage, he has brought it upon himself by reason of the nature of the defense.

50. The majority in *Sherman, supra*, adhered to this approach and further explained that in deciding whether there has been entrapment "a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal" (p. 372).

51. The minority judgments in *Sorrells, supra*, and *Sherman, supra*, were authored by Roberts and Frankfurter JJ. respectively. In both cases the statutory construction approach is severely criticized as "strained and unwarranted" (*Sorrells, supra*, at p. 456) and "sheer fiction" (*Sherman, supra*, at p. 379). The minority argue that the acts of the accused fall clearly within the statute because he or she has engaged in conduct that is prohibited and all of the elements of the offence have been met (*Sorrells, supra*, p. 456; *Sherman, supra*, p. 379). In *Sorrells, supra*, Roberts J. stated, at p. 456:

Viewed in its true light entrapment is not a defense to him; his act, coupled with his intent to do the act, brings him within the definition of the law; he has no rights or equities by

reason of his entrapment. It cannot truly be said that entrapment excuses him or contradicts the obvious fact of his commission of the offense.

52. Frankfurter J. makes the further point in *Sherman, supra*, at p. 380, that viewing entrapment as going to the innocence of the accused ignores the anomaly that the defence is not available to one who is induced by a private individual into committing an offence:

If [the defendant] is to be relieved from the usual punitive consequences, it is on no account because he is innocent of the offense described. In these circumstances, conduct is not less criminal because the result of temptation, whether the tempter is a private person or a government agent or informer.

53. The minority assert that the recognition of the defence rests instead on public policy considerations. As stated by Roberts J. in *Sorrells, supra*, at p. 457:

The doctrine rests, rather, on a fundamental rule of public policy. The protection of its own functions and the preservation of the purity of its own temple belongs only to the court. It is the province of the court and of the court alone to protect itself and the government from such prostitution of the criminal law.

54. The court has an obligation, with the power derived from its inherent jurisdiction, to refuse to lend its processes and effectuate the enforcement of the law by "lawless means or means that violate rationally vindicated standards of justice" (*Sherman, supra*, at p. 380). Frankfurter J. asserted that the concerns raised by an entrapment case extend beyond the particular accused (*Sherman, supra*, at p. 380):

Public confidence in the fair and honorable administration of justice, upon which ultimately depends the rule of law, is the transcending value at stake.

55. Having established the theoretical underpinnings to its version of the entrapment claim, the minority conclude that the central question in each case is "whether the police conduct . . . falls below standards, to which common feelings respond, for the proper use of government power" (*Sherman, supra*, at p. 382). The minority in *Sherman* advocated an objective test in answering the above question. The government was fully entitled to act in such a manner as to detect those engaged in criminal conduct and ready and willing to engage in further crimes should the occasion arise, and the state may offer inducements that were likely to attract those people. What the government was prohibited from doing is offering inducements to "others who would normally avoid crime and through self-struggle resist ordinary temptations" (p. 384). The advantage of this approach is described by Frankfurter J. as follows, at p. 384:

This test shifts attention from the record and predisposition of the particular defendant to the conduct of the police and the likelihood, objectively considered, that it would entrap only those ready and willing to commit crime. It is as objective a test as the subject matter permits, and will give guidance in regulating police conduct that is lacking when the reasonableness of police suspicions must be judged or the criminal disposition of the defendant retrospectively appraised.

56. In terms of factors which would be relevant to this analysis, Frankfurter J., at pp. 384-85, referred to the following: the setting in which the inducements occurred, the nature of the crime, its secrecy and difficulty of detection, and the manner in which the particular criminal activity is usually carried out.

57. The minority finds the majority's reliance on the origin of intent quite misplaced because in their view, "in every case of this kind the intention that the particular crime be committed originates with the police, and without their inducement the crime would not have occurred" (*Sherman, supra*, p. 382). The minority have particular disdain for the majority's reliance on the predisposition of the accused because in their view it is an incoherent and unprincipled basis upon which to allow for a difference in the treatment of two accused. Roberts J. in *Sorrells, supra*, explained at pp. 458-59:

Whatever may be the demerits of the defendant or his previous infractions of law these will not justify the instigation and creation of a new crime, as a means to reach him and punish him for his past misdemeanors. He has committed the crime in question, but, by supposition, only because of instigation and inducement by a government officer. To say that such conduct by an official of government is condoned and rendered innocuous by the fact that the defendant had a bad reputation or had previously transgressed is wholly to disregard the reason for refusing the processes of the court to consummate an abhorrent transaction. It is to discard the basis of the doctrine and in effect to weigh the equities as between the government and the defendant when there are in truth no equities belonging to the latter, and when the rule of action cannot rest on any estimate of the good which may come of the conviction of the offender by foul means. The accepted procedure, in effect, pivots conviction in such cases, not on the commission of the crime charged, but on the prior reputation or some former act or acts of the defendant not mentioned in the indictment.

58. In *Sherman, supra*, Frankfurter J. repeated this criticism and elaborated upon it in the following passage at p. 383:

Permissible police activity does not vary according to the particular defendant concerned; surely if two suspects have been solicited at the same time in the same manner, one should not go to jail simply because he has been convicted before and is said to have a criminal disposition. No more does it vary according to the suspicions, reasonable or unreasonable, of the police concerning the defendant's activities. Appeals to sympathy, friendship, the possibility of exorbitant gain, and so forth, can no more be tolerated when directed against a past offender than against an ordinary law-abiding citizen. A contrary view runs afoul of fundamental principles of equality under law, and would espouse the notion that when dealing with the criminal classes anything goes. The possibility that no matter what his past crimes and general disposition the defendant might not have committed the particular crime unless confronted with inordinate inducements, must not be ignored. Past crimes do not forever outlaw the criminal and open him to police practices, aimed at securing his repeated conviction, from which the ordinary citizen is protected.

59. As a result of the majority decisions in *Sorrells* and *Sherman*, the subjective approach was followed in the federal courts. However, an attempt had been made by some of the Circuit Courts to allow an entrapment claim even when the predisposition of the accused had been established (see: *United States v. Bueno*, 447 F.2d 903 (5th Cir. 1971), and *Greene v. United States*, 454 F.2d 783 (9th Cir. 1971)). In *Russell*, *supra*, this trend was reversed to some extent. *Russell* was the first entrapment case in which the Court was divided on the result, as well as on the doctrinal foundation of the defence. *Russell* also signalled a movement towards recognizing a due process defence.

60. In *Russell* the government agent, assigned to locate a laboratory where it was thought methamphetamine was being made illegally, told the accused he represented an association interested in controlling the manufacture and sale of

methamphetamine. He offered to supply the accused with an essential ingredient which was difficult to obtain although not illegal, in return for one-half of the drug produced. The condition was that the agent be shown the laboratory and a sample. This condition was met. Later the agent observed the manufacturing process and the agreed to transaction was completed. The accused was convicted at trial of unlawfully manufacturing and selling methamphetamine.

61. On appeal, the accused conceded that the jury was entitled to find that he was predisposed. The Court of Appeals, however, held that entrapment existed as a matter of law whenever the court was of the opinion there had been "an intolerable degree of governmental participation in the criminal enterprise" (*United States v. Russell*, 459 F.2d 671 (9th Cir. 1972), at p. 673). The United States Supreme Court reversed that holding. Rehnquist J., writing for the majority, held that the principal element of entrapment was the accused's lack of predisposition to commit the crime and the concession by the accused in the Court of Appeals was fatal to his claim of entrapment.

62. The majority refused the invitation to give the defence of entrapment a constitutional dimension and the holdings in *Sorrells, supra*, and *Sherman, supra*, were expressly reaffirmed. The constitutional argument was that the government's involvement in the manufacture of the crime was so high that it violated the fundamental principles of due process to permit prosecution. The suggested analogy to the exclusionary rule adopted for illegal search and seizures and confessions was held to be imperfect because in the case at bar there had not been a violation of an independent constitutional right of the accused. Nor had the government agent violated any law in infiltrating the drug business. Rehnquist J. also rejected the argument that

due process is violated whenever a government agent provides an indispensable mean to the commission of a crime; it had not been demonstrated that it was impossible to obtain the necessary ingredient. The door was left open for future due process claims, however, as Rehnquist J. stated at pp. 431-32:

While we may someday be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction, cf. *Rochin v. California*, 342 U.S. 165 (1952), the instant case is distinctly not of that breed.

63. Rehnquist J. referred to the criticism that had been made of the subjective approach, in particular, the limitation of the defence to entrapment by government agents and the doubt that predisposition could be factually established with the necessary degree of certainty. It was admitted that these points were "not devoid of appeal" (p. 433). Rehnquist J. felt, however, that the minority's approach was equally problematic because in denying the right of the government to rebut the claim of inducement by showing the conduct was due to the accused's own readiness, it would likely be impossible to obtain convictions where the criminal transaction occurs in secret (p. 434). In addition, Rehnquist J. questioned the propriety of barring the prosecution of an accused who had planned and actually committed a crime "simply because government undercover agents subjected him to inducements which might have seduced a hypothetical individual who was not so predisposed" (p. 434). Regarding lower court decisions which barred prosecution because of a perception of "overzealous law enforcement", Rehnquist J. warned that the defence accepted in *Sorrells, supra*, and *Sherman, supra*, "was not intended to give the federal judiciary a 'chancellor's foot' veto over law enforcement practices of which it did not approve"

(p. 435). The decision of the Court below was viewed as introducing an "unmanageably subjective standard which is contrary to the holdings of this Court in *Sorrells* and *Sherman*" (p. 435). It was also noted that the executive branch of government had the primary responsibility of enforcing federal laws, subject to relevant constitutional and statutory limits, and judicial rules enforcing those limits.

64. Two dissenting opinions were filed. In a brief statement, Douglas J. (Brennan J. concurring) adopted the views of those advocating the minority approach and held that in this case the supply of the chemical ingredient made the "United States an active participant in the unlawful activity" (p. 437), and this was a "debased role" barred by the doctrine of entrapment (p. 439).

65. Stewart J. (Brennan and Marshall JJ. concurring) also adopted the objective approach of the minority in the earlier decisions as in his view "[it] is the only [approach] truly consistent with the underlying rationale of the defence" (p. 441) (footnote omitted). Stewart J. stated that the whole notion of predisposition was "misleading" since the mere fact of commission demonstrates a predisposition in the sense of accused persons proving themselves to be quite capable of committing the crime. Stewart J. also pointed out, at p. 442, that entrapment by private individuals, as compared to the state, affords no defence:

Since the only difference between these situations is the identity of the tempter, it follows that the significant focus must be on the conduct of the government agents, and not on the predisposition of the defendant.

The purpose of the entrapment defense, then, cannot be to protect persons who are "otherwise

innocent." Rather, it must be to prohibit unlawful governmental activity in instigating crime.

66. Stewart J. went on to adopt the views of Frankfurter J. in *Sherman, supra*, and Roberts J. in *Sorrells, supra*, quoted earlier, condemning the inequality in treatment between accused persons by reference to past criminal conduct because it makes the permissibility of police conduct vary accordingly. Stewart J. stated at p. 444: "In my view, a person's alleged 'predisposition' to crime should not expose him to government participation in the criminal transaction that would be otherwise unlawful" (footnote omitted). Stewart J. held that the conduct of the government in the case at bar constituted entrapment as a matter of law.

67. The Supreme Court split again on the issue of the parameters of the entrapment defence in *Hampton, supra*. The accused was convicted of distributing heroin as a result of sales made to a government agent. He argued that notwithstanding his predisposition--which was conceded--the due process clause barred prosecution where the heroin that was the subject of the charge had been supplied to him by a government informant who had arranged the sales. This argument was rejected by a majority of the Court in two separate opinions. Brennan, Stewart and Marshall JJ. dissented.

68. Rehnquist J.'s opinion affirming the conviction was joined in by Burger C.J. and White J. He held that *Russell, supra*, stood for the proposition that there could never be a defence of entrapment based on governmental misconduct where the predisposition of the accused to commit the crime had been established (*Hampton, supra*, at pp. 489-90, emphasis mine). Although the government played a more significant role in enabling the sale of drugs in this case as compared to *Russell*,

supra, the difference was one of degree only. Due process limits would only be relevant where the result of the government activity was a violation of some protected right of the accused. Further, recognition of the accused's argument would be in conflict with the statement in *Russell, supra*, that the defence of entrapment did not provide the courts with a "chancellor's foot" veto (at p. 490). Rehnquist J. thus closed the door he had left open in *Russell, supra*, and stated at p. 490:

If the police engage in illegal activity in concert with a defendant beyond the scope of their duties the remedy lies, not in freeing the equally culpable defendant, but in prosecuting the police under the applicable provisions of state or federal law.

69. In a separate concurring opinion, Powell J. (with whom Blackmun J. joined) agreed that there was nothing of significance to distinguish the facts from the earlier decision in *Russell, supra*, but he rejected the plurality's assertion that *Russell, supra*, held that the concept of fundamental fairness in the due process clause would never prevent the conviction of a predisposed accused, irrespective of the outrageousness of the police conduct in the particular case (pp. 492-93). Nor was Powell J. of the opinion that *Russell, supra*, foreclosed, by reference to the "chancellor's foot" metaphor, any reliance on the Court's supervisory powers in an appropriate case. Powell J. noted at pp. 494-95 that there were "doctrinal and practical difficulties of delineating limits to police involvement in crime that do not focus on predisposition" and he agreed that it would be an unusual case where predisposition would not be conclusive; but he did not accept that *Russell, supra*, precluded a bar to conviction in appropriate circumstances. In a footnote he commented (at p. 494, note 6):

The fact that there is sometimes no sharply defined standard against which to make these judgments is not itself a sufficient reason to deny the federal judiciary's power to make them when warranted by the circumstances. Much the same is true of analysis under our supervisory power. Nor do I despair of our ability in an appropriate case to identify appropriate standards for police practices without relying on the "chancellor's" "fastidious squeamishness or private sentimentalism". [Citations omitted.]

70. In his dissenting opinion, concurred in by Stewart and Marshall JJ., Brennan J. held that the conviction should be barred because the government's involvement in the crime had gone beyond the point of tolerance. Brennan J. adopted, under the Court's supervisory power, a rule which would be engrafted on the entrapment defence prohibiting conviction where "the subject of the criminal charge is the sale of contraband provided to the defendant by a Government agent" (at p. 500). In a footnote he left open the question of whether the principle should be applied to the states under the due process clause (at p. 500, footnote 4). The dissenting opinion urged that the degree of government involvement here superceded that in *Russell, supra*, and the state was doing "nothing less than buying contraband from itself through an intermediary and jailing the intermediary" (p. 498, citing *United States v. Bueno, supra*, at p. 905). The scheme was offensive because it deliberately enticed someone to commit a crime instead of being designed to uncover ongoing drug traffic, and the predisposition of the accused did not justify the government's acts. Brennan J. stated at p. 499: "No one would suggest that the police could round up and jail all 'predisposed' individuals, yet that is precisely what set-ups like the instant one are intended to accomplish".

71. In concluding this description of the leading cases I would point out that in a recent decision the Supreme Court of the United States held that an accused

facing federal prosecution on criminal charges is entitled, where the evidence so warrants, to a jury instruction on the defence of entrapment even if the accused also denies commission of the offence: *Mathews v. United States*, 108 S.Ct. 883 (1988). In giving reasons for the majority, Rehnquist C.J. adhered to the subjective approach to the entrapment defence. Of note is the separate concurring opinion of Brennan J. who in brief reasons explained why he concurred with the majority (at pp. 888-89):

Although some governmental misconduct might be sufficiently egregious to violate due process, *Russell, supra*, 411 U.S. at 431-432, 93 S.Ct. at 1642-1643 my differences with the Court have been based on statutory interpretation and federal common law, not on the constitution. Were I judging on a clean slate, I would still be inclined to adopt the view that the entrapment defense should focus exclusively on the government's conduct. But I am not writing on a clean slate; the Court has spoken definitively on this point. Therefore I bow to *stare decisis*, and today join the judgment and reasoning of the Court.

72. The objective approach advocated by the minority in the Supreme Court decisions had found the most support in American academic literature on entrapment which, I would note, is nothing short of voluminous. In a 1978 article criticizing the objective method, R. Rossum, "The Entrapment Defense and The Teaching of Political Responsibility: The Supreme Court as Republican Schoolmaster" (1978), 6 *Amer. J. Crim. Law* 287, the author reported that of twenty-six law review articles published since 1950, only three favoured the subjective test and of ninety-eight notes and case comments published during the same time frame, only two clearly advocated the subjective test (at pp. 296-97).

73. As was noted by Estey J. in *Amato, supra*, at pp. 437-38, proposals for the reform of federal criminal law in the United States also follow the objective test (see: the American Law Institute, *Model Penal Code*, s. 2.13 (1962) and more recently, *Commentaries* (1985), at pp. 405-20; see also, the Brown Commission Final Report, s. 702(2)).

III. *The Rationale*

A: The Regulation of the Administration of Justice

74. It is critical in an analysis of the doctrine of entrapment to be very clear on the rationale for its recognition in Canadian criminal law. Much of what is contained in the opinion of Estey J. in *Amato, supra*, provides this rationale. As was explained by Estey J., central to our judicial system is the belief that the integrity of the court must be maintained. This is a basic principle upon which many other principles and rules depend. If the court is unable to preserve its own dignity by upholding values that our society views as essential, we will not long have a legal system which can pride itself on its commitment to justice and truth and which commands the respect of the community it serves. It is a deeply ingrained value in our democratic system that the ends do not justify the means. In particular, evidence or convictions may, at times, be obtained at too high a price. This proposition explains why as a society we insist on respect for individual rights and procedural guarantees in the criminal justice system. All of these values are reflected in specific provisions of the *Charter* such as the right to counsel, the right to remain silent, the presumption of innocence and in the global concept of fundamental justice. Obviously, many of the rights in ss. 7 and 14 of the *Charter* relate to norms for the proper conduct of criminal

investigations and trials, and the courts are called on to ensure that these standards are observed.

75. The principles expressed in the *Charter* obviously do not emerge in a legal, social, or philosophical vacuum. With respect to criminal law in particular, the courts have, throughout the development of the common law and in the interpretation of statutes, consistently sought to ensure that the balance of power between the individual accused and the state was such that the interests and legitimate expectations of both would be recognized and protected. Lord Devlin, in *Connelly v. Director of Public Prosecutions*, [1964] 2 All E.R. 401 (H.L.), made the following apposite observation in this regard at p. 438:

...nearly the whole of the English criminal law of procedure and evidence has been made by the exercise of the judges of their power to see that what was fair and just was done between prosecutors and accused. The doctrine of *autrefois* was itself doubtless evolved in that way.

76. It is my view that in criminal law the doctrine of abuse of process draws on the notion that the state is limited in the way it may deal with its citizens. The same may be said of the *Charter* which sets out particular limitations on state action and, as noted, in the criminal law context ss. 7 to 14 are especially significant. This Court in *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, commented at p. 503 on the philosophical context in which these *Charter* provisions operate:

Thus, ss. 8 to 14 provide an invaluable key to the meaning of "principles of fundamental justice". Many have been developed over time as presumptions of the common law, others have found expression in the international conventions on human rights. All have been recognized as

essential elements of a system for the administration of justice which is founded upon a belief in "the dignity and worth of the human person" (preamble to the *Canadian Bill of Rights*, R.S.C. 1970, App. III) and on "the rule of law" (preamble to the *Canadian Charter of Rights and Freedoms*).

It is this common thread which, in my view, must guide us in determining the scope and content of "principles of fundamental justice". In other words, the principles of fundamental justice are to be found in the basic tenets of our legal system. They do not lie in the realm of general public policy but in the inherent domain of the judiciary as guardian of the justice system. Such an approach to the interpretation of "principles of fundamental justice" is consistent with the wording and structure of s. 7, the context of the section, i.e., ss. 8 to 14, and the character and larger objects of the *Charter* itself. It provides meaningful content for the s. 7 guarantee all the while avoiding adjudication of policy matters. [Emphasis added.]

77. It is the belief that the administration of justice must be kept free from disrepute that compels recognition of the doctrine of entrapment. In the context of the *Charter*, this Court has stated that disrepute may arise from "judicial condonation of unacceptable conduct by the investigatory and prosecutorial agencies": *R. v. Collins*, [1987] 1 S.C.R. 265, at p. 281. The same principle applies with respect to the common law doctrine of abuse of process. Conduct which is unacceptable is, in essence, that which violates our notions of "fair play" and "decency" and which shows blatant disregard for the qualities of humanness which all of us share.

78. The power of a court to enter a stay of proceedings to prevent an abuse of its process was, as noted earlier, confirmed by this Court in *Jewitt, supra*. The appropriateness of the court's exercise of the power, as well as the circumstances in

which it may be used, is discussed in the following passage (at pp. 136-37, *per* Dickson C.J.):

I would adopt the conclusion of the Ontario Court of Appeal in *R. v. Young* [(1984), 40 C.R. (3d) 289], and affirm that "there is a residual discretion in a trial court judge to stay proceedings where compelling an accused to stand trial would violate those fundamental principles of justice which underlie the community's sense of fair play and decency and to prevent the abuse of a court's process through oppressive or vexatious proceedings". I would also adopt the caveat added by the Court in *Young* that this is a power which can be exercised only in the "clearest of cases".

79. It is essential to identify why we do not accept police strategy that amounts to entrapment. There could be any number of reasons underlying what is perhaps an intuitive reaction against such law enforcement techniques but the following are, in my view, predominant. One reason is that the state does not have unlimited power to intrude into our personal lives or to randomly test the virtue of individuals. Another is the concern that entrapment techniques may result in the commission of crimes by people who would not otherwise have become involved in criminal conduct. There is perhaps a sense that the police should not themselves commit crimes or engage in unlawful activity solely for the purpose of entrapping others, as this seems to militate against the principle of the rule of law. We may feel that the manufacture of crime is not an appropriate use of the police power. It can be argued as well that people are already subjected to sufficient pressure to turn away from temptation and conduct themselves in a manner that conforms to ideals of morality; little is to be gained by adding to these existing burdens. Ultimately, we may be saying that there are inherent limits on the power of the state to manipulate people and events for the purpose of attaining the specific objective of obtaining convictions.

These reasons and others support the view that there is a societal interest in limiting the use of entrapment techniques by the state.

80. The competing social interest is in the repression of criminal activity. Further, our dependance 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.

81. It must be stressed, however, that the central issue is not the power of a court to discipline police or prosecutorial conduct but, as stated by Estey J. in *Amato, supra*, at p. 461: "the avoidance of the improper invocation by the state of the judicial process and its powers". In the entrapment context, the court's sense of justice is offended by the spectacle of an accused's being convicted of an offence which is the work of the state (*Amato, supra*, at p. 447). The court is, in effect, saying it cannot condone or be seen to lend a stamp of approval to behaviour which transcends what our society perceives to be acceptable on the part of the state. The stay of the prosecution of the accused is the manifestation of the court's disapproval of the state's conduct. The issuance of the stay obviously benefits the accused but the Court is primarily concerned with a larger issue: the maintenance of public confidence in the legal and judicial process. In this way, the benefit to the accused is really a derivative one. We should affirm the decision of Estey J. in *Amato, supra*, that the basis upon

which entrapment is recognized lies in the need to preserve the purity of administration of justice.

82. B: The Guilt of the Accused

83. Both the appellant and respondent agree that the rationale for recognition of the entrapment doctrine lies in the inherent jurisdiction of the court to prevent an abuse of its own processes. The respondent asserts this is the exclusive rationale; the appellant submits that it is open to the court to view entrapment as also bearing on the accused's culpability and as such it would operate as a substantive defence.

84. It is not fruitful, in my view, to deal with impermissible police conduct through the vehicle of substantive criminal law doctrine. There are three problems with the appellant's proposition. Firstly, the conduct of the police or their agents in most cases will not have the effect of negating *mens rea* or, for that matter, *actus reus*. (There may be exceptional cases, however; see, for example, the decision of this Court in *Lemieux v. The Queen*, [1967] S.C.R. 492.) The physical act of the accused is a voluntary one and the accused will have an aware state of mind. The prohibited act will have been committed intentionally and with knowledge of the facts which constitute the offence and the consequences which flow from them.

85. However they may be defined, the essential elements of the offence in issue will be met in most cases, and it is from this general position that the doctrine of entrapment should develop. The decision of Estey J. in *Amato, supra*, and Dickson

C.J. in *Jewitt, supra*, may also be seen to support this perspective. In a passage cited earlier, Estey J. stated at p. 445:

A successful defence leads to an acquittal on the charge, a determination that the offence has not been committed by the accused. Here, axiomatically, the crime from a physical point of view at least has been committed. Indeed, it may be that the necessary intent and act have combined to form a complete crime.

86. The following comments of Dickson C.J. in *Jewitt, supra*, at p. 148, are worthy of attention and are, in my view, equally applicable to the present discussion:

We are concerned here with a stay of proceedings because of an abuse of process by the Crown. While a stay of proceedings of this nature will have the same result as an acquittal and will be such a final determination of the issue that it will sustain a plea of *autrefois acquit*, its assimilation to an acquittal should only be for purposes of enabling an appeal by the Crown. Otherwise, the two concepts are not equated. The stay of proceedings for abuse of process is given as a substitute for an acquittal because, while on the merits the accused may not deserve an acquittal, the Crown by its abuse of process is disentitled to a conviction. No consideration of the merits--that is whether the accused is guilty independently of a consideration of the conduct of the Crown--is required to justify a stay. In the case at bar the accused admitted that he had sold a pound of marijuana to an undercover officer. A consideration of the merits would necessarily have led to his conviction. The stay in this case intervenes to prevent consideration of the merits lest a conviction occur in circumstances which would bring the administration of justice into disrepute. [Emphasis added.]

87. Secondly, while the argument that the accused is not culpable because his or her conduct may be excused is more plausible, it is ultimately not compelling. For entrapment to be recognized as an excusing defence, it is clear that the focus must be directed at the effect of the external or internal circumstances on the accused. The appellant draws the Court's attention to the decision in *Perka v. The Queen*, [1984] 2 S.C.R. 232, where the defence of necessity was recognized. A majority of the Court (*per* Dickson, J. (as he then was) with Ritchie, Chouinard and Lamer JJ. concurring) held that the proper conceptual basis for recognition of the defence of necessity was as an excuse. Wilson J., writing for herself, held that necessity could be conceived of either as an excuse or as a justification for a criminal act.

88. Dickson C.J. outlined the distinction between "justifications" and "excuses" in criminal law theory in the following terms, at pp. 246-47:

Criminal theory recognizes a distinction between "justifications" and "excuses". A "justification" challenges the wrongfulness of an action which technically constitutes a crime. The police officer who shoots the hostage-taker, the innocent object of an assault who uses force to defend himself against his assailant, the Good Samaritan who commandeers a car and breaks the speed laws to rush an accident victim to the hospital, these are all actors whose actions we consider *rightful*, not wrongful. For such actions people are often praised, as motivated by some great or noble object. The concept of punishment often seems incompatible with the social approval bestowed on the doer.

In contrast, an "excuse" concedes the wrongfulness of the action but asserts that the circumstances under which it was done are such that it ought not to be attributed to the actor. The perpetrator who is incapable, owing to a disease of the mind, of appreciating the nature and consequences of his acts, the person who

labours under a mistake of fact, the drunkard, the sleepwalker: these are all actors of whose "criminal" actions we disapprove intensely, but whom, in appropriate circumstances, our law will not punish.

89. Wilson J. agreed that there is a distinction between justifications and excuses in criminal law theory. She stated at p. 268: "In the case of justification the wrongfulness of the alleged offensive act is challenged; in the case of excuse the wrongfulness is acknowledged but a ground for the exercise of judicial compassion for the actor is asserted".

90. Dickson C.J. explained that what is being admitted in allowing the defence of necessity is that while the acts of the accused are voluntary in the physical sense of the word, the "'choice' to break the law is no true choice at all; it is remorselessly compelled by normal human instincts" (p. 249). Dickson C.J. cited with approval the views of George Fletcher in *Rethinking Criminal Law* (1978), on the issue of moral or normative involuntariness (Fletcher, at pp. 804-5, cited in *Perka, supra*, at p. 249):

The notion of voluntariness adds a valuable dimension to the theory of excuses. That conduct is involuntary--even in the normative sense--explains why it cannot fairly be punished. Indeed, H.L.A. Hart builds his theory of excuses on the principle that the distribution of punishment should be reserved for those who voluntarily break the law. Of the arguments he advances for this principle of justice, the most explicit is that it is preferable to live in a society where we have the maximum opportunity to choose whether we shall become the subject of criminal liability. In addition, Hart intimates that it is ideologically desirable for the government to treat its citizens as self-actuating, choosing agents. This principle of respect for individual autonomy is implicitly

confirmed whenever those who lack an adequate choice are excused for their offenses.

91. In his conclusion on the proper theoretical source for the defence of necessity, Dickson C.J. stated at p. 250:

At the heart of this defence is the perceived injustice of punishing violations of the law in circumstances in which the person had no other viable or reasonable choice available; the act was wrong but it is excused because it was realistically unavoidable.

92. The concept of normative involuntariness also informs the recognition of the defence of duress. In *Bergstrom v. The Queen*, [1981] 1 S.C.R. 539, this Court, per McIntyre J., stated that with respect to the defence of duress as codified in s. 17 of the *Criminal Code* at p. 544:

It can only become effective to protect an accused when it can be shown that the accused has, in fact, actually committed the offence. Where it applies, the commission of the offence is excused.

93. What both the defence of necessity and duress share is the requirement in law that to succeed on the allegation, the accused must demonstrate that the circumstances in which the offence was committed were truly oppressive and threatening so that the accused's decision to break the law is one which the community can both comprehend and absolve.

94. There may well be cases where the accused can argue that the police conduct gives rise to a defence of duress. If so, the accused can plead duress in conjunction with the claim that to allow the trial to proceed would constitute an abuse

of process. It is hard to imagine a situation which amounted to duress that would not also form the basis of an abuse of process allegation, but the obverse is not necessarily true; practices which constitute abuse of process may not amount to duress.

95. There is a distinction in the type of pressure an accused is faced with in a situation involving duress or necessity, and the type of pressure brought to bear on an accused through entrapment techniques. For example, with respect to duress, s. 17 of the *Code* requires that the accused be threatened with "immediate death or bodily harm". Similarly, the defence of necessity requires that the "situation be urgent and the peril be imminent" so that "normal human instincts cry out for action and make a counsel of patience unreasonable" (*Perka, supra*, at p. 251). Can it really be said that in an entrapment situation the accused is placed in circumstances which are equally traumatic? I do not think this is the case, and this is precisely the reason why a stay is entered instead of an acquittal. The accused in a typical entrapment situation is not being threatened with death or bodily harm and nor is peril imminent. I agree that there is a limit, imposed by external events, on the accused's freedom of choice of action in all three cases of duress, necessity and entrapment; there is, however, a great difference in the quality and degree of pressure in the entrapment situation: it is less intense and the circumstances are not morally agonizing to the accused.

96. The criminal law, as noted by Professor Eric Colvin in his text *Principles of Criminal Law* (1986), has recognized as defences, "Only the strongest of excuses" (at p. 166). It is my considered opinion that entrapment is not an exculpating defence and I find absolutely no merit in the idea that the entrapment is a justifying defence because it cannot be said that the accused's commission of the crime by reason of police pressure was not wrongful.

97. There is a third and perhaps more fundamental problem with the notion that entrapment relates to the blameworthiness or culpability of the accused: if this is the proper theoretical foundation for allowing the claim of entrapment, then on what principled basis can we justify limiting the defence to situations where it is the state, and not a private citizen, who is the entrapping party? Professor Colvin makes this point in the following passage (*supra*, at p. 232):

Considering entrapment from the standpoint of the theory of criminal culpability, the better arguments are for recognizing the defence in a procedural rather than an exculpatory form. This is not to deny that circumstances of entrapment can sometimes provide an excuse which might merit recognition by way of a special defence. But, if the argument for an excusing defence is accepted, it demands much more than the entrapment defence as it has been hitherto conceived. The arguments for an entrapment defence have been made with respect to entrapment by the police or their agents. Yet in almost all cases, the accused would not have known who was entrapping him. It is therefore immaterial to his culpability whether it happened to be the police or someone else. The argument for an excusing defence can only be sustained as an argument for a defence of wider application, available wherever someone has been pressured into committing an offence by another person. The defence of duress represents a limited concession to the view that exculpation can be appropriate in this kind of situation. There has, however, been little support for extending its rationale to cases of persistent solicitation. In addition, the arguments for making entrapment an excusing defence have generally been confined to entrapment by the police or their agents. If the defence is to be subject to this limitation, it is best conceived as an aspect of abuse of process. [Citations omitted.]

98. It could be argued, as an American author has, that the limitation to police and their agents is necessary to avoid collusion between co-conspirators, for

example where one conspirator takes the blame for the commission of an offence by testifying he or she entrapped the co-conspirators, and also to avoid false claims of entrapment against people who cannot be located by the prosecution. The writer asserts it would be difficult to ascertain the truth if such testimony is uncontradicted (see: R. Park, "The Entrapment Controversy" (1976), 60 *Minn. L.R.* 163, at pp. 241-42). The second point urged by this author is that in addition to being concerned with culpability, the defence has the objective of maintaining the purity of the courts and controlling police conduct and one "may properly limit the defense to circumstances in which these policies would be served simultaneously" (at p. 242).

99. I do not find either of these two arguments persuasive of the proposition for which they are put forward. First of all, I would note that the authors of the majority opinions in the United States Supreme Court make no effort to justify the lack of extension of the defence to entrapment by private persons on any grounds, let alone either of the two described above. This suggests to me that the issue is not the appropriateness of limiting the defence to entrapment by police or their agents, but rather the assumed inappropriateness of extending the defence any further. The reasons for not extending it do not relate to blameworthiness.

100. Even if I were of the view, which I am not, that the fundamental reason behind recognizing the claim of entrapment is culpability, I could not accept Professor Park's justifications for restricting the defence. The concern regarding collusion among co-conspirators exists in the defence of duress as well. The credibility of the testimony of a co-conspirator who admits to entrapment under an agreement to take the blame for the commission of an offence would have to be carefully considered even assuming it would be a common event for one conspirator to play the part of a martyr. I think

this proposition is a bit unrealistic but even if it is not, a trier of fact would not likely be misled by invalid claims by co-conspirators. Further, under s. 17 of the *Code*, individuals who are parties to a conspiracy or association whereby they are subject to compulsion are disentitled to claim duress as a defence. Similarly, in England, where the defence of duress is governed by the common law, it has been held that the defence is unavailable to those who commit an offence under pressure, if at the time of commission they are active members of a criminal organization or association that they joined voluntarily and with the knowledge that the association might put pressure on them to commit an offence (see: *R. v. Sharp*, [1987] 3 All E.R. 103 (C.C.A.); and see also, *R. v. Howe*, [1987] 1 All E.R. 771 (H.L.), *per* Lord Halisham at p. 782 and *per* Lord Griffiths at p. 786, both citing *R. v. Fitzpatrick*, [1977] N.I. 20 (N.I. C.C.A.))

101. The spectre of false allegations by people is also an unsatisfactory basis upon which to deny the availability of the defence to those who are not falsely claiming that they have been entrapped. In the situation where the alleged entrapper cannot be found the issue would fall to be resolved by reference to the credibility of the accused and, if necessary, to any facts which support or undermine the accused's version of events. In all truly difficult cases the trier of fact may be trusted to ascertain the truth to the degree necessary to either uphold or reject the defence.

102. I also reject the second argument put forward by Professor Park, namely, that it is proper to limit the defence to cases where the culpability concern and assessment of police conduct concern can both be met. This simply illustrates that the real issue is the conduct of the state and the effect that conduct has on the administration of justice. Further, an American court following the subjective approach will convict a predisposed accused even if the police conduct was

particularly offensive unless, perhaps, it was so outrageous as to trigger a due process defence. It is my view that it would bring the administration of justice into disrepute to permit a conviction in those circumstances and the goal of preserving respect for the courts would be undermined. This illustrates that a fusion of the culpability and administration of justice rationales produces a doctrine which is misguided with respect to blameworthiness and too restrictive to achieve the objective of preserving respect for the administration of justice.

103. I remain firmly of the view that the true basis for allowing an accused the defence of entrapment is not culpability. I will summarize the main reasons. Firstly, in most cases the essential elements of the offence will have been met. Secondly, the circumstances in which an accused is placed in an entrapment situation are not agonizing in the sense acknowledged by the defences of duress or necessity. Where the police conduct does amount to duress, that defence can be pleaded in conjunction with an abuse of process allegation. I would note, however, that any "threats" by the police, even if insufficient to support the defence of duress, will be highly relevant in the assessment of police conduct for the purpose of an abuse of process claim. The third reason why I am unwilling to view entrapment as relating to culpability is that if it did, there would not be a valid basis on which to limit the defence to entrapment by the state. The lack of support for an extension of the defence to provide against entrapment by private citizens demonstrates that the real problem is with the propriety of the state's employing such law enforcement techniques for the purpose of obtaining convictions. If this is accepted, then it follows that the focus must be on the police conduct.

IV. *The Proper Approach*

104. The next and more difficult issue to be considered is what is the appropriate method of determining whether police conduct has exceeded permissible limits such that allowing a trial to proceed would constitute an abuse of process? The objective and subjective approaches as revealed in the writings of the United States Supreme Court have each been soundly criticized and there is some difficulty in disentangling oneself from the accepted definitions of the terms "subjective" and "objective", or from the explanations of these two types of analysis. As far as possible, however, I would like to consider the issue from a clean slate and decide what is appropriate in the Canadian context. Before doing so, however, the decision of Estey J. in *Amato*, *supra*, must be reviewed.

105. In *Amato*, Estey J. accepted the rationale of the minority in the United States Supreme Court, and this might seem to dictate a concurrent acceptance of the minority's method of inquiry, which is to ask if a hypothetical nonpredisposed person would likely have been induced to commit an offence; if so, the police have gone beyond providing merely an opportunity for criminal activity (*Sherman*, *supra*, per Frankfurter J., at p. 384). It appears, however, that Estey J. articulated a test which has both subjective and objective components. For ease of reference I will paraphrase the essential elements of the defence as stated by Estey J. in *Amato*, at p. 446:

1. (a) The offence must be instigated, originated or brought about by the police; and

(b) the accused must be ensnared into the commission of the offence by the police conduct.

2. The purpose of the scheme must be to gain evidence for the prosecution of the accused for the very crime which has been so instigated.

3. The inducement may include, among other things, deceit, fraud, trickery or reward and will usually, although not necessarily, consist of calculated inveigling and persistent importuning.

4. The character of the initiative taken by the police is unaffected by the fact that the law enforcement agency is represented by a member of a police force or an undercover or other agent, paid or unpaid, but operating under the control of the police.

5. In the result the scheme must be considered, in all the circumstances, so shocking and outrageous as to bring the administration of justice into disrepute.

6. In examining the character in law of the police conduct--for example, persistent importuning --, the existence of reasonable suspicion on behalf of the police that the accused would commit the offence without inducement is relevant.

7. By itself and without more the predisposition in fact of the accused is not relevant to the availability of the defence.

106. It is evident to me that Estey J.'s criteria have nothing to do with a determination of whether the particular accused should be excused from the commission of the crime. The question is whether the conduct of the police has exceeded acceptable limits. The issue is whether this conduct should be evaluated in light of the particular accused or whether the analysis should be more detached and focus on police conduct with accused persons generally. I have come to the conclusion that it is the latter method of analysis which is the most consistent with the reasons for recognizing the doctrine of entrapment, and which best achieves the objective of ensuring that the administration of justice commands the respect of the community.

107. There is a danger that a court will be misled into a subjective analysis focusing on the effect of the police conduct on the particular accused because of some of the wording used by Estey J. in *Amato, supra*. This appears to be the approach taken by the trial judge in the present case. Since I concurred in that opinion it is necessary to explain what I believe to have been the meaning of Estey J.'s opinion and further, to expand on parts of the test enunciated in *Amato, supra*. It has, for example, been noted by Professor France in his article, "Problems in the Defence of Entrapment" (1988), 22 *U.B.C. Law Rev.* 1, at p. 12, that Estey J.'s use of certain turns of phrase may lead to a predisposition inquiry:

The use of the word "ensnare" is confusing. The requirement that the accused be ensnared may just be a reference to the factual necessity that the commission of the offence must have been in response to the efforts of the government agent. If this is the case though, it seems to add little to the preceding condition that the offence be brought about by the agent. The concern here is that the word is more likely to be seen as suggesting some predisposition inquiry, in that it must be the government agent's conduct alone that prompted the accused to offend, or in other words, that the accused would not have otherwise offended. It is not suggested that Estey J. meant this, but hindsight suggests it is an unhappy word to have used.

108. In the same manner, the reference to the "reasonable suspicion" of the police as being a relevant circumstance could be interpreted as begging a predisposition-based analysis. In other words, if the police believe the accused would have committed the offence without inducement, does this mean they believe he or she was predisposed to commit the offence, and therefore their conduct is justified? If this is how the reference to "reasonable suspicion" is interpreted, it would have the effect

of indirectly incorporating a predisposition analysis. I concede that it is hard to deny the relevance of the reasonable suspicions of the police in assessing their conduct towards a particular accused, and I will explain later at what stage of the analysis it should be taken into account.

109. It could also be argued that the use of the term "entrapment" itself dictates an inquiry into the predisposition of the individual accused. The argument is really one of causation. As I understand it, the idea is that even if the police conduct, viewed objectively, has gone further than the provision of an opportunity, in the case of an accused who is predisposed, it cannot be said that the reason or cause for his or her commission of the offence is the actions of the police; rather, it is because of the accused's predisposition to crime. In my opinion, the test for entrapment cannot be safely based on the assumption that a predisposed person can never be responding to police conduct in the same way a non-predisposed person could be. It is always possible that, notwithstanding a person's predisposition, in the particular case it is the conduct of the police which has led the accused into the commission of a crime.

110. Those who argue for an inquiry into predisposition, and thereby deny the availability of an allegation of police misconduct, ignore this possibility. I am unwilling to do so. Obviously it is difficult to determine exactly what caused the accused's actions, but given that the focus is not the accused's state of mind but rather the conduct of the police, I think it is sufficient for the accused to demonstrate that, viewed objectively, the police conduct is improper. To justify police entrapment techniques on the ground that they were directed at a predisposed individual is to permit unequal treatment. I gratefully adopt the criticisms espoused in the minority and dissenting opinions of the judgments of the United States Supreme Court discussed

earlier, which have convinced me of the fundamental inequality inherent in an approach that measures the permissibility of entrapment by reference to the predisposition of the accused.

111. Further, the predisposition approach amounts in most cases to little more than an *ex post facto* justification for behaviour which would be unacceptable if directed at a non-predisposed person, and the reasoning process is quite illogical. For example, in those courts following a subjective approach, once predisposition is admitted, there can be no defence of entrapment, regardless of whether the conduct, objectively considered, appears to go beyond the mere provision of an opportunity to commit a crime. It seems to me, however, that since, according to the definition used in the United States Supreme Court, a predisposed person is one who would commit an offence when given the opportunity, the fact that the police must go further to attract a person into the commission of an offence suggests that the person was not predisposed. This demonstrates that the police were wrong; it hardly supports the idea that it is logical to preclude an entrapment claim by predisposed persons who have been provided with more than an opportunity. There is an additional concern that the mere fact that the accused committed the crime may be taken to demonstrate predisposition, and again this would preclude any analysis of the propriety of the police behaviour. For these reasons, I have come to the conclusion that the subjective approach followed by the majority of the United States Supreme Court is fundamentally flawed and is inconsistent with the rationale I have accepted for the doctrine of entrapment.

112. I do not interpret what was said in *Amato* as in any way endorsing a predisposition-based inquiry, and I am confirmed in this view by Estey J.'s statement

that "By itself and without more the predisposition in fact of the accused is not relevant to the availability of the defence" (*Amato, supra*, at p. 446, emphasis added). Further, the statement of Estey J. with respect to the police suspicion that the accused would commit the offence without inducement, properly understood, does not import an inquiry into the predisposition of the particular accused. I take this statement to mean that the police are entitled to provide opportunities for the commission of offences where they have reasonable suspicion to believe that the individuals in question are already engaged in criminal conduct. The absence of a reasonable suspicion may establish a defence of entrapment for two reasons: firstly, it may indicate the police are engaged in random virtue-testing or, worse, are carrying on in that way for dubious motives unrelated to the investigation and repression of crimes and are as such "*mala fides*".

113. 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. 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. While, in the course of such an operation, affording an opportunity in a random way to persons might unfortunately result in attracting into committing a crime someone who would not otherwise have had any involvement in criminal conduct, it is inevitable if we are to afford our police the means of coping with organized crime such as the drug trade and certain forms of prostitution to name but those two.

114. To illustrate *mala fides* conduct, consider the following: a police officer, who disapproves of parole, sends prostitutes to solicit male parolees on, let us say, their first day out of the penitentiary, in order to get them to commit an offence and so have their parole revoked.

115. To illustrate conduct which is suggestive of random virtue-testing and which has the serious unnecessary risk of attracting innocent and otherwise law-abiding individuals into the commission of a criminal offence, consider the situation where a police officer decides he wants to increase his performance in court. To this end he plants a wallet with money in an obvious location in a park, and ensures that the wallet contains full identification of the owner. Someone may walk up, take the money and throw away the wallet and the identification; he would then arrest and charge that person. In my opinion, whether or not we are willing to say the average person would steal the money, this policeman has acted without any grounds, and his conduct carries the unnecessary risk that otherwise law-abiding people will commit a criminal offence. On the other hand, consider the situation where the police have received many complaints with respect to a theft of handbags in, for example, a bus terminal. If in the course of a *bona fide* inquiry, the police plant a handbag in an obvious location in the bus terminal and then arrest and charge the person who took the bag, I am of the opinion that this would not be a situation of entrapment. Despite the fact that the second of these three situations actually occurred in the United States, there is no indication that the police in this country are anywhere engaged in this type of conduct, and I doubt that entrapment cases in this country will raise allegations of this sort. I point it out because I think these extreme and unlikely examples illustrate that, at a very basic level, we do not expect to have contact with the police unless we have done something to trigger their suspicions, or unless we happen to be in the

vicinity or reach of a *bona fide* investigation of criminal activity. Further, I think this type of situation must be considered, if only to ensure that the structure of the doctrine of entrapment is internally coherent.

116. The past criminal conduct of an individual is relevant only if it can be linked to other factors leading the police to a reasonable suspicion that the individual is engaged in a criminal activity. Furthermore, the mere fact that a person was involved in a criminal activity sometime in the past is not a sufficient ground for "reasonable suspicion". But when such suspicion exists, the police may provide that person with an opportunity to commit an offence. Obviously, there must be some rational connection and proportionality between the crime for which police have this reasonable suspicion and the crime for which the police provide the accused with the opportunity to commit. For example, if an individual is suspected of being involved in the drug trade, this fact alone will not justify the police providing the person with an opportunity to commit a totally unrelated offence. In addition, the sole fact that a person is suspected of being frequently in possession of marijuana does not alone justify the police providing him or her with the opportunity to commit a much more serious offence, such as importing narcotics, although other facts may justify their doing so.

117. There should also be a sufficient temporal connection. If the reasonable suspicions of the police arise by virtue of the individual's conduct, then this conduct must not be too remote in time. I would note, however, that the reasonable suspicions of the police could be based on many factors and that it is not necessary for one of these factors to be a prior conviction. If the police have obtained information leading to a reasonable suspicion that a person is engaged in criminal activity, it will

be enough of a basis for them to provide that person with the opportunity to commit an offence--the presence of a prior criminal record is not a prerequisite to the formation of reasonable suspicion. I do not think the requirement that the police act on reasonable suspicion is unduly onerous; from a common sense viewpoint it is likely that the police would not waste valuable resources attempting to attract unknown individuals into the commission of offences. It can perhaps be safely assumed, therefore, that the police will act on such grounds.

118. To summarize then, the police must not, and it is entrapment to do so, offer people opportunities to commit crime unless they have a reasonable suspicion that such people are already engaged in criminal activity or, unless such an offer is made in the course of a *bona fide* investigation. In addition, the mere existence of a prior record is not usually sufficient to ground a "reasonable suspicion". These situations will be rare, in my opinion. If the accused is not alleging this form of entrapment the central question in a particular case will be: have the police gone further than providing an opportunity and instead employed tactics designed to induce someone into the commission of an offence?

119. There is, therefore, entrapment when: (a) the authorities provide an opportunity to persons to commit an offence without reasonable suspicion or acting *mala fides*, as explained earlier or, (b) having a reasonable suspicion or acting in the course of a *bona fide* inquiry, they go beyond providing an opportunity and induce the commission of an offence. As I have already mentioned, the first form of entrapment is not likely to occur. The police of this country are generally resorting to the type of investigatory technique of providing opportunities only in relation to targeted people or locations clearly, and therefore reasonably, suspected of being involved in or

associated with criminal activity, or again are already engaged in a *bona fide* investigation justifying the provision of such opportunities.

120. As regards the latter form of entrapment, to determine whether police conduct gives rise to this concern, it is useful to consider whether the conduct of the police would have induced the average person in the position of the accused, i.e., a person with both strengths and weaknesses, into committing the crime. I believe such a test is useful not only as an analytical mechanism that is consistent with objective analysis, but also because it corresponds to one of the reasons why the defence is thought desirable. In other words, it may be inevitable that, when apprised of the factual context of an entrapment case, members of the community will put themselves in the position of the accused; if a common response would be that anyone could have been induced by such conduct, this is a valuable sign that the police have exceeded the bounds of propriety. The reasoning does not go so far as to imply that the accused is therefore less blameworthy; rather, it suggests that the state is involved in the manufacture as opposed to the detection of crime.

121. An objective approach which uses the hypothetical person test only is subject to some criticism. For example, Professor Park argues (*supra*, at pp. 270-71):

The defense creates a risk that dangerous chronic offenders will be acquitted because they were offered inducements that might have tempted a hypothetical law-abiding person. More subtly, it creates a danger that persons will be convicted who do not deserve punishment. This danger stems from its attempts to evaluate the quality of government conduct without considering the defendant's culpability. The notion that sauce for the wolf is sauce for the lamb leads to unhappy consequences, since the sauce will be brewed with wolves in mind. Because many targets are

professional criminals, judges will be reluctant to rule that entrapment has occurred simply because an agent found it necessary to appeal to friendship, make multiple requests, or offer a substantial profit. Yet approval of such conduct would lead to unfair results in cases where the target was law-abiding but ductile. For example, conviction of someone who has been solicited by a friend may be fair enough in the general run of cases, but unfair if the target was a nondisposed person who would not have committed the type of crime charged but for a request from that particular friend.

122. The response to this is two-fold. Firstly, I agree that there is a danger of convicting "lambs" or people who have a particular vulnerability such as a mental handicap or who are suffering from an addiction. In those situations, it is desirable for the purposes of analysis to consider whether the conduct was likely to induce criminal conduct in those people who share the characteristic which appears to have been exploited by the police. I am not, however, in agreement with the assertion that it is fair for the police in the general run of cases to abuse a close relationship between friends or family members as compared to that between acquaintances, contacts or associates, for the purpose of inducing someone into the commission of an offence, and thus I do not consider this a valid criticism of the hypothetical person test. The nature of the relationship at issue is relevant and in certain cases it may be that the police have exploited confidence and trust between people in such a manner as to offend the value society places on maintaining the dignity and privacy of interpersonal relationships.

123. Secondly, I do not find the danger of acquitting wolves particularly troublesome. It assumes that it cannot be said the chance exists that a predisposed person would not have committed the particular offence were it not for the use of inducements that would have caused a nonpredisposed person to commit the offence.

More fundamentally, this perspective is part of a larger viewpoint that in certain cases it would be better for society to send someone to jail for committing a crime, even if fundamental rights and procedural guarantees normally provided to an accused have been disregarded. The familiar refrain is that the end justifies the means. This view is, however, entirely inconsistent with the model of fairness which exists both within and alongside substantive criminal law doctrine. Could not the same comment of "acquitting wolves" be made where an accused's right to counsel or to remain silent have been flagrantly violated, and the evidence of his or her confession to the crime is excluded? In the short term, it may well be "better" for society to convict such persons, but it has always been held that in the long term it would undermine the system itself. If the rule of law is to have any meaning and provide the security which all in society desire, it is axiomatic that it be extended to every individual.

124. I am not of the view that the hypothetical or average person model is the only relevant method of analysis. There may be situations where it cannot be concluded that a hypothetical person would likely have committed the offence under the same circumstances, and yet the presence of other factors support the conclusion that the police involvement in the instigation of crime has exceeded the bounds of propriety. When a court is of this view, the mere fact that the hypothetical-person model of analysis is not appropriate does not mean the conduct does not amount to an abuse of process. Each situation will have to be considered on its own merits, and with a view to determining whether the police have gone beyond merely providing the opportunity for the commission of a crime and have entered into the realm of the manufacture of criminal conduct. I would, at this point, re-emphasize Estey J.'s observation that it is not possible to state at the outset which elements will be decisive

in an entrapment scenario. Nonetheless, it is possible to outline what factors will be relevant and I will attempt to suggest some of them.

125. I remain in agreement with Estey J.'s statement that "the inducement may be but is not limited to deceit, fraud, trickery or reward, and ordinarily but not necessarily will consist of calculated inveigling and persistent importuning" (p. 446), but there is no magic number of requests made on behalf of the police to the accused that will trigger the defence. I would also agree that the scheme must have been for the purpose Estey J. indicated and that the state's responsibility extends to those people who operate on its behalf in an entrapment situation. It is also necessary for the offence to be "instigated, originated or brought about by the police", but this is clearly a minimum standard since in cases where the police merely provide a person with the opportunity to commit an offence, it could be said that the same requirement will be met. Similarly it can be said that in any offence instigated by the police, the offence would not have been committed without their involvement. Taken alone, these requirements are insufficient to determine when police conduct goes beyond what is generally thought to be acceptable in protecting society from crime.

126. In certain cases the police conduct will be offensive because it exploits human characteristics that as a society we feel should be respected. As I noted earlier, if the law enforcement officer or agent appeals to a person's instincts of compassion, sympathy and friendship and uses these qualities of a person to effect the commission of a crime, we may say this is not permissible conduct because it violates individual privacy and the dignity of interpersonal relationships, and condemns behaviour that we want to encourage. (Such appeals may generally indicate that more than a mere opportunity is being provided, although it must be recalled that the police or agents

will in the detection of certain crimes have to infiltrate criminal organizations, and thus gain the confidence of the people involved.) Along the same lines, if the police appear to exploit a particular vulnerability of an individual, such as by encouraging one who suffers from a mental handicap to commit a crime, this too may strike us as patently offensive because such a person is in need of protection, and not abuse. Similarly, the inducement of those attempting to recover from drug or alcohol addiction into committing offences relating to those substances may not be proper since the result will be to retard, as opposed to advance, the interest of society in reducing the personal and social costs of drug and alcohol abuse.

127. In some cases we may find that the degree of police involvement is disproportionate to the crime committed by the accused in so far as it causes more harm than it seeks to catch. In addition, we may be offended by disproportionality in the role played by the police in the criminal activity, as compared with the role played by the person being targeted. In assessing this, the timing of the police involvement, and whether the criminal activity is ongoing, should be considered. Whether the police or their agents themselves commit crimes in the course of efforts to induce another is relevant, but I am not willing to lay down an absolute rule prohibiting the involvement of the state in illegal conduct.

128. Earlier I noted that one indication of impermissible action on the part of the state would be the existence of any threats, implied or express, made to the individual being targeted by inducement techniques. If the strategy used carries the risk of potential harm to third parties, this too should be considered and, absent exceptional circumstances, condemned. A further consideration, if the facts so warrant, would be the extent to which the conduct of the police is directed at undermining other

constitutional values, such as legitimate exercises of freedom of thought, belief, opinion and association.

129. The above description of activity is not intended to be exhaustive in terms of possible situations, or conclusive in the assessment of propriety. It is meant only to illustrate that in any number of situations, the reason why something is "improper" may vary. It cannot be stated that only one reason will be compelling or determinative. The issue of permissibility of police conduct must be considered in light of the totality of the circumstances. It is important to recall at all times the context in which entrapment usually occurs. An understanding of the reality of criminal activity is imperative to the development of a workable doctrine that accommodates the interests of all in society. In this respect, more leeway may be granted to police methods directed at uncovering criminal conduct that is simply not capable of being detected through traditional law enforcement techniques.

Summary

130. In conclusion, and to summarize, the proper approach to the doctrine of entrapment is that which was articulated by Estey J. in *Amato, supra*, and elaborated upon in these reasons. As mentioned and explained earlier there is entrapment 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.

131. It is neither useful nor wise to state in the abstract what elements are necessary to prove an entrapment allegation. It is, however, essential that the factors relied on by a court relate to the underlying reasons for the recognition of the doctrine in the first place.

132. Since I am of the view that the doctrine of entrapment is not dependant upon culpability, 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. The predisposition, or the past, present or suspected criminal activity of the accused, is relevant only as a part of the determination of whether the provision of an opportunity by the authorities to the accused to commit the offence was justifiable. Further, there must be sufficient connection between the past conduct of the accused and the provision of an opportunity, since otherwise the police suspicion will not be reasonable. 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.

133. 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. The presence of reasonable suspicion or the mere existence of a *bona fide* inquiry will, however, never justify entrapment techniques: the police may not go beyond providing an opportunity regardless of their perception of the accused's character and regardless of the existence of an honest inquiry. To determine whether the police have employed means which go further than providing an opportunity, it is useful to consider any or all of the following factors:

- 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.

134. This list is not exhaustive, but I hope it contributes to the elaboration of a structure for the application of the entrapment doctrine. Thus far, I have not referred to the requirement in *Amato, supra, per Estey J.*, that the conduct must, in all the circumstances, be shocking or outrageous. I am of the view that this is a factor which is best considered under the procedural issues to which I will now turn.

Procedural Issues

135. The resolution of the issues surrounding the manner in which an entrapment claim should be considered at trial is, in my view, entirely dependant upon the conceptual basis for the defence, outlined earlier. If I were of the opinion that there was a substantive or culpability-based defence of entrapment, I would readily come to the conclusion that the defence raised a question of fact, which should be decided by a jury when there is a sufficient evidentiary basis on which to raise the defence, and I would hold that the onus would rest on the Crown to disprove the existence of

entrapment beyond a reasonable doubt. Having come to the opposite viewpoint on the rationale for recognizing the doctrine of entrapment, I am not persuaded that the adoption of rules which historically, and by virtue of the *Charter*, conform to most substantive defences is either necessary or correct. It seems to me, however, that this Court must be clear on how an entrapment claim is to be handled, as a brief review of some lower court decisions suggests that there is, at present, and understandably so, a great deal of confusion on the matter.

136. A: Who Decides: Judge or Jury?

137. Both the appellant and respondent agree that objective entrapment, involving police misconduct and not the accused's state of mind, is a question to be decided by the trial judge, and that the proper remedy is a stay of proceedings. I too am of this view. The question of unlawful involvement by the state in the instigation of criminal conduct is one of law, or mixed law and fact. In *Jewitt, supra*, in a passage cited previously, Dickson C.J. expressed this opinion (at p. 145): "Staying proceedings on the basis of abuse of process, and in particular, on the basis of the defence of entrapment, in my view, amounts to a decision on a complex question of law and fact". Along the same lines is the observation of Estey J. in *Amato, supra*, at p. 448:

The realization of an abuse of the judicial branch is a question essentially of law or law and political science and one not by its nature ordinarily assigned to the jury component of the trial courtroom.

138. Estey J.'s statement is also supportive of the view that a judge should decide the issue. Some courts have, however, concluded that the defence of entrapment raises a question of fact to be decided by a jury. In *R. v. Baxter* (1983), 9 C.C.C. (3d)

555, [1983] C.A. 412 [hereinafter cited to C.C.C.], a majority of the Quebec Court of Appeal were of the view that the defence of entrapment was a matter for the jury. In separate opinions both Nolan and Beauregard J.J.A. relied on the following comment of Laskin C.J. in *Kirzner*, *supra*, at p. 498:

There is the further problem arising in jury trials whether entrapment should be dealt with by judges alone, or should involve the jury as a trier of fact. The Model Penal Code takes the position that the issue of entrapment should be tried by the Court in the absence of the jury: s. 2.13(2). The jury would not be excluded on the subjective test since, if there was evidence of entrapment, it would be for the jury to determine if there was entrapment in fact and if there was predisposition in the accused. This is consistent with Canadian practice in respect of factual issues in a trial with a jury, which is to limit the judge to a determination of whether there is evidence to go to the jury and to leave it to the jury to act on its view of the evidence once the issue is left to them.

139. It must be recalled, however, that Laskin C.J. concurred in Estey J.'s opinion in *Amato*, *supra*. In this passage he seems to be discussing what would be the role of a jury if entrapment were a substantive defence. Beauregard J.A. in *Baxter*, *supra*, also noted that Wong Co. Ct. J. in *Jewitt*, *supra*, had held that the issue of entrapment should go to the jury, and Beauregard J.A. expressly disagreed with Anderson J.A. who, on the appeal in *Jewitt* before the British Columbia Court of Appeal, was of the opinion that the defence of entrapment should be dealt with by the trial judge (*Baxter*, *supra*, at p. 561).

140. In a dissenting opinion, Vallerand J.A. declined to rule conclusively on the appropriateness of a jury deciding the issue as he held that on the facts the issue should not be considered by the jury. He clearly had some reservations about such a

jury process, however, given the conceptual basis for recognition of the defence as outlined by Estey J. in *Amato, supra*, (*Baxter, supra*, at pp. 563-64). Later in his reasons he made the following comment at p. 571:

...is necessary that clear limits be established with respect to initiatives taken by the police forces without which they would find themselves in a state of anarchy or paralysis. Naturally, it is in the law as interpreted and applied by the courts that the police officers will seek their directions. That being so, it would be poorly conceived if it were left to the will--and this is said with all respect for the institution and proper purposes that it serves so well--the changing and undeterminable will of the jury, the care of setting the limits on the work of investigation and detection by the police.

141. *Baxter, supra*, was followed in *R. v. Gingras* (1987), 61 C.R. (3d) 361, by Boilard J. of the Quebec Superior Court, albeit with some variations. In *Gingras, supra*, it was held that the entrapment issue is one of fact to be decided by a jury. If the jury returns a verdict of guilty it can then consider whether the accused has demonstrated on balance of probabilities whether there was entrapment. If the jury comes to this conclusion and returns a verdict of guilty with entrapment, the accused then must satisfy a judge, again on a balance of probabilities, that the Crown by its abuse of process is disentitled to a conviction. In the particular case the jury returned a verdict of guilty with entrapment, but the judge decided the entrapment was not so "shocking" in the eyes of a reasonable person to preclude the entry of a conviction.

142. An opposite procedure was advocated by Rice J.A. in his concurring opinion in *R. v. Dionne* (1987), 79 N.B.R. (2d) 297 (C.A.) He was of the opinion that regardless of whether the issue of entrapment arises because of abuse of process, exclusion of evidence under s. 24(2) following a violation of a *Charter* right, or under

the doctrine of criminal intention, the [TRANSLATION] "basic and deciding issue...is the accused's state of mind" (at p. 322). In his view, the trial judge must first decide whether a stay should issue because of an abuse of process or whether evidence should be excluded under s. 24(2) and if he or she concludes that neither of these claims is made out, the jury must then decide if, on the facts, the accused had the necessary *mens rea* to commit the offence. The separate opinion of Angers J.A. in this case also supports a jury determination in situations where the police conduct, although not giving rise to exclusion of evidence or a stay of proceedings, has the effect of negating the *mens rea* because the "influence" of the police conduct on the accused makes the [TRANSLATION] "act with which the accused is charged ...one of submission, devoid of any criminal intent" (at p. 321).

143. Supporting the view that a judge should decide is the decision of the Court of Appeal in the present case, referred to earlier. Further, Tallis J.A. (Cameron J.A. concurring) in *R. v. Mistra* (1986), 32 C.C.C. (3d) 97 (Sask. C.A.), at p. 122, appears to have approved the decision of the British Columbia Court of Appeal in the present case and in *R. v. Showman*, (unreported). In *Jewitt*, *supra*, at the level of the Court of Appeal, Anderson J.A. gave four reasons for his conclusion that the issue of entrapment is one to be decided by a trial judge (*supra*, at pp. 219-20). I am in complete agreement with the first and the fourth of these reasons. Anderson J.A. began by observing, at p. 219:

...the courts have always been the masters of their own process and it is for the courts alone to determine whether there has been an abuse of process. All issues relating to abuse of process require a factual determination but it does not follow that such a determination should be made by a jury.

And he concluded at p. 220:

...as a matter of policy, the issue of entrapment should be left to the courts so that standards and guidelines may be established by case law. Such a development will be impossible if issues of entrapment are left to juries.

144. Anderson J.A. made reference to potential prejudice arising should the issue go to the jury, for the jury may find the accused guilty because of the accused's criminal record or bad reputation (citing Frankfurter J. in *Sherman*, *supra*, at p. 382). I am not concerned by this for two reasons: firstly, as I noted earlier, in most cases the accused will have committed the offence and his or her guilt is not in issue; secondly, in my view the past criminal conduct of the accused is not relevant to the analysis, except where it relates to the reasonable suspicions of the police. The last point made by Anderson J.A. was that an accused could ask for evidence to be excluded by a trial judge under s. 24(2) of the *Charter* because of entrapment, and be denied that request and yet, in the same case, a jury may find that the police conduct brought the administration of justice into disrepute. He felt that such a result should be avoided. I prefer to express no opinion in this case on the propriety of a s. 24(2) application to exclude evidence because of entrapment. I am, however, of the view that the reasons which support a judicial determination of applications under s. 24(2) for the exclusion of evidence are equally relevant to the present discussion.

145. This Court has held that the determination of whether the admission of evidence obtained in violation of a *Charter* right would bring the administration of justice into disrepute is one which should be made by a trial judge (*R. v. Therens*, [1985] 1 S.C.R. 613, *per* Le Dain J., at p. 653). In articulating how a trial judge should engage him or herself in that analysis, I stated in *Collins*, *supra*, that a judge should

consider the question from the perspective of a reasonable person, "dispassionate and fully apprised of all the circumstances", and I commented that "The reasonable person is usually the average person in the community but only when that community's current mood is reasonable" (*supra*, at p. 282). The issue there, as here, is maintaining respect for the values which, over the long term, hold the community together. One of those very fundamental values is the preservation of the purity of the administration of justice. In my opinion a judge is particularly well suited to make this determination and this finding should be guided by the above quoted comments from *Collins, supra*. Further, as noted by Anderson J.A. in *Jewitt, supra*, and commented on by Vallerand J.A. in *Baxter, supra*, if one of the advantages of allowing claims of entrapment is the development of standards of conduct on the part of the state, it is essential that decisions on entrapment, and those allowing the claim especially, be carefully explained so as to provide future guidance; this is not something the jury process lends itself to. Accordingly, I am of the firm opinion that the issue of entrapment should be resolved by the trial judge for policy reasons.

146. Finally, I am of the view that before a judge considers whether a stay of proceedings lies because of entrapment, it must be absolutely clear that the Crown had discharged its burden of proving beyond a reasonable doubt that the accused had committed all the essential elements of the offence. If this is not clear and there is a jury, the guilt or innocence of the accused must be determined apart from evidence which is relevant only to the issue of entrapment. This protects the right of an accused to an acquittal where the circumstances so warrant. If the jury decides the accused has committed all of the elements of the crime, it is then open to the judge to stay the proceedings because of entrapment by refusing to register a conviction. It is not necessary nor advisable in this case to expand on the details of procedure. Because the

guilt or innocence of the accused is not in issue at the time an entrapment claim is to be decided, the right of an accused to the benefit of a jury trial in s. 11(f) of the *Charter* is in no way infringed.

B: Who Bears the Burden of Proof and on What Standard?

147. In *Baxter, supra*, Beauregard J.A., although holding that the issue of entrapment should be resolved by the jury, was not willing to conclude that the onus lay on the Crown to disprove entrapment beyond a reasonable doubt. He stated in this respect, at p. 561:

...as Mr. Justice Estey pointed out in *Amato*, entrapment does not really constitute a defence in the classical sense of the word. When it considers whether there has been entrapment or not, the jury does not determine whether the accused is guilty or innocent but it scrutinizes the conduct of the police to determine whether the police abused their power and therefore whether the Crown thereby commits an abuse of process. I would accept with difficulty the proposition that the Crown can be prevented from prosecuting a case where the abuse attributed to it was not established on the balance of probabilities.

148. In *Gingras, supra*, wherein a two-stage process involving the jury and then a judge was adopted, at both stages the onus was on the accused to prove entrapment or abuse of process on a balance of probabilities. In a very recent decision allowing a Crown appeal from an acquittal, the Court of Appeal for the Northwest Territories came to the conclusion, which had been accepted by both counsel, that the trial judge had applied the wrong test in holding that the onus lay on the Crown to

prove beyond a reasonable doubt that entrapment had not occurred (*R. v. Ashoona*, unreported, January 19, 1988, reversing (1987), 38 C.C.C. (3d) 163 (N.W.T.S.C.)) Laycraft C.J., on behalf of himself, Stratton and Côté JJ.A., in delivering judgment from the bench and ordering a new trial stated: "It was not for the Crown to show beyond a reasonable doubt that there was not entrapment. Rather, it was for the accused to show on a balance of probabilities the facts leading to that finding".

149. The Manitoba Court of Appeal appears to have left the issue open in its recent decision in *R. v. Biddulph* (1987), 34 C.C.C. (3d) 544. In that case the trial judge had entered an acquittal, and according to the Court of Appeal, since the accused had admitted facts consistent only with the commission of the crime, the only basis for the acquittal could be that the trial judge was not satisfied that there was an absence of entrapment. The Court of Appeal (O'Sullivan, Huband and Twaddle JJ.A.) entered a verdict of guilty because the facts did not, in their view, support the claim of entrapment. With respect to the question of the onus and standard of proof, Twaddle J.A., delivering judgment on behalf of the court, stated rather ambiguously at p. 546:

The Crown does not have to disprove entrapment when there is no evidence that the accused was entrapped. There is an evidentiary burden on the accused to show, at least, that there were circumstances from which entrapment might be inferred. Laskin C.J.C. . . . [in *Kirzner, supra*, at p. 501] appears to have been of the view that the onus is on an accused person to establish entrapment by a preponderance of evidence...but it is unnecessary for me to go that far in this case.

150. This comment of Laskin C.J. referred to above appears in the following passage from his reasons in *Kirzner, supra*, at p. 501:

I do not think that the evidence is open to such a view. Although the trial judge's charge is confusing on what is meant by entrapment, the accused cannot complain of the withdrawal of entrapment as a defence (assuming it to be a defence, if established by a preponderance of evidence) if there was no evidence upon which it could be based. [Emphasis added.]

151. In *Jewitt, supra*, Anderson J.A. was of the view that the accused should not bear the onus of proof on a balance of probabilities. His reasons for so holding are set out in the following passage from his judgment, at pp. 220-21:

With respect to the onus of proof, I am of the opinion that the accused should not be required to establish the defence of entrapment by a preponderance of evidence. The Crown is not, as suggested by counsel, required to prove a negative. The accused has the evidentiary burden in the sense that he must adduce evidence by way of cross-examination of Crown witnesses or by direct testimony that would enable the trier of fact to conclude that the accused was unlawfully entrapped or that there was a reasonable doubt as to whether he was entrapped. The burden on the accused is no different, for example, from the burden imposed in respect of other defences such as duress, self-defence, drunkenness, etc., where the accused is entitled to the benefit of any reasonable doubt.

Counsel for the Crown suggested that the onus here should be the same as the onus on the accused on a plea of insanity. There is statutory authority for such an onus: see s. 16(4) of the Code, reading as follows:

"(4) Every one shall, until the contrary is proved, be presumed to be and to have been sane."

A perusal of the provisions of the Code indicate that where Parliament has determined to place a special onus on the accused it has said

so in clear terms: see, for example, s. 237(1)(a) of the Code.

Anderson J.A. also noted a potential *Charter* issue if the onus is not on the Crown, and he felt that the accused who is successful on an entrapment claim is entitled to an acquittal as opposed to a stay.

152. I have come to the conclusion that it is not inconsistent with the requirement that the Crown prove the guilt of the accused beyond a reasonable doubt to place the onus on the accused to prove on a balance of probabilities that the conduct of the state is an abuse of process because of entrapment. I repeat: the guilt or innocence of the accused is not in issue. The accused has done nothing that entitles him or her to an acquittal; the Crown has engaged in conduct, however, that disentitles it to a conviction. This point was made by Dickson C.J. in *Jewitt, supra*, in a passage cited earlier. This Court in *Jewitt*, and more recently in *R. v. Keyowski*, [1988] 1 S.C.R. 657, affirmed that a Court may only enter a stay for an abuse of process in the "clearest of cases" (*Jewitt, supra*, at p. 137; *Keyowski, supra*, at p. 659). It is obvious to me that requiring an accused to raise only a reasonable doubt is entirely inconsistent with a rule which permits a stay in only the "clearest of cases". More fundamentally, the claim of entrapment is a very serious allegation against the state. The state must be given substantial room to develop techniques which assist it in its fight against crime in society. It is only when the police and their agents engage in a conduct which offends basic values of the community that the doctrine of entrapment can apply. To place a lighter onus on the accused would have the result of unnecessarily hampering state action against crime. In my opinion the best way to achieve a balance between the interests of the court as guardian of the administration of justice, and the interests

of society in the prevention and detection of crime, is to require an accused to demonstrate by a preponderance of evidence that the prosecution is an abuse of process because of entrapment. I would also note that this is consistent with the rules governing s. 24(2) applications (*Collins, supra*, at p. 277), where the general issue is similar to that raised in entrapment cases: would the administration of justice be brought into disrepute?

153. Before turning to the particular case at bar I would like to comment on the requirement in *Amato, supra*, that "In the result, the scheme so perpetrated must in all the circumstances be so shocking and outrageous as to bring the administration of justice into disrepute" (at p. 446, emphasis in original). I would, upon reconsideration, prefer to use the language adopted by Dickson C.J. in *Jewitt, supra*, and hold that the defence of entrapment be recognized in only the "clearest of cases". The approach set out in these reasons should provide a court with the necessary standard by which to judge the particular scheme. Once the accused has demonstrated that the strategy used by the police goes beyond the limits described earlier, a judicial condonation of the prosecution would by definition offend the community. It is not necessary to go further and ask whether the demonstrated entrapment would "shock" the community, since the accused has already shown that the administration of justice has been brought into disrepute.

154. In conclusion, the onus lies on the accused to demonstrate that the police conduct has gone beyond permissible limits to the extent that allowing the prosecution or the entry of a conviction would amount to an abuse of the judicial process by the state. The question is one of mixed law and fact and should be resolved by the trial judge. A stay should be entered in the "clearest of cases" only.

Disposition

155. In determining whether the doctrine of entrapment applies to the present appeal, this Court is restricted to the summary of evidence provided by Wetmore Co. Ct. J. in his reasons. I am of the view that a stay of proceedings should be entered in this case. While the trial judge had the advantage of hearing the testimony of the appellant, and normally findings on entrapment cases should not be disturbed because of this, I am concerned that in this case too much emphasis was placed on the appellant's state of mind. Earlier in my summary of the decisions below I cited a passage from the trial judge's reasons wherein he stated that the fundamental issue was the appellant's state of mind and his predisposition to crime. This, perhaps, explains why in his conclusion the trial judge stated the appellant was not entrapped because he acted out of a desire to profit from the transaction. If the trial judge had been permitted only to evaluate the conduct of the police objectively, I think he might well have, and in any event, ought to have come to the conclusion the police conduct amounted to entrapment.

156. From the facts it appears that the police had reasonable suspicion that the appellant was involved in criminal conduct. The issue is whether the police went too far in their efforts to attract the appellant into the commission of the offence.

157. Returning to the list of factors I outlined earlier, this crime is obviously one for which the state must be given substantial leeway. The drug trafficking business is not one which lends itself to the traditional devices of police investigation. It is absolutely essential, therefore, for police or their agents to get

involved and gain the trust and confidence of the people who do the trafficking or who supply the drugs. It is also a crime of enormous social consequence which causes a great deal of harm in society generally. This factor alone is very critical and makes this case somewhat difficult.

158. The police do not appear, however, to have been interrupting an ongoing criminal enterprise, and the offence was clearly brought about by their conduct and would not have occurred absent their involvement. The police do not appear to have exploited a narcotics addiction of the appellant since he testified that he had already given up his use of narcotics. Therefore, he was not, at the time, trying to recover from an addiction. Nonetheless, he also testified that he was no longer involved in drugs and, if this is true, it suggests that the police were indeed trying to make the appellant take up his former life style. The persistence of the police requests, as a result of the equally persistent refusals by the appellant, supports the appellant's version of events on this point. The length of time, approximately six months, and the repetition of requests it took before the appellant agreed to commit the offence also demonstrate that the police had to go further than merely providing the appellant with the opportunity once it became evident that he was unwilling to join the alleged drug syndicate.

159. Perhaps the most important and determinative factor in my opinion is the appellant's testimony that the informer acted in a threatening manner when they went for a walk in the woods, and the further testimony that he was told to get his act together after he did not provide the supply of drugs he was asked for. I believe this conduct was unacceptable. If the police must go this far, they have gone beyond providing the appellant with an opportunity. I do not, therefore, place much

significance on the fact that the appellant eventually committed the offence when shown the money. Obviously the appellant knew much earlier that he could make a profit by getting involved in the drug enterprise and he still refused. I have come to the conclusion that the average person in the position of the appellant might also have committed the offence, if only to finally satisfy this threatening informer and end all further contact. As a result I would, on the evidence, have to find that the police conduct in this case was unacceptable. Thus, the doctrine of entrapment applies to preclude the prosecution of the appellant. In my opinion, the appellant has met the burden of proof and the trial judge should have entered a stay of proceedings for abuse of process.

160. I would accordingly allow the appeal, set aside the conviction of the appellant and enter a stay of proceedings.

Appeal allowed.

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