
COMMENT

CHRONIQUE DE JURISPRUDENCE

Persistent Importuning for a Defence of Entrapment

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In this comment the author discusses the defence of entrapment in light of two recent decisions of the British Columbia Court of Appeal: *R. v. Mack* and *Showman v. R.* The author notes that there are three possible bases on which to found the defence, and that the choice of juridical basis determines whether the mental element of the defence is analyzed subjectively or objectively. The first possible basis is the substantive defence of entrapment found in the *Criminal Code*. The mental element under the *Criminal Code* is subjective: the Court examines the accused's predisposition to commit the crime in question. The second basis is procedural, deriving from the doctrine of abuse of process. This is not a true defence, and the remedy is not acquittal but a judicial stay of proceedings. Here the analysis is objective, focussing on the effect of the impugned police practices on the integrity of the criminal justice system. Finally, a defence of entrapment may be founded on sections 7 and 24 of the *Canadian Charter of Rights and Freedoms*. The mental element and remedy under the *Charter* are similar to those relevant to the procedural basis. The author notes that the procedural approach has predominated in Canadian courts, but he detects a recent willingness to accept entrapment defences based on the *Charter*.

Dans ce commentaire, l'auteur aborde le moyen de défense de provocation à la lumière de deux récentes décisions de la Cour d'appel de la Colombie-Britannique, soit *R. c. Mack* et *Showman c. R.* L'auteur remarque qu'il existe trois fondements possibles à ce moyen de défense, et que le choix du fondement juridique déterminera si l'élément mental de l'accusé sera apprécié de façon subjective ou objective. Le premier fondement possible est la disposition substantive sur la défense de provocation que l'on retrouve dans le *Code criminel*. L'élément mental en vertu du *Code criminel* est subjectif: le tribunal considère les prédispositions de l'accusé à commettre le crime en question. Le second fondement est de nature procédurale, qui découle de la doctrine d'abus de droit. Il ne s'agit pas d'un véritable moyen de défense, et le résultat n'est pas l'acquittement, mais bien la simple suspension des procédures. Ici, l'analyse est de type objectif, en ce que l'attention est portée sur certaines pratiques policières à être réprimées au nom de l'intégrité du système judiciaire. Finalement, la défense de provocation peut trouver fondement dans les articles 7 et 24 de la *Charte canadienne des droits et libertés*. L'élément mental requis et le résultat de cette défense sont alors similaire à ceux que l'on retrouve lorsque le moyen de défense se fonde sur des considérations procédurales. L'auteur rappelle que l'approche procédurale semble prédominer dans la jurisprudence canadienne, mais il remarque une tendance récente selon laquelle les tribunaux opteraient pour une défense de provocation fondée sur la *Charte*.

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The elusive defence of entrapment, back before the Supreme Court of Canada in *R. v. Mack*¹ and *Showman v. R.*,² is attempting again to find a place in Canadian criminal law.

Canadian criminal courts have grappled with this defence for years. Some have rejected it³ or accepted it in some form,⁴ whereas others have distinguished it on the facts⁵ or sidestepped it altogether by ruling on other issues.⁶

The defence of entrapment is a creation of the courts, there being no statutory basis,⁷ and despite recommendations to enact such a defence,⁸ legislation does not appear to be forthcoming.

¹(1985), 23 C.C.C. (3d) 421, 49 C.R. (3d) 169 (B.C.C.A.) [hereinafter *Mack* (B.C.C.A.) cited to C.C.C.], aff'g *R. v. Mack* (1983), 34 C.R. (3d) 228 (B.C. Co. Ct) [hereinafter *Mack* (B.C. Co. Ct)]; leave to appeal to S.C.C. granted 24 February 1986, [1986] 1 S.C.R. x.

²(6 January 1986), Vancouver CA002218 (B.C.C.A.) [hereinafter *Showman*]; leave to appeal to S.C.C. granted 24 February 1986, [1986] 1 S.C.R. xiii.

³*R. v. Chernecki* [1971] 5 W.W.R. 469, 4 C.C.C. (2d) 556, 16 C.R.N.S. 230 (B.C.C.A.).

⁴*R. v. Shipley* [1970] 2 O.R. 411, [1970] 3 C.C.C. 398 (Co. Ct) [hereinafter *Shipley*]; *R. v. MacDonald* (1971), 15 C.R.N.S. 122, 13 Crim. L.Q. 502 (B.C. Prov. Ct); *R. v. Sampare* (1977), 6 B.C.L.R. (Prov. Ct); *R. v. Haukness* [1976] 5 W.W.R. 420 (B.C. Prov. Ct) [hereinafter *Haukness*]; *R. v. Sabloff* [1979] C.S. 821 [hereinafter *Sabloff*]; *R. v. Rippey* (1981), 65 C.C.C. (2d) 158 (N.S. Co. Ct); *R. v. Jeanrie* [1984] C.S.P. 1015 [hereinafter *Jeanrie*]; *R. c. McCann* (1985), 16 C.R.R. 136 (Ont. Prov. Ct) [hereinafter *McCann*]; *R. v. Gudbrandson* (1986), 53 C.R. (3d) 20 (B.C. Co. Ct) [hereinafter *Gudbrandson*]; *R. v. Gingras* (4 December 1987), Montreal 500-01-012339-864 (Que. S.C.) [hereinafter *Gingras*]; *Baxter v. R.* [1983] C.A. 412, 9 C.C.C. (3d) 555 [hereinafter *Baxter*]; *R. v. Misra* (1986), 54 C.R. (3d) 305 (Sask. C.A.); *R. v. Ashoona* (1988), 38 C.C.C. (3d) 163 (N.W.T.S.C.) [hereinafter *Ashoona*].

⁵*R. v. Ormerod* [1969] 2 O.R. 230, [1969] 4 C.C.C. 3, 6 C.R.N.S. 37 (C.A.) [hereinafter *Ormerod*]; *R. v. Bonnar* (1975), 30 C.C.C. (2d) 55, 34 C.R.N.S. 182 (N.S.C.A.) [hereinafter *Bonnar* cited to C.C.C.]; *R. v. Coupal* (1986), 31 C.C.C. (3d) 31 (B.C.C.A.) [hereinafter *Coupal*]; *Dionne v. R.* (1987), 58 C.R. (3d) 351 (N.B.C.A.) [hereinafter *Dionne*]; *R. v. Ridge* (1979), 51 C.C.C. (2d) 261 (B.C.C.A.) [hereinafter *Ridge*]; *R. v. Biddulph (No. 1)* (1987), 1 W.C.B. (2d) 438 (Man. C.A.) [hereinafter *Biddulph*]; *R. v. Kirzner* (1977), 38 C.C.C. (2d) 131, 81 D.L.R. (3d) 229, 18 N.R. 400 (S.C.R.) [hereinafter *Kirzner* cited to C.C.C.], aff'g (1975), 32 C.C.C. (2d) 76 (Ont. C.A.); *Amato v. R.* [1982] 2 S.C.R. 418, [1983] 1 W.W.R. 1, 69 C.C.C. (2d) 31, 29 C.R. (3d) 1, 140 D.L.R. (3d) 405, 42 N.R. 487 [hereinafter *Amato* cited to S.C.R.], aff'g (1979), 51 C.C.C. (2d) 401, 12 C.R. 386 (B.C.C.A.) [hereinafter *Amato* (B.C.C.A.) cited to C.C.C.].

⁶*Lemieux v. R.* [1967] S.C.R. 492, [1968] 1 C.C.C. 187, 2 C.R.N.S. 1, 63 D.L.R. (2d) 75 [hereinafter *Lemieux*]; *R. v. Madigan* [1970] 1 O.R. 80, [1970] 1 C.C.C. 354, 6 C.R.N.S. 180 (C.A.); *Amsden v. Rogers* (1916), 9 Sask. L.R. 323, 10 W.W.R. 1337, 26 C.C.C. 389, 30 D.L.R. 354 (S.C.); *R. v. Woods* (1968), [1969] 3 C.C.C. 222, 7 C.R.N.S. 1 (Ont. C.A.).

⁷Subject to potential development under s. 7(3) of the *Criminal Code*, R.S.C. 1970, c. C-34 [hereinafter the *Criminal Code*], and the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c.11 [hereinafter the *Charter*].

⁸*Report of the Canadian Committee on Corrections: Towards Unity: Criminal Justice and Corrections* (Ottawa: Queen's Printer, 1969) (Chair: R. Ouimet) at 75-76 [hereinafter *Ouimet*].

Entrapment has been defined 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."⁹

In Canada and in other common law jurisdictions, the courts have traditionally approved the use of police stratagems and subterfuge in the detection of crime, particularly regarding consensual crimes or "crimes without victims", due to the lack of a complainant or aggrieved victim — other than society itself — hence the difficulty in obtaining evidence through ordinary means of law enforcement and crime detection.¹⁰ As a result, the police have not been strait-jacketed by artificial means of detection which would be illusory "on the streets".

As Mr Justice Lamer has stated, "the investigation of crime and the detection of criminals is not a game to be governed by the Marquess of Queensbury rules"¹¹ and further that "[t]he authorities, in dealing with shrewd and often sophisticated criminals, must sometimes of necessity resort to tricks or other forms of deceit ...".¹²

Consequently, police stratagems and undercover operations amounting to traps which provide opportunities for willing persons to commit offences are recognized as permissible crime detection methods.¹³ The difficulty arises when police practices, usually involving informers and undercover operatives, although designed for crime detection, become methods of instigating crime, particularly by persons who would not otherwise have implicated themselves criminally. It is in this context that the question of entrapment arises.

Chief Justice Laskin underlined the problem as follows:

Committee]; *Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police*, 2d report, *Freedom and Security Under the Law* (Ottawa: Supply & Services, 1982) (Chair: D.C. McDonald) vol. 2 at 1051-53 [hereinafter McDonald Commission].

⁹*Sorrells v. United States*, 287 U.S. 435 at 454 (1932), Roberts J. [hereinafter *Sorrells*]. This definition was recently cited by Dickson C.J.C. in *R. v. Jewitt* (1985), 21 C.C.C. (3d) 7 at 21, [1985] 6 W.W.R. 127, 47 C.R. (3d) 193, 20 D.L.R. (4th) 651, 61 N.R. 150 (S.C.C.) [hereinafter *Jewitt* cited to C.C.C.], rev'g (1983), 5 C.C.C. (3d) 234, [1983] 4 W.W.R. 481, 34 C.R. (3d) 193 [hereinafter *Jewitt* (B.C.C.A.) cited to C.C.C.].

¹⁰*R. v. Berdino* [1924] 3 W.W.R. 198 at 201, 42 C.C.C. 308 (B.C.C.A.); *R. v. White* [1945] O.R. 378 at 394, 84 C.C.C. 126 (C.A.); *Kirzner, supra*, note 5 at 135-36 per Laskin C.J.C.; see also E.M. Schur, *Crimes Without Victims* (Englewood Cliffs, N.J.: Prentice-Hall, 1965).

¹¹*Rothman v. R.* [1981] S.C.R. 640 at 647, 59 C.C.C. (2d) 30, 121 D.L.R. (3d) 578, 35 N.R. 485 [hereinafter *Rothman* cited to S.C.R.].

¹²*Ibid.*

¹³See *Kirzner, supra*, note 5 at 136.

The problem which has caused judicial concern is the one which arises from the police-instigated crime, where the police have gone beyond mere solicitation or mere decoy work and have actively organized a scheme of ensnarement, of entrapment, in order to prosecute the person so caught. In my opinion, it is only in this situation that it is proper to speak of entrapment and to consider what effect this should have on the prosecution of a person who has thus been drawn into the commission of an offence.¹⁴

In order to strike a balance between the protection of the public from criminal activity and the protection of the individual from overzealous police activity, control measures must be implemented to deal with entrapment.¹⁵ Ordinary measures, such as mitigation of sentence of the entrapped accused, civil and criminal liability of the entrapper and accountability of the offending officer before administrative disciplinary review boards, are not sufficiently effective and may offer little solace to a convicted accused. An effective control measure should block the intended aim of police entrapment — the conviction of the entrapped accused. This may be achieved by the courts by excluding evidence obtained by entrapment, staying proceedings or acquitting the accused. However, in order to avoid a legal imbroglio, the courts must be consistent in their approach and in the juridical basis underlying it.

The “defence” of entrapment presupposes the commission of the offence. Thus, the constituent elements of the offence, the *actus reus* and *mens rea*, are complete.¹⁶ There are two approaches or schools of thought with respect to the application of the defence.

Pursuant to the subjective approach, which has been adopted by the United States Supreme Court,¹⁷ the accused is exonerated due to a lack of predisposition to commit the offence prior to the instigation by law enforcement officers or their agents (i.e. informers).

¹⁴*Ibid.*

¹⁵*Ibid.* at 135-38. See also M.L. Friedland, “Controlling Entrapment” (1982) 32 U.T.L.J. 1; D. Stuart, *Canadian Criminal Law: A Treatise*, 2d ed. (Toronto: Carswell, 1987) at 480-93. Note that the Crown’s refusal to disclose the identity and whereabouts of an informer may affect the accused’s right to make full answer and defence, and lead to a stay of proceedings: see *R. v. Davies* (1982), 1 C.C.C. (3d) 299, 31 C.R. (3d) 88 (Ont. C.A.); *Gudbrandson*, *supra*, note 4; *R. v. Ross* (1984), 15 C.C.C. (3d) 177, 42 C.R. (3d) 49 (B.C. Co. Ct); *R. v. Farrer* (1975), 32 C.C.C. (2d) 84 (Ont. Co. Ct).

¹⁶See *Amato*, *supra*, note 5 at 445; *Sabloff*, *supra*, note 4 at 829; *Gingras*, *supra*, note 4 at 11.

¹⁷*Sorrells*, *supra*, note 9; *Sherman v. United States*, 356 U.S. 369 (1958) [hereinafter *Sherman*]; *United States v. Russell*, 411 U.S. 423 (1973) [hereinafter *Russell*]; *Hampton v. United States*, 425 U.S. 484 (1976) [hereinafter *Hampton*]. This subjective defence is a matter of statutory construction in that Congress had not intended its statutes to be enforced when otherwise-innocent persons are entrapped by the police. This defence is also known as the “origin of intent”, “genesis of intent” or “creative activity” formulation.

The objective view, which has found support in a minority of the United States Supreme Court¹⁸ and in certain state courts,¹⁹ focuses on the police conduct and its effect on the integrity of the criminal justice system, regardless of the predisposition of the accused.

Each of these views is based upon different rationales, but appears to find its basis in the common law. It is noteworthy, however, that in England, the House of Lords has rejected a defence of entrapment.²⁰

Canadian criminal courts have been inconsistent with respect to the existence of a defence of entrapment. Furthermore, in those rare cases where the defence has been recognized, the courts have been equally inconsistent with respect to which of these approaches (subjective or objective) applies, and what legal basis supports it.

Entrapment has previously been before the Supreme Court of Canada, although neither its existence as a defence, nor its ingredients, has achieved recognition by a majority of the Court.

In *Lemieux v. R.*,²¹ as a result of the participation of the police and the consent of a homeowner, Lemieux was acquitted of break and enter, on appeal, due to the absence of the *actus reus*, one of the essential elements of the offence.²² Mr Justice Judson, on behalf of the Court, appeared to have rejected an entrapment defence altogether, stating:

Had Lemieux in fact committed the offence with which he was charged, the circumstance that he had done the forbidden act at the solicitation of an *agent provocateur* would have been irrelevant to the question of his guilt or innocence. The reason that this conviction cannot stand is that the jury were not properly instructed on a question vital to the issue whether any offence had been committed.²³

¹⁸*Ibid.* This objective defence is based on public policy. It has been referred to as the "police conduct" or "hypothetical person" formulation.

¹⁹See R. Park, "The Entrapment Controversy" (1975-76) 60 Minn. L. Rev. 163 at 166-69.

²⁰*R. v. Sang* (1979), [1980] A.C. 402, [1979] 3 W.L.R. 263, [1979] 2 All E.R. 1222 (H.L.) [hereinafter *Sang*].

²¹*Supra*, note 6.

²²Thus the intervention of the authorities and/or the victim may lead to an acquittal by negating one of the constituent elements of an offence. See *R. v. Snyder* (1915), 24 C.C.C. 101 (Ont. C.A.); *R. v. Kotyszyn* (1949), 95 C.C.C. 261 (Que. K.B.); *Detering v. R.* [1982] 2 S.C.R. 583, 70 C.C.C. (2d) 321, 31 C.R. (3d) 354; *Haughton v. Smith* [1973] 3 All E.R. 1109 (H.L.). Professor Williams suggests a parallel between the position of the owner in respect of crimes against property and the position of the police in respect of crimes against the state; see G. Williams, *Criminal Law: The General Part*, 2d ed. (London: Stevens & Sons, 1961) at 782; *R. v. Burke* (1978), 44 C.C.C. (2d) 33 at 49-50 (P.E.I.C.A.) [hereinafter *Burke*].

²³*Supra*, note 6 at 496.

Entrapment, either as a substantive defence or based upon the doctrine of abuse of process, was rejected on the facts, but left open in *R. v. Kirzner*.²⁴ In the majority judgment, Mr Justice Pigeon (with whom Martland, Ritchie, Beetz and Pratte JJ. concurred) held that the evidence was not open to the entrapment claim. In a minority concurring judgment, Chief Justice Laskin, with whom Spence J., Dickson J. (as he then was) and Estey J. concurred, appeared to favour a substantive defence of entrapment.²⁵ His Lordship stated:

In these circumstances, I would not, however, endorse the view of the Ontario Court of Appeal in the present case or of the British Columbia Court of Appeal in *Chernecki* rejecting entrapment as a defence. There are good reasons for leaving the question open. Indeed, if that position is based on a static view of s. 7(3) of the *Criminal Code* I find it unacceptable. I do not think that s. 7(3) should be regarded as having frozen the power of the Courts to enlarge the content of the common law by way of recognizing new defences, as they may think proper according to circumstances that they consider may call for further control of prosecutorial behaviour or of judicial proceedings.²⁶

And further:

Having indicated that I prefer to leave open the question whether entrapment, if established, should operate as a defence I express no view on the approach taken in the *Haukness* case. Similarly, I leave open the question whether the appropriate way to deal with entrapment is by a stay of proceedings, a matter considered by this Court in another context in *R. v. Rourke* ...²⁷

In *Amato v. R.*,²⁸ Dickson J. (as he then was) with whom Martland, Beetz and Chouinard JJ. concurred, held that "on the facts of this case the defence of entrapment, assuming it to be available under Canadian law, does not arise".²⁹ This reasoning, once again, would leave open, if not implicitly recognize, a defence of entrapment.

If available, the application of a defence of entrapment would be restricted, pursuant to this decision, because of its rejection on what appeared to be a strong factual setting involving: police instigation of the events leading to the charges; indirect suggestions of violence; persistent solicitation of the accused by a paid police informer with a drug-related criminal record and later by an undercover police officer; the lack of any wrongdoing by

²⁴*Supra*, note 5.

²⁵Prior to *Kirzner*, in *Ormerod*, *supra*, note 5, Laskin J.A. (as he then was) leaned towards abuse of process as a basis for the entrapment defence. Subsequent to *Kirzner*, Laskin C.J.C. concurred in the dissenting judgment of Estey J. in *Amato*, *supra*, note 5, in which abuse of process was recognized as the basis for the defence.

²⁶*Kirzner*, *supra*, note 5 at 137-38.

²⁷*Ibid.* at 141.

²⁸*Supra*, note 5.

²⁹*Ibid.* at 464.

the accused until approached by the informer; and even then, the accused did not benefit from the transactions.

Mr Justice Ritchie rendered a separate opinion (concurring with Dickson J.) that the appeal should be dismissed, thereby constituting a majority, but for different reasons. Although Ritchie J. did not find entrapment on the facts, after referring to *Kirzner*, he acknowledged the existence of a defence of entrapment as follows:

[T]he weight of authority is to the effect that in a case where the evidence discloses that the crime in question would not have been committed save for the "calculated inveigling or persistent importuning" of the police it may then be apparent that it was the creative activity of the police rather than the intention of the accused which gave rise to the crime being committed. In such event the essential element of *mens rea* would be absent and the accused's defence would be established.³⁰

His Lordship summarized:

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.³¹

This reasoning appears to justify a subjective substantive defence, but is somewhat incongruous. Rather than considering the offence as committed, but excused or justified as a result of entrapment, Ritchie J. would view entrapment as eliminating *mens rea*, the result being that no offence is committed at all.³²

The constituent elements of an offence, the *actus reus* and *mens rea*, must, of course, be complete for an offence to be committed and an accused convicted. Entrapment does not eliminate these elements. It instigates the commission of a complete offence. An entrapped accused still commits the offence with the requisite *mens rea*, albeit after inducement by, or on behalf of, law enforcement officials. A substantive defence would excuse or justify the accused's conduct due to police entrapment. Therefore, notwithstanding the commission of the offence, the accused would be exonerated much like one who benefits from the defences of due diligence, necessity, compulsion, duress or self-defence.

In an oft-cited and lengthy dissenting judgement, Mr Justice Estey, (with whom Laskin C.J.C., McIntyre and Lamer JJ. concurred) recognized the "defence" of entrapment, the roots of which are to be found in the common

³⁰*Ibid.* at 471-72.

³¹*Ibid.* at 473. See the judgments of Angers and Rice JJ.A. in *Dionne*, *supra*, note 5 at 353-56; see also *Ashoona*, *supra*, note 4.

³²With respect to police conduct eliminating the *actus reus*, see *Lemieux*, *supra*, note 6; *Burke*, *supra*, note 22 at 49-50.

law. On the facts of *Amato*, His Lordship applied the “defence”, concluding as follows:

The cumulative effect of such a deliberately launched enterprise by the police would in my view “in all the circumstances” be viewed in the community as shocking and outrageous, and such conduct is clearly contrary to the proper principles upon which justice must be done by the courts.³³

Mr Justice Estey considered the defence to be a form of abuse of process, the remedy for which would be a stay of proceedings. The issue would accordingly be a question of law for the trial judge alone to determine. Estey J. laid out general, somewhat vague, guidelines regarding the component elements of the defence, preferring to leave it to the case law to “paint in the variants”. He stated:

The availability of this defence in law and the proper constituent elements of the offence are closely entwined. Assuming the defence to be known to the common law and available in Canadian criminal law, in a proper case what are the component elements, the criteria to be met for its invocation? It is, of course, impossible to cast *in futuro* a set of guides, principles, rules or yardsticks with satisfactory precision and detail. This defence perhaps more than any other will succeed only in an unusual and delicately balanced set of circumstances. Case law will have to paint in the variants. 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*.

At least one relevant circumstance in examining the character in law of the police conduct (such as persistent importuning) is whether the law enforcement agency had a reasonable suspicion that the accused would commit the offence without inducement. By itself and without more the predisposition in fact of the accused is not relevant to the availability of the defence. On the other hand, where the true purpose of the police initiative is to put the enforcement officers in a position to obtain evidence of an offence when committed, absent other circumstances already noted, the concept of entrapment does not arise.

Each case will turn within the influence of these factors according to its own circumstances. The root of the defence must, in my view, be the same as,

³³*Amato, supra*, note 5 at 464.

for example, the exclusion of involuntary confessions. The integrity of the criminal justice system demands the rule.³⁴

And further:

The consensual crimes, their detection and demonstration in court, raise new issues or aggravate the problems surrounding older issues. The appointed spy may, pursuant to arrangements, infiltrate and report upon participants in a crime to which the agent may be a party or which the agent has provided to others the opportunity to commit. In some circumstances, indeed, the offence would in all likelihood not have otherwise been committed. The law enforcement agency in these circumstances moves from the position of merely affording an opportunity for the commission of crime to persons who may be so disposed to a position where the agency itself encourages the commission of the crime. Expressed another way, the police may have by any such measures instigated the offence, or at least its planning, and did so simply to catch the otherwise innocent members of the public in order to prosecute them. The ensnared or entrapped must in such a situation have a defence in law for the police and the state have gone beyond mere crime detection by decoy work or solicitation of evidence. In fact the crime has been designed and committed by the state itself.³⁵

This judgment adheres to an objective approach similar to that adopted by a minority of the United States Supreme Court.

Therefore, in *Amato*, five Justices of the Supreme Court of Canada (a majority) recognized the existence of a defence of entrapment without, however, any consensus with respect to its form or basis. As a result, Canadian criminal courts faced with the defence have not taken a uniform and consistent position, and the issue is still open.

The confusion manifested itself in *Baxter v. R.*,³⁶ in which a majority of the Quebec Court of Appeal, while referring to *Amato* as the authority for recognizing a defence of entrapment, supported an independent substantive defence infused with a subjective content focusing on the predisposition of the accused to commit the offences charged, and held that the factual determination of the defence should be left with the jury. A dissenting opinion, following Estey J.'s decision in *Amato*, favoured the opposing objective approach which scrutinizes the conduct of the police without regard

³⁴*Ibid.* at 446-47.

³⁵*Ibid.* at 458. See D. Stuart, "Amato: Watersheds in Entrapment and Abuse of Process" (1982) 29 C.R. (3d) 54.

³⁶*Supra*, note 4.

for the subjective consequences on the accused's behaviour. In fact, according to this dissenting opinion, it is the police alone who are on trial.³⁷

Much of the confusion in Canadian criminal courts confronted with the entrapment issue stemmed from the uncertainty surrounding the existence of the doctrine of abuse of process and its remedial judicial stay of proceedings. This uncertainty has since been resolved by the Supreme Court of Canada in *R. v. Jewitt*³⁸ in which the Court recognized the existence, at common law, of a discretionary judicial power (vested in trial court judges) to stay proceedings in a criminal case for abuse of process,

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. It is a power, however, of special application which can only be exercised in the clearest of cases.³⁹

In *Jewitt*, entrapment was raised in the lower courts but was not before the Supreme Court which, after ruling on the principal issues before it,⁴⁰ directed the British Columbia Court of Appeal to hear and determine the merits.

An end to the entrapment debate may be forthcoming as the question is presently before the Supreme Court of Canada in *Mack* and *Showman*. However, the facts allegedly supporting an entrapment defence in both cases, particularly *Showman*, do not appear to be as strong as those disclosed in *Amato*. Although the Court could, as in *Kirzner* and *Amato*, rule that the facts do not give rise to entrapment, without deciding further, it is hoped that the law be settled, and a clear position taken, regarding the existence of a defence of entrapment.

³⁷This uncertainty is further reflected in *Jeanrie, supra*, note 4, where the Quebec Court of Sessions of the Peace did not follow the majority judgments in *Baxter*. The court adopted the dissenting judgments of Vallerand J.A. in *Baxter* and Estey J. in *Amato*. In *Gingras, supra*, note 4, although a Quebec Superior Court jury found entrapment, Boilard J. convicted the accused, as he did not find a stay of proceedings to be justified in the circumstances. See also *Dionne, supra*, note 5; *Jewitt (B.C.C.A.), supra*, note 9 per Anderson J.A., dissenting in part; *Bonnar, supra*, note 5.

³⁸*Supra*, note 9.

³⁹*Ibid.* at 135, where the Supreme Court adopted this conclusion of the Ontario Court of Appeal in *R. v. Young* (1984), 46 O.R. (2d) 520 at 551, 13 C.C.C. (3d) 1, 40 C.R. (3d) 289 [hereinafter *Young* cited to O.R.].

⁴⁰On the principal issue, the Supreme Court ruled that a stay of proceedings is tantamount to a judgment or verdict of acquittal from which the Crown may appeal pursuant to s. 605(1)(a) of the *Criminal Code*. See M. Stober, "Notes and Comments, Abuse of Process — Stay of Proceedings, *R. v. Jewitt*" (1986) 28 Crim. L.Q. 148; D. Stuart, Annotation, *R. v. Jewitt* (1985) 47 C.R. (3d) 193. With respect to the judgment of Anderson J.A. (dissenting in part) of the British Columbia Court of Appeal, see S. France, "Jewitt: The Entrapment Defence Succeeds" (1983) 34 C.R. (3d) 224.

In *Mack*, at the conclusion of the evidence at the accused's trial for trafficking in cocaine, defence counsel applied for a stay of proceedings based upon entrapment. County Court Judge Wetmore adhered to the reasoning of Estey J. in *Amato*, but rejected the defence application and found the accused guilty.

His Honour considered the issue to be a separate matter from the trial proper, upon which the accused had an evidential burden to satisfy the court "on a balance of probabilities that there has been an 'entrapment' which would constitute an abuse of the processes of the court."⁴¹ The ruling, he added, would have been different if the Crown had to negate entrapment beyond a reasonable doubt. Although the opportunity to commit the offence was made available through the tactics of the police and their agent, Wetmore Co. Ct J. made particular note of the accused's prior drug record and of the alacrity of his actions after seeing the cash, and found that it was "far more probable that the accused became involved in this transaction for profit, rather than through persistent inducement and fear."⁴²

An appeal by the accused was dismissed by a panel of five Justices of the British Columbia Court of Appeal, in a decision which dealt with the predominant issues in entrapment cases. In view of *Amato* and *Jewitt*, the Court of Appeal held that entrapment is now available, not as a traditional defence, but as an aspect of abuse of process.

With respect to its application, the Court held that the issue is a question of law which must be determined by the trial judge and that the accused has the onus of establishing entrapment on a preponderance of evidence or a balance of probabilities, that is, "that the conduct of the police or its representatives is an abuse of the court's process."⁴³

The Court pointed out that the criterion for such a stay of proceedings at common law — the bringing of the administration of justice into disrepute — is the same for an order to exclude evidence pursuant to subsection 24(2) of the *Charter*. Under this provision, the onus is clearly on the accused-applicant to establish, on a balance of probabilities, that the admission of the evidence would bring the administration of justice into disrepute.⁴⁴ Consequently, the Court found that it would be anomalous if the same burden of proof were not to be shouldered by the accused in both situations.

⁴¹*Mack* (B.C. Co. Ct), *supra*, note 1 at 234.

⁴²*Ibid.* at 237.

⁴³*Mack* (B.C.C.A.), *supra*, note 1 at 433. In *Jewitt* (B.C.C.A.), *supra*, note 9 at 257, Anderson J.A. (dissenting in part) held that the accused is entitled to the benefit of any reasonable doubt on the issue of entrapment.

⁴⁴*Collins v. R.* [1987] 1 S.C.R. 265 at 280, 33 C.C.C. (3d) 1, 56 C.R. (3d) 193 [hereinafter *Collins* cited to S.C.R.]; see text accompanying notes 66-79, below.

On the facts, the Court of Appeal found that the trial judge was justified in concluding that there was no entrapment in this case.

In *Showman*, the trial for trafficking in marijuana proceeded before judge and jury. On *voir dire*, the trial judge ruled that "the Crown has proved beyond a reasonable doubt that the accused had not been entrapped into committing this offence."⁴⁵ The trial judge found that the accused was predisposed to commit the offence, having come to an independent decision to sell drugs. The accused was subsequently convicted and appealed to the British Columbia of Appeal.

The Court considered the defence of entrapment as it had previously done in the *Mack* case. The Court affirmed the finding of the trial judge and stated that the accused had not established entrapment on a balance of probabilities. However, the Court also pointed out that the trial judge erred in favour of the accused by imposing on the Crown the ordinary burden of proving beyond a reasonable doubt that the accused was not entrapped.

In *Showman*, the evidence disclosed ordinary solicitation of an eager trafficker of marijuana by the police and their agent. More persistence was required in *Mack*.

Notwithstanding reliance by the British Columbia Court of Appeal, in both decisions, on abuse of process as the basis for the defence of entrapment, the predisposition of the accused was dispositive of the entrapment issue. Abuse of process, it seems, was no more than the procedural vehicle for the defence as its content drew elements from what would be a subjective substantive defence by inquiring into the pre-existing intention of the accused to commit the offence charged, something Estey J. in *Amato* considered, by itself, to be irrelevant. These cases further demonstrate, therefore, that the content of the defence of entrapment is not settled.⁴⁶

However, in addition to deciding upon the existence of the defence of entrapment and its availability on the facts, these cases pinpoint the recurring issues that arise in entrapment cases, which can be summed up as follows:

- 1) What is the legal basis of the defence?

⁴⁵*Supra*, note 2 at 1.

⁴⁶*Coupal, supra*, note 5; *Ridge, supra*, note 5 (both decisions of the B.C. Court of Appeal). Note that in *Jewitt* (B.C.C.A.), *supra*, note 9 at 257-59, although Anderson J.A. (dissenting in part) adhered to Estey J.'s judgment in *Amato*, he preferred, as a remedy, an acquittal rather than a stay of proceedings. See S.D. Frankel, "Entrapment: Recent Happenings" (1985) 43 Advocate 505.

2) Is entrapment a question of law to be determined by the trial judge or is it a factual issue to be determined by the jury?

3) What is the burden of proof with respect to entrapment and upon whom does it rest?

Although inconsistency remains since *Amato*, the popular view of Canadian criminal courts appears to be recognition of a defence of entrapment as an aspect of abuse of process with its remedial judicial stay of proceedings (ironically, in practice, the predisposition of the accused is rarely excluded as a significant factor). This is a novel approach in Canadian criminal law.

Unlike the American constitutional tradition whereby the courts control the police investigative stage through exclusionary rules of evidence,⁴⁷ Canadian courts, independent of the *Charter* and in accordance with the common law, have refused to scrutinize the means of obtaining evidence except with respect to extra-judicial confessions. Canadian courts have traditionally been concerned with the search for the truth and fairness *at trial* rather than with illegal or improper police methods in obtaining evidence, or their effect on the public's conception of the administration of justice.⁴⁸

Moreover, our courts have traditionally focused on the individual accused before the court, and have, accordingly, been called upon to determine the applicability of certain established defences such as drunkenness, alibi, mistake of fact, self-defence, necessity, compulsion and duress, all of which are personal to the accused. No overall collective policy or concern regarding the integrity of the administration of justice arises.

Entrapment cases differ from others in that they relate to police conduct which contributes to the commission of a crime, as opposed to police conduct in the course of an investigation after a crime has been committed.⁴⁹

In order to finally settle the different issues found in entrapment cases, the legal basis of the entrapment defence must be determined conclusively. There appear to be three legal bases which may underlie a defence of entrapment:

⁴⁷Note that the defence of entrapment recognized by the U.S. Supreme Court is not based on the Constitution: see text accompanying notes 67-68, below.

⁴⁸Pursuant to the common law, the courts have determined that relevant evidence of substantial probative value is admissible, regardless of how it was obtained, unless it is of trifling weight and gravely prejudicial to the accused: *R. v. Wray* (1970), [1971] S.C.R. 272, [1970] 4 C.C.C. 1, 11 C.R.N.S. 235; *Sang, supra*, note 20.

⁴⁹*Amato, supra*, note 5 at 454; *Young, supra*, note 39 at 551; *Re R. and Rourke* (1975), 25 C.C.C. (2d) 555 at 567 (B.C.C.A.), aff'd *Rourke v. R.* (1977), [1978] 1 S.C.R. 1021, 35 C.C.C. (2d) 129, [1977] 5 W.W.R. 487, 38 C.R.N.S. 26.

1) subsection 7(3) of the *Criminal Code*, the substantive common law defence leading to an acquittal;

2) the common law doctrine of abuse of process and its remedial judicial stay of proceedings; and

3) section 7 of the *Charter* and remedies under section 24, in particular, the exclusion of evidence and a judicial stay of proceedings.

A common law substantive defence of entrapment pursuant to subsection 7(3) of the *Criminal Code* would adhere to a subjective test and focus on the primary issue before the court, that is, the guilt or innocence of the accused, rather than police conduct. As a result, the "culpability" and predisposition of the accused would preoccupy the court rather than a general concern for the integrity of the criminal justice system.⁵⁰

Although the offence is technically committed, the subjective approach aims to distinguish between those who are blameworthy and those who are not (as a result of an outside force operating on them) and to excuse the latter from having committed the offence by acquitting them (not unlike the defences of self-defence, compulsion, duress and necessity).⁵¹ In this way, the courts would "manufacture" a defence through the development of the common law to deal with "manufactured" crime.

A substantive defence of entrapment, where supported by evidence, should be put to the jury for determination, subject, of course, to the directives of the presiding judge as to what facts, if accepted, could constitute entrapment.⁵² If accepted by the jury, then, as is the case with other substantive defences, the accused would be acquitted. Unlike traditional defences where the accused benefits from any reasonable doubt, the preferred view, when this defence is raised, is for the accused to shoulder the burden of proof and establish the defence on a preponderance of evidence or a balance of probabilities.⁵³ Since an accused who raises a defence of self-defence, compulsion, duress or necessity as an excuse or justification for having committed an offence, benefits from any reasonable doubt, it seems

⁵⁰Ouimet Committee, *supra*, note 8 at 79; McDonald Commission, *supra*, note 8 at 1053-54.

⁵¹P.H. Robinson, "Criminal Law Defenses: A Systematic Analysis" (1982) 82 Col. L. Rev. 199 at 236-41.

⁵²Kirzner, *supra*, note 5 at 139; Baxter, *supra*, note 4 at 413-14; Sabloff, *supra*, note 4 at 829; Gingras, *supra*, note 4 at 10; Dionne, *supra*, note 5 at 354-56; Burke, *supra*, note 22 at 48-50; McDonald Commission, *supra*, note 8 at 1052; D. Stuart, Annotation: *R. v. Mack* (B.C. Co. Ct), (1983) 34 C.R. (3d) 228 [hereinafter Annot. B.C. Co. Ct]; Sherman, *supra*, note 17 at 377.

⁵³Kirzner, *ibid.* at 141 (per Laskin C.J.C.); Baxter, *ibid.* at 414; Sabloff, *ibid.* at 830; Gingras, *ibid.* at 11; McDonald Commission, *ibid.* at 1051.

incongruous that the same evidentiary standard should not apply to an accused raising this entrapment defence.⁵⁴

A substantive entrapment defence is not without drawbacks. It may be contended that the police appear to be given a licence to entrap those inclined to criminality and the concern at trial would relate more to the accused's background and proclivities than to his guilt or innocence on the facts giving rise to the charge.⁵⁵ Evidence with respect to such matters however, would have to comply with strict evidentiary rules: for example, similar fact evidence, rebuttal evidence, hearsay, cross-examination of the accused as to his previous convictions and so on. Moreover, our jurisprudence has demonstrated that the question of an accused's predisposition may be determined by the degree of pressure applied by the police as well as the accused's conduct and statements in his dealings with undercover police officers or informers prior to his arrest.⁵⁶

Opponents of the subjective approach maintain that it creates an artificial distinction by restricting the defence to entrapment by police or their agents and excluding its application to lay entrappers, since culpability is not diminished according to the status of the entrapper.⁵⁷ Moreover, the suspect is unaware of the entrapper's true identity. Entrapment by the police or their agents, however, involves the state as entrapper and prosecutor. Furthermore, for the courts to consider entrapment by private individuals would be to increase the danger of collusion and false allegations, and this would neither reflect a true search for guilt or innocence nor would it manifest a desired aim of the criminal justice system.⁵⁸

Although a substantive defence of entrapment is more in line with the philosophy of the common law and our criminal jurisprudence, Canadian courts, in particular the Supreme Court of Canada, have been moving towards examining police conduct and its effect on the community's view of

⁵⁴*Perka v. R.* [1984] 2 S.C.R. 233 at 257-58, 14 C.C.C. (3d) 385, [1984] 6 W.W.R. 289, 42 C.R. (3d) 113; Annot. B.C. Co. Ct, *supra*, note 52; Editor's Note, *R. v. Mack* (B.C.C.A.), *supra*, note 1.

⁵⁵See the minority judgments in *Sorrells*, *supra*, note 9 at 458-59; *Sherman*, *supra*, note 17 at 382-84; and the dissenting judgments in *Russell*, *supra*, note 17 at 437, 443-44; see also R.A. Rossum, "The Entrapment Defense and the Teaching of Political Responsibility: The Supreme Court as Republican Schoolmaster" (1978) *Am. J. Crim. Law* 287 at 294-95 [hereinafter Rossum]; R.C. Donnelly, "Judicial Control of Informants, Spies, Stool Pigeons, and Agents Provocateurs" (1951) 60 *Yale L.J.* 1091 at 1106-08.

⁵⁶See cases cited, *supra*, notes 4 and 5.

⁵⁷*Amato* (B.C.C.A.), *supra*, note 5 at 405; *Sherman*, *supra*, note 17 at 380; *Russell*, *supra*, note 17 at 433-34; *United States v. Garcia*, 546 F.2d 613 (5th Circ. C.A., 1977), cert. denied 430 U.S. 958; *Robinson*, *supra*, note 51 at 237-38; *Park*, *supra*, note 19 at 240-43.

⁵⁸Rossum, *supra*, note 55 at 303-04; *Park*, *ibid.* at 241-42, 271-72.

the administration of justice, even prior to the enactment of the *Charter*.⁵⁹ In this way, the courts are taking a more active role by developing policy and, in fact, making law.

The objective approach to the defence of entrapment demonstrates this change in perspective by focusing on active police practices and their effect on the integrity of the criminal justice system. Little emphasis, if any, is placed on the predisposition or "culpability" of the individual accused.

The propriety of police practices would be measured by requirements of justice and fairness and by their probable effect upon a hypothetical person. Egregious police initiatives, such as entrapment, offend common notions of decency and fair play, thereby tainting and undermining respect for the administration of justice, of which the police, the prosecution and the judiciary are integral parts. The courts, therefore, as a matter of public policy, withhold their processes from the prosecution of an entrapped accused notwithstanding the fact that the offence is committed and the accused is not entitled to an acquittal.⁶⁰ As a result, police conduct would be monitored by the judiciary.

A defence of entrapment according to this objective approach is a question of law, for the trial judge alone to determine,⁶¹ as an aspect of abuse of process with its remedial judicial stay of proceedings which puts an end to the prosecution without, however, considering the merits of the case and the culpability of the accused. Again, the preferred view places the onus on the accused to establish entrapment on a preponderance of evidence or a balance of probabilities.⁶²

Positive aims and effects of this approach include the protection of the purity and integrity of the criminal justice system, and the upholding of the

⁵⁹*Amato, supra*, note 5, per Estey J. (in dissent); *Rothman, supra*, note 11, per Estey J. (in dissent) and Lamer J.

⁶⁰*Amato, ibid.* at 445, 463; *Jewitt, supra*, note 9 at 23.

⁶¹*Amato, ibid.* at 448, per Estey J. (in dissent); *Mack* (B.C.C.A.), *supra*, note 1 at 428-31; *Showman, supra*, note 2 at 2; *Baxter, supra*, note 4 at 416, 420-21, per Vallerand J.A. (in dissent); *Jewitt* (B.C.C.A.), *supra*, note 9 at 254-56 per Anderson J.A. (dissenting in part); *Dionne, supra*, note 5 at 356, 363; *Ridge, supra*, note 5 at 268-69; *R. v. Hogans* [1987] 1 W.C.B. (2d) 259 (Ont. Dist. Ct) [hereinafter *Hogans*]; *Jeanrie, supra*, note 4 at 1025; *Gingras, supra*, note 4 at 16, 28; *Sorrells, supra*, note 9 at 457.

⁶²*Mack* (B.C.C.A.), *ibid.* at 431-33; *Mack* (B.C. Co. Ct), *supra*, note 1 at 232-34; *Showman, ibid.* at 2; *Gudbrandson, supra*, note 4 at 40; *Hogans, ibid.* at 59; *Gingras, ibid.* at 16, 17, 28. But see *Jewitt* (B.C.C.A.), *ibid.* at 257 where Anderson J.A. was of the view that the accused need only raise a reasonable doubt on the issue of entrapment; Wong Co. Ct J. (B.C.) instructed the jury in this manner at trial, *Jewitt* (B.C.C.A.), *ibid.* at 245-46. See also *Ashoona, supra*, note 4 at 169-70; *Jeanrie, ibid.* at 1023, and the trial judge's ruling in *Showman, ibid.* at 1, 3, 4.

respect and confidence of the community in the administration of criminal justice. Since the issue would be a question of law, the decisions of the courts would have great significance in establishing standards and guidelines for police conduct, a function juries are unable to accomplish.⁶³ As a result, police misconduct would be deterred.

This objective defence also has its shortcomings. The police would be held to the same standard of conduct when dealing with predisposed or nondisposed persons. By focusing on police conduct instead of the culpability or predisposition of the accused, it creates a risk of absolving chronic dangerous offenders. More importantly, by condoning certain less shocking police practices without considering the accused's predisposition, there is a risk of convicting nondisposed persons who ought to be exonerated, where a particular and susceptible accused (for example, a reformed drug addict, a mentally imbalanced individual or a close friend of the entrapper) is tempted in a situation in which a hypothetical person or a wary, but predisposed and willing, criminal would have resisted.⁶⁴ The purity and integrity of the criminal justice system are not maintained through results of this kind.

A final and fertile means which may serve to challenge entrapment lies in the *Charter*. Since its provisions apply only to actions of the state, pursuant to section 32, its application would be restricted to entrapment by the police or their agents.

Is there a constitutional right not to be entrapped in Canada? Police traps designed for the ordinary solicitation of predisposed persons would not be an appropriate basis for an effective *Charter* challenge. Entrapment, on the other hand, is tantamount to an invasion of personal integrity and privacy in the form of pressure tactics designed to induce an otherwise-innocent person to commit a crime conceived by representatives of the state and for which this person will later be prosecuted by the state. Strong arguments exist, therefore, that the entrapped person's right to life, liberty and security of the person, pursuant to section 7 of the *Charter* has been breached.⁶⁵ And the means utilized to achieve the purpose envisaged by the state are clearly far removed from any notion of fair play inherent in the principles of fundamental justice, especially if the officials acted without

⁶³*Sherman, supra*, note 17 at 385, per Frankfurter J. (for the minority); *Jewitt* (B.C.C.A.), *ibid.* at 256, per Anderson J.A., dissenting in part.

⁶⁴*Rossum, supra*, note 55 at 298-303; *Park, supra*, note 19 at 216-21; *Baxter, supra*, note 4; *McCann, supra*, note 4; *Shipley, supra*, note 4; *Sorrells, supra*, note 9; *Sherman, supra*, note 17; *United States v. Silva*, 180 F. Supp. 557 (U.S. Dist. Ct. S.D.N.Y., 1959).

⁶⁵Section 7 was successfully raised in *McCann, ibid.* at 160-62; see also *Jewitt* (B.C.C.A.), *supra*, note 9 at 254; *Jeanrie, supra*, note 4 at 1020, 1024; *Re Uba and R.* (1983), 5 C.C.C. (3d) 529 (Ont. H.C.) [hereinafter *Uba*]; *Dionne, supra*, note 5 at 354.

reasonable grounds at the outset.⁶⁶ Moreover, contrary to section 1, not only would such police entrapment methods be unreasonable, but also unjustifiable in a free and democratic society.

The right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice, are not precisely defined rights entrenched by Parliament in one operation. As the courts adapt to new and changing conditions in the community, the exercise of these rights in new or untested circumstances increases their potential but renders any clear definition unpredictable.

The Supreme Court of the United States has held that the defence of entrapment is not of a constitutional dimension.⁶⁷ However, members of that Court, as well as of lower courts, have left the question open and would apply a constitutional due process facet of the defence in the face of outrageous police conduct, notwithstanding the predisposition of the accused.⁶⁸

If then, there is, in Canada, a constitutional right not to be entrapped, then the potential remedy is twofold: a stay of proceedings or the exclusion of evidence obtained by entrapment, pursuant to subsections 24(1) and 24(2)

⁶⁶*Amato, supra*, note 5. Note, however, that in the U.S., courts have held that there is no constitutionally imposed requirement of reasonable suspicion before an undercover operation, such as Abscam, can be commenced: see *United States v. Janotti*, 673 F.2d 578 at 608-09 (3d Cir. C.A., 1982) [hereinafter *Janotti*]; *United States v. Myers*, 635 F.2d 932 at 940-41 (2d Cir. C.A., 1980); cert. denied 449 U.S. 956 (1982); *United States v. Kelly*, 707 F.2d 1460 at 1471 (D.C.C.A., 1983) [hereinafter *Kelly*]. See also W.H. Hitchler, "Entrapment as a Defense in Criminal Cases" (1937-38) 42 Dick. L. Rev. 195 at 200-01; G.E. Dix, "Undercover Investigations and Police Rulemaking" (1974-75) Tex. L. Rev. 203 at 249-54. Does the right to be secure against unreasonable search and seizure, pursuant to s. 8 of the Charter, extend to police officers or their agents, who, in "searching" for crime and armed only with a suspicion, induce an individual to commit an offence? Does entrapment infringe equality rights under s. 15 of the Charter with respect to an individual arbitrarily selected to be entrapped? See D.L. Rotenberg, "The Police Detection Practice of Encouragement" (1973) 49 Va. L. Rev. 871 at 894-95, 901; Notes and Comments, "The Serpent Beguiled Me and I Did Eat: The Constitutional Status of the Entrapment Defense" (1964-65) 74 Yale L.J. 942 at 944, 951-52.

⁶⁷*Hampton, supra*, note 17 at 490-91, per Rehnquist J. (as he then was) in a plurality opinion.

⁶⁸See the obiter comments of Rehnquist J. (as he then was), in *Russell, supra*, note 17 at 431-32; see also the separate judgments of Powell and Brennan JJ. in *Hampton, ibid.*, in which five of a panel of eight Supreme Court Justices, although not all arriving at the same conclusion on the facts, would apply due process principles and the Court's supervisory power in the face of outrageous police conduct, notwithstanding the predisposition of the accused. Subsequent to *Hampton*, this view has been reflected in lower court decisions: see *Janotti, supra*, note 66; *United States v. Alexandro*, 675 F.2d 34 (2d Cir. C.A. 1982); *Kelly, supra*, note 66; *United States v. Twigg*, 588 F.2d 373 (3d Cir. C.A. 1978); see also L.W. Abramson & L.L. Lindeman, "Entrapment and Due Process in the Federal Courts" (1980) 8 Am. J. Crim. Law 139.

of the *Charter*, respectively.⁶⁹ In most entrapment cases, the exclusion of evidence would be tantamount to an acquittal because the evidence obtained, which would be a direct consequence⁷⁰ of entrapment, would likely constitute the only evidence relied upon by the prosecution for conviction.

Theoretically, a stay of proceedings has greater consequences in a criminal trial than the exclusion of evidence. The stringent conditions in subsection 24(2) would, therefore, likely apply: that is, having regard to all the circumstances, the admission of the evidence in the proceedings would bring the administration of justice into disrepute.⁷¹ In determining an appropriate and just remedy under the *Charter* or a stay of proceedings based on abuse of process, the courts will inevitably examine common elements in considering the impact of entrapment on the administration of justice.⁷²

Decisions with respect to the existence of a *Charter* violation and, consequently, the appropriate and just remedy, are questions of law for the trial judge to determine. The burden of establishing the *Charter* breach and the conditions precedent to a stay of proceedings or the exclusion of evidence rests with the accused on a balance of probabilities.⁷³

The Supreme Court of Canada has already held that the onus of showing that the administration of justice would be brought into disrepute is less stringent than the community shock test.⁷⁴

Therefore, the terms used by Mr Justice Estey, in his dissenting judgment in *Amato*, a pre-*Charter* case, do not escape notice. In defining en-

⁶⁹Entrapment has not been challenged pursuant to the *Canadian Bill of Rights*, S.C. 1960, c. 44, reprinted in R.S.C. 1970, App. III. The *Bill of Rights*, although containing a rule of statutory construction (s. 2) which may, in rare cases, render a statutory provision inoperative as in *R. v. Drybones* [1970] S.C.R. 282, [1970] 3 C.C.C. 355, or consistent with it as in *Brownridge v. R.* [1972] S.C.R. 926, 7 C.C.C. (2d) 417, 18 C.R.N.S. 308, does not contain an enforcement section like s. 24, giving to the courts jurisdiction to grant remedies for violations of the enumerated rights and freedoms. Whereas entrapment may be an infringement of rights contained in s. 1(1)(a) of the *Bill of Rights* (the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law), the courts are not likely to refuse to apply the criminal law, pursuant to s. 2 or the due process clause (see *Curr v. R.* [1972] S.C.R. 889, 7 C.C.C. (2d) 181, 18 C.R.N.S. 281) when faced with such a breach. An exclusionary rule contended for under the *Bill of Rights* has already been rejected in *Hogan v. R.* (1974), 9 N.S.R. (2d) 145, 18 C.C.C. (2d) 65 (S.C.C.). The *American Bill of Rights* does not contain a remedial provision either; however, American courts faced with infringements of constitutional rights, have developed exclusionary rules of evidence: see *Boyd v. United States*, 116 U.S. 616 (1886); *Mapp v. Ohio*, 367 U.S. 643 (1961); *Miranda v. State of Arizona*, 384 U.S. 436 (1966).

⁷⁰*R. v. Manninen*, [1987] 1 S.C.R. 1233 at 1244-46, 34 C.C.C. (3d) 385, 58 C.R. (3d) 97.

⁷¹E.G. Ewaschuk, "The Charter: An Overview and Remedies" (1982) 26 C.R. (3d) 54 at 73.

⁷²*Gingras*, *supra*, note 4 at 16-30.

⁷³*Collins*, *supra*, note 44 at 275-80.

⁷⁴*Ibid.* at 287-88.

trapment, he held that it must be “so shocking and outrageous *as to bring the administration of justice into disrepute*.”⁷⁵ On the facts, Estey J. found that the community would view the police actions as “shocking and outrageous” and held that “such conduct is clearly contrary to the proper principles upon which justice must be done by the courts”.⁷⁶ Prosecution, in entrapment cases, he indicated, “would bring the administration of justice into disrepute”.⁷⁷

With this in mind, an examination of police entrapment, “having regard to all the circumstances”, would generally disclose its willingness, lack of urgency, unfair prejudice to the accused, the seriousness of the *Charter* violation and the potential unreliability of evidence, particularly where informers are involved. An examination of this conduct would further disclose, in many cases, that the offence instigated was not so serious, harmful to others or immediate that it called for drastic measures interfering with human dignity and rights, and resulting in exposing the public and the administration of justice to ignoble behaviour by an arm of the criminal justice system.⁷⁸

If a *Charter* right is violated as a result of entrapment, it seems unlikely that the courts would permit the state to benefit from its own misconduct and thereby taint the administration of justice. Otherwise, judicial condonation of such conduct would imply judicial ratification for “if the court should turn a blind eye to this kind of conduct, then the police may assume that they have the court’s tacit approval of it”.⁷⁹ And as Mr Justice Stewart of the United States Supreme Court reasoned:

Even less should the federal courts be accomplices in the willful disobedience of a Constitution they are sworn to uphold.⁸⁰

Perhaps Mr Justice Brandeis best summed up the public’s concerns, as follows:

Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example.

⁷⁵*Amato, supra*, note 5 at 446.

⁷⁶*Ibid.* at 464.

⁷⁷*Ibid.* at 445. Similar terms were used in other pre-*Charter* cases: see *Bonnar, supra*, note 5 at 64; *Haukness, supra*, note 4 at 442; *Biddulph, supra*, note 5; *R. v. Meuckon*, [1986] 1 W.C.B. (2d) 174 (B.C. Co. Ct).

⁷⁸*Collins, supra*, note 44 at 280-88.

⁷⁹*R. v. Duguay* (1985), 18 C.C.C. (3d) 289 at 301, 45 C.R. (3d) 140 (Ont. C.A.) per Mackinnon A.C.J.O. See also *Collins, ibid.* at 280-81.

⁸⁰*Elkins v. United States*, 364 U.S. 206 at 223 (1960).

Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means — to declare that the Government may commit crimes in order to secure the conviction of a private criminal — would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face.⁸¹

An entrapment “defence” based on the *Charter* would adhere closely to an objective approach with an overriding concern for the effect of the police conduct on individual rights and the administration of justice. Culpability, whether it be manifested as predisposition in entrapment cases or knowledge and intention in search and seizure cases, is not a determining factor in establishing a *Charter* breach or justifying a *Charter* remedy. However, in dealing with predisposed persons, police intrusion may be minimal, amounting only to mere solicitation, and a breach of *Charter* rights, as a result of entrapment, would not arise in such cases.

Where the state has artificially propagated crime by entrapment practices, it is urged that an entrapped accused must have a legal defence. The availability of such a defence should not cause alarm in the community since, as American studies have shown,⁸² it would only succeed in rare cases.⁸³

The three potential bases to challenge police entrapment may overlap⁸⁴ to some extent, in particular, abuse of process and the *Charter*, with their focus on police conduct and its effect on the administration of justice as well as their common remedy, a judicial stay of proceedings.

These three avenues need not necessarily be exclusive. The exclusion of evidence pursuant to subsection 24(2) of the *Charter* may find application in circumstances where a stay of proceedings in virtue of the *Charter* or the common law (abuse of process) would not be appropriate. However, the results would be similar, because, as pointed out earlier, such an exclusion of evidence would lead to an acquittal, unless the Crown had other evidence.

⁸¹*Olmstead v. United States*, 277 U.S. 438 at 485 (1928).

⁸²Park, *supra*, note 19 at 267-68 n. 339; B.A. Hardy, “The Traps of Entrapment” (1974-75) 3 *Am. J. Crim. Law* 165 at 188-90.

⁸³Furthermore, as a matter of public interest and much like the defence of compulsion under s. 17 of the *Criminal Code*, any defence of entrapment would not apply to crimes of violence: see Ouimet Committee, *supra*, note 8 at 79-80; Amato, *supra*, note 5; Sorrells, *supra*, note 9 at 451.

⁸⁴*McCann*, *supra*, note 4; *Meuckon*, *supra*, note 77; *Jeanrie*, *supra*, note 4; *R. v. St. Pierre* (18 December 1986), (Ont. Dist. Ct) [unreported]; *Jewitt* (B.C.C.A.), *supra*, note 9, per Anderson J.A. (dissenting in part); *Uba*, *supra*, note 65; *Mack* (B.C.C.A.), *supra*, note 1.

If the courts did not find the police conduct to be so outrageous as to be an abuse of process or a breach of *Charter* rights justifying a remedy, could not an accused plead lack of predisposition as part of an independent and subjective defence of entrapment? Such a traditional, substantive defence could remain for clear cases involving nondisposed persons. In this way, collective and individual interests would be safeguarded and the entrapment "defence" would become a multidimensional defence tool benefiting from the advantages of the subjective and objective views while avoiding the pitfalls of each.

It is not surprising that with three potential legal bases for a defence of entrapment and with no clear direction from the Supreme Court of Canada, this area of the law has been interpreted and applied inconsistently throughout the country. The time is ripe for a definitive stand and the Supreme Court⁸⁵ should meet the challenge in *Mack* and *Showman*.

⁸⁵Note that the composition of the Supreme Court of Canada has changed since *Kirzner* and *Amato*.