CANADIAN BAR ASSOCIATION

NATIONAL CRIMINAL JUSTICE SECTION

COMMITTEE ON CRIMINAL CODE REFORM

ENTRAPMENT

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C.B.A. TASK FORCE ON CRIMINAL CODE REVISION

WORKING/DISCUSSION PAPER ON ENTRAPMENT

The Supreme Court of Canada has put to rest any issue in Canada about either the existence or viability of the defence of entrapment. Two recent decisions (Mack v. The Queen (1988), 44 C.C.C. (3d) 513; Barnes v. The Queen (1991), 63 C.C.C. (3d) 1), have both defined the concept and attempted to set the parameters for "the defence".

Most significant is that while the concept is known as a "defence", the Supreme Court of Canada has defined it not as a traditional defence, but, as a judicial bar to a successful prosecution. Specifically therefore, once the Crown has demonstrated both mens rea and actus reas beyond a reasonable doubt, so that the trier of fact will convict, the accused then has the right to seek a judicial stay of proceedings based on the abuse of process defined as entrapment.

In Mack, supra, Mr. Justice Lamer (for the entire Court) drew a distinction between police involvement in crime and police manufacture of crime. It is the manufacture of crime which sets up the successful abuse of process argument.

In describing why the Court has chosen to proscribe police manufacture of crime, the Court indicated that without maintaining societal values, the integrity of the judicial system wanes. Contrary to police belief, "... it is a deeply engrained value in our democratic system that the ends do not justify the means ..." (Mack, supra, at p. 539). The defence, embodied as it is within notions of abuse of process is an attempt to limit the ways in which the state may deal with the citizenry. "... 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." (Mack, supra, p. 540).

The Court in Mack was clear that the decision to refuse to convict an individual who has committed an offence because that individual was entrapped, is a matter of public policy. Police are not permitted to randomly test the virtue of individuals. The Court was also concerned that police activity may in fact persuade those who would not otherwise engage in criminal activity to do so. Further, as a matter of public policy, the state does

not condone police agencies engaging in crime (notwithstanding the "virtuous" motivation of the police agency).

In defining the public interest and the public policy, the Court chose to define the public benefits of judicial recognition of abuses of process:

> "... The issuance of the stay obviously benefits the accused but the court is primarily concerned with a larger issue: the maintenance of the public confidence in the legal and judicial process. In this way, the benefit to the accused is really a derivative one ... the basis upon which entrapment is recognized lies in the need to preserve the purity of administration of justice." (Mack, supra, at p. 542)

Entrapment is only a consideration of the Court when all requisites of the particular offence have been demonstrated by the prosecution beyond a reasonable doubt. Therefore, the "defence" is not a defence in the traditional sense. The judicial stay of proceedings is not an acquittal in that the Judge does not find the crime charged has not been committed. However, once a judicial stay of proceedings has been entered, the Crown may appeal as if an acquittal had been entered, and the accused may plead autrefois acquit in subsequent proceedings." ... 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 ..." (Mack, supra, at p. 543).

In deciding whether entrapment exists in a given set of factual circumstances, the Court is not to analyze the state of mind of the accused, but, is to analyze the conduct of the police vis-a-vis the accused. Therefore, the pre-disposition of an accused to commit a crime may not be relevant if the police have, notwithstanding the disposition of the accused, manufactured the offence in question.

In approaching a target, the police must have a reasonable suspicion that the target is involved in the type of crime in question. Then, they must not go further than providing the individual with the opportunity to commit the crime. "... 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 a ground a 'reasonable suspicion' ... the central question in a particular case will be: have the police gone further than providing an opportunity and instead employed tactics designed to induce someone into the commission of an offence?" (Mack, supra, at pp. 554 and 555).

The Court defined two types of entrapment:

1. Police act without reasonable suspicion or with mala fides; and

2. Even though a reasonable suspicion exists, the police action is what induces the offence.

In analyzing the second form of entrapment, a Judge is to look to how the police conduct would have affected the average citizen with strengths and weaknesses. If the average citizen would have been persuaded to commit the offence, the Court felt that it was therefore clear that the police would in fact be involved in the manufacture of crime. The Court further indicated that even if the average person might not be so persuaded, some police conduct is nonetheless so blatant as to fall within the parameters of entrapment.

The Court defined a non-exhaustive list of factors for consideration in analyzing a claim of entrapment (Mack, supra, at p. 560). Most of the factors are analysis of police illegality.

The Supreme Court of Canada was clear that the question of entrapment is a question of law, or, mixed fact and law, and is therefore an issue for a judge, and not for a jury. In jury cases, the issue will arise only if the jury has found guilt beyond a reasonable doubt. "... 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 ..." (Mack, supra, at p. 565).

In claims of entrapment, the onus of proof will be on the accused on a balance of probabilities; akin to the onus upon an accused in a motion pursuant to s.24 of the Charter. The accused need not demonstrate that the community would be shocked by the police conduct, only that the administration of justice has been brought into disrepute.

An accused person may plead guilty to an offence; thereby acknowledging all of the elements of the offence, and then, still seek a judicial stay of proceedings on the basis of entrapment (Regina v. Maxwell (1990), 61 C.C.C. (3d) 289 (Ont. C.A.).

Subsequent to the decision in Mack, supra, a number of courts across the country set out to define the concept of "random virtue testing" enunciated in Mack. Such a concept comes into play when a police undercover operator or agent supplies the opportunity to commit a crime to an unknown target. Therefore, in Barnes v. The Queen (1991), 63 C.C.C. (3d) 1, the Supreme Court of Canada both defined and limited "random-virtue testing".

Factually, in Barnes, the Vancouver Police Department targeted a 6-block area of the Granville Mall to purchase small amounts of narcotics. The undercover officer approached the accused because he was in the area wearing appropriate clothing (long hair, jeans, leather). He had done nothing to attract her suspicion. The Supreme Court of Canada upheld the factual finding that the undercover officer did not have a reasonable suspicion that the accused was a trafficker. His manner of dress and appearance did not give rise to the appropriate level of suspicion.

Therefore, because of the lack of reasonable suspicion, the behaviour of the officer would have been entrapment unless her approach of the accused took place within the confines of a bona fide investigation. In assessing the conduct, the Court stated, "... The police department had reasonable grounds for believing that drug related crimes were occurring throughout the Granville Mall area. The accused was not, therefore, approached for questionable motives unrelated to the investigation ... the police department directed its investigation at a suitable area within the City of Vancouver ..." (at pp. 8 and 9).

The Court found that police can present the opportunity to commit a crime to persons found in areas where the police have reasonable grounds to believe that that crime

is taking place. Such police behaviour will not amount to random virtue testing. Identical police behaviour will be offensive and therefore will be "random virtue testing" if the opportunity is presented to an individual who is not a suspect and who is not in an area which is a specific target of a specific police operation (Regina v. Kenyon (1990), 61 C.C.C. (3d) 538 (B.C.C.A.)).

> "Random virtue testing, conversely, only arises where a police officer presents a person with the opportunity to commit an offence without a reasonable suspicion that:
>
> (a) the person is already engaged in the particular activity, or
>
> (b) the physical location with which the person is associated is a place where the particular activity is likely occurring." (Barnes, supra, at p. 11)

In summary, where an accused feels aggrieved by police investigational conduct, the process in Canada at present is as follows:

A. Trial into merits of charge with conviction based on reasonable doubt, or

B. Guilty plea acknowledging actus reas and mens rea;

C. Trial or hearing into police conduct:

   (i) Analysis of bona fides of police investigation;

   (ii) Analysis of reasonableness of police suspicion;

   (iii) Analysis of police conduct vis-a-vis presentation of opportunity to commit the offence versus total manufacture of the offence;

D. If:

(i) The investigation is not bona fide, or

(ii) The police were not acting upon reasonable suspicion; or

(iii) The police conduct would have compelled the average citizen to commit the offence;

E. The trial Judge grants a judicial stay of proceedings.

The issues for us therefore are to decide:

A. Whether we agree with the Supreme Court of Canada definition; and

B. Whether we feel the definitions ought to be codified; and if so, an attempt at codification.

I am enclosing for your interest, photocopies of all cases referred to.

RESOLUTIONS OF MANITOBA WORKING GROUP WITH RESPECT TO

POWER OF JUDICIARY TO ENTER STAYS OF PROCEEDINGS

We believe in the notion of judicial stays of proceedings as a means of protecting the public from abusive police behaviour.

All people have some degree of evil in them. No one is immune to enticing overtures. When the police entice people into criminal activity, we believe that the judiciary ought to step in as a means of not condoning offensive police behaviour.

We believe that the judiciary must police the policy playing on human frailties in order to entice people into wrong-doing.

We all agree that the Courts must have the power to intervene in cases where actus reus and mens rea have been proven.

A new Criminal Code must embody in it a power for judicial stays of proceedings.

We believe that there must be codification of such power in order to ensure the continued power.

We believe that a section of the Criminal Code ought to deal with the powers of the judiciary with respect to stays of proceedings. The section ought to deal not only with entrapment, but with respect to issues of delay.

Having so resolved all of the above, issue was taken with respect to the right of the Crown to appeal. While we all agreed that the Crown should have a right of appeal, an issue remained with respect to the test on appeal. One of our members (and I'm sure you can all guess who) felt that the right of appeal to the Crown should be as if the judicial stay of proceedings were an acquittal, with the Crown then having to demonstrate in the Court of Appeal, that the trial judge committed an error of law. The balance of our membership felt that because the power to enter a judicial stay of proceedings subsequent to the Crown demonstrating proof beyond reasonable doubt of the offence so charged is so remarkable, that the right of appeal ought to be automatic to the Court of Appeal, akin to a review of the trial judge's ruling.

We all agree that within the sections of the Criminal Code dealing with judicial stays of proceedings, that the rights of appeal must also be codified.

MANITOBA WORKING GROUP

DRAFT PROPOSAL FOR CODIFICATION OF ENTRAPMENT

1. Notwithstanding proof beyond reasonable doubt of the elements of the crime charged, the trial judge shall enter a judicial stay of proceedings where the trial judge is satisfied on a balance of probabilities as demonstrated by the accused that the investigatory body or its agent(s) entrapped the accused into committing the crime so proven.

2. Without restricting the generality of the foregoing, entrapment includes:

   (a) Investigatory action inducing the crime charged without the policing body having had reasonable suspicion regarding involvement of the accused person in activities related to the crime as charged; or

   (b) The investigatory body acting with mala fides with respect to the accused person; or

   (c) Notwithstanding the existence of reasonable suspicion on the part of the investigatory body, the action of the investigatory body is the sole inducer of the crime so charged.

ENTRAPMENT HYPOTHETICALS

1. Gurjit Singh is an owner and driver of a taxi cab. While driving his cab, he is involved in a minor fender bender. He makes a claim to the Manitoba Public Insurance Corporation for personal injury. He subsequent to filing the complaint and making his initial statement, retains Sheldon Pinx as his counsel. He advises Mr. Pinx that he can no longer drive and will lose approximately $100,000.00 per year. Mr. Pinx continues with the claim on this basis. He continues to advise MPIC of this fact. The investigators at MPIC feel that it is a fraudulent claim. However, the investigators do not have justification to re-interview Mr. Singh because he has counsel. An informant has advised the investigators that Mr. Singh now drives a cab for a different owner. The investigator, former Superintendent King decides to follow the particular cab. He observes Mr. Singh driving the cab. He feels that he has a case of fraud against Mr. Singh. However, since the time of Mr. Singh's initial claim to MPIC, Mr. Singh himself has not made a statement regarding his injuries. The investigator feels that he has reasonable and probable grounds to believe that fraud has been committed. He therefore calls Mr. Singh and advises Mr. Singh he wishes to re-interview him in order to clarify his first statement. The investigator goes through the first statement with Mr. Singh on a line-by-line basis. Mr. Singh adopts the first statement. Is it entrapment because the investigator lied to Mr. Singh regarding the purpose of the second interview?

2. Instead of conducting a second interview with Mr. Singh, the adjuster at MPIC requests that Mr. Singh attend for an independent medical examination. At the examination, Mr. Singh advises the doctor that he cannot drive. Is the admission to the doctor a form of entrapment?

3. A young man is in a middle class bar that is not known to the Vice Division as a bar where narcotics are generally bought and sold. The young man himself is not known to any member of the Vice Division. Pauline (a very attractive female Vice officer) attends at the bar and begins speaking with our friend Johnny. She indicates to Johnny that she is interested in buying Marijuana. Johnny himself is interested in Pauline. He figures to himself that if he assists Pauline in her purchase of Marijuana, that he may get lucky with her. He indicates to Pauline that he himself does not have Marijuana, but that he can get some for her. He takes Pauline to an apartment building near the bar. He tells Pauline he knows that the price is $50.00 for 1/4 ounce of Marijuana. He receives the money from

Pauline and tells her to wait in the hallway. He attends at an apartment and returns with 1/4 ounce of Marijuana. He hands Pauline the Marijuana. As they are leaving the building in the elevator, Pauline arrests Johnny.

4. Harry is at a coffee shop which is frequented by government employees, and most specifically by Crown Attorneys. Pauline has attended at Court and has been excused by the prosecutor. She decides that she wants to get a cup of coffee. She attends at the coffee shop. The coffee shop is known to her as being a hang-out for Crown Attorneys. It is not known anywhere as being a place where narcotics are bought and sold. While the coffee shop is frequented by Crown Attorneys, it is a public coffee shop and members of the public are often having coffee there. Pauline observes Harry in the coffee shop. She notices that he is staring at her and smiling at her. He has long hair and a moustache. He does not look like a Crown Attorney. She decides on her own accord to approach him. When she approaches him, he hits on her. She indicates that she is interested in buying Marijuana. He tells her that he doesn't have any Marijuana on him, that he doesn't use Marijuana, that he doesn't sell Marijuana, but that if she wants Marijuana, he can get it for her from a friend of his. He decides to take her over to his friend Sheldon's because he feels that he can get lucky with Pauline if he does so. Pauline and Harry enter Sheldon's home. Sheldon tells Pauline that the cost is $15.00 per gram. Sheldon tells Harry that the Marijuana can be found on a table in the other room and that he is to go get Pauline a gram. He also tells Harry to get the $15.00 from Pauline. Pauline gives Harry the $15.00. Harry gets the Marijuana from another room and gives it to Pauline. After the transaction, Harry says, "Can I get lucky now?" Pauline says, "Yea, but we gotta make a pit stop." Harry says, "What do you mean by a pit stop?" Pauline says, "Before I have sex with a strange man, I like to handcuff him. Turn around." Harry turns around and Pauline handcuffs him. Pauline states, "You're under arrest."