Entrapment–The Commonly Misunderstood Doctrine
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Author: Micheal R. Weger

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By Micheal R. Weger, NSWB Law Firm, Weyburn

Entrapment is a term that is often tossed around by individuals who have been charged with committing an offence, especially when they have been "caught" by the police. In my short legal career I have had a number of clients who have wanted to help their defence lawyer out by explaining how they were "entrapped by the cops." Or, after discussing possible defences, the suggestion is put forward: "but what about entrapment?"

The misconception seems to be that if one is caught in a trap set by the police they have obviously been "entrapped". This leads to individuals claiming that they have been entrapped by police doing a seatbelt blitz in which officers use binoculars to catch the infraction; and, more commonly, the claim of entrapment arises when the police set up a speed "trap" and catch the infraction using radar or laser. The legal doctrine of entrapment does not look at the actions or techniques to catch or record the infraction but rather looks at the actions taken by the authorities to provide a person with the opportunity to commit an offence.

The second misunderstanding is that the entrapment defence is quite commonly argued and commonly successful when, in fact, entrapment is rarely argued and rarely successful. A CanLII search narrowed to Saskatchewan using the search term ["entrapment" NOT nerve NOT root] (brackets omitted) reveals only 36 hits, with only 15 of those cases involving the doctrine of entrapment. For comparison, a CanLII search of "self defence" results in 142 reported cases. The reported entrapment cases involve offences under the *Tobacco Act* and the *Fisheries Act*, Section 213(1) of the *Criminal Code* (prostitution) and 4 reported cases involving drug trafficking offences. The entrapment argument was made successfully at trial but reversed on appeal in the recent case of *R. v. Germain*, 2012 SKCA 9. Of the other 14 reported cases the entrapment argument was only successful twice.

Review of the Doctrine of Entrapment

The entrapment issue is raised by the defence at trial after a finding of guilty has been reached. After receiving a guilty verdict, the defence is to advise the court that they are seeking a stay of proceedings as a result of entrapment and ultimately an abuse of process. The onus is on the accused to establish on a balance of probabilities that the police conduct constituted an abuse of process.

The Supreme Court of Canada provided a thorough review of the entrapment doctrine in the often cited case of *R. v. Mack*, [1988] 2 SCR 903, [1988] CanLII 24 (SCC). At paragraphs 130 to 133 Lamer J. provides a lengthy but very useful summarization of the doctrine of entrapment:

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, <u>it is never relevant</u> 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.

The above summarization will prove to be very useful when assessing the strengths and weaknesses of a potential entrapment argument. What is important to recognize, is that there are two separate grounds which can form the basis for an entrapment argument, and, therefore, there are two angles that can be taken when preparing a case for entrapment. Both may apply to the fact scenario, but you only need to be convincing on a balance of probabilities on one of the grounds. The first ground refers to what is commonly described as "random virtue testing." The question to ask is whether the police acted on a reasonable suspicion that the targeted individual was already engaged in criminal

activity. The second ground involves questioning whether the police crossed the line from providing an opportunity to actually inducing the individual to commit the offence. With an entrapment argument you do get "two kicks at the can"; unfortunately, the difficulty is that according to *Mack*, "a stay should be entered in the 'clearest of cases' only."

The First Ground – Reasonable Suspicion

In 1991, the case of *R. v. Barnes*, [1991] CanLII 84 (SCC), [1991] 63 C.C.C. (3d) 1 (S.C.C.) expanded on the first ground originally set out in *Mack* with Lamer, CJC stating at pp. 10-11:

> The basic rule articulated in *Mack* is that the police may only present the opportunity to commit a particular crime to an individual who arouses a suspicion that he or she is already engaged in the particular activity. An exception to this rule arises when the police undertake a *bona fide* investigation directed at an area where it is reasonably suspected that criminal activity is occurring. When such a location is defined with sufficient precision, the police may present any person associated with the area with the opportunity to commit the particular offence. Such randomness is permissible within the scope of a *bona fide* inquiry.
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> Random virtue testing, conversely, only arises when a police officer presents a person with the opportunity to commit an offence without a reasonable suspicion that:
> a. the person is already engaged in the particular criminal activity, or
>
> b. the physical location with which the person is associated is a place where the particular criminal activity is likely occurring.

With this development in the law, the authorities are free to test the virtue of otherwise law abiding citizens if they are in a bar or other location, provided that it is a "target location" linked to ongoing criminal activity. If the Crown disclosure reveals that the accused was caught up in an undercover operation and approached at a "target" location, defence will likely have to focus its attention on the second ground unless it can be argued that there wasn't enough information to reasonably suspect that criminal activity was occurring at the certain location. Whether the accused was a target or the accused was approached at a target location, the argument on the first ground has to address whether or not a reasonable suspicion existed.

The standard of reasonable suspicion has been interpreted and described by the courts in various ways. In the recent case of *R. v. Williams*, [2010] CarswellOnt 1956, Hill J. of the Ontario Superior Court of Justice summarized the contours of the reasonable suspicion standard at para. 44 by referring to numerous cases. Some of the referenced cases can be relied upon to argue that it is easy to establish reasonable suspicion whereas others support a more onerous standard. For instance, *Mack* is relied on as describing the standard as not "unduly onerous" and in *R. v. Cahill*, [1992], 13 C.R. (4th) (B.C. C.A.) at 339 the standard was described as "necessarily...low". On the other hand, in the case of *R. v. Barnes*, [1991] 1 S.C.R. 449 (S.C.C.) at para. 16, it is suggested that while a reasonable suspicion involves lesser probability than reasonable and probable grounds, it cannot be limited to a hunch or feeling without extrinsic evidence. Likewise, *R. v. Mann*,[2004] 3 S.C.R. 59 (S.C.C.) at para. 30 confirms that the standard is not a hunch based on intuition

gained by experience. *R. v. M.(A.),* [2008], 230 C.C.C. (3d) 377 (S.C.C.) at para. 91 provides that a reasonable suspicion is not a well-educated guess and at paras. 42 and 80 it is proposed that an officer's subjective belief must be accompanied by objectively verifiable evidence supporting reasonable suspicion. Ultimately, the observation of Binnie J. at para. 75 of *R. v. Brown*, [2008] 1 S.C.R. 456 (S.C.C.) provides a generally broad definition of reasonable suspicion by stating that "a 'reasonable' suspicion means something more than a mere suspicion and something less than a belief based upon reasonable and probably grounds."

The fact that the reasonable suspicion standard has varying interpretations creates a major difficulty when arguing entrapment based on the first ground. Success may require that there is basically no information linking the accused or the location to criminal activity. If a trial judge accepts a reasonable suspicion standard that is more onerous and grants a stay of proceedings the Crown has the leisure to appeal this finding to the appeal court which may then decide the case using a less onerous standard and allow the appeal. A trial judge may be more open to accept a more onerous standard after having the opportunity to hear the evidence first hand and assessing the conduct of the investigating officers. The argument at trial will be that the investigating officers could have and should have done more to elevate their mere suspicion or hunch to a reasonable suspicion. On appeal you do not have the same opportunities to convince the court to accept the more onerous standard.

In the most recently reported entrapment case in Saskatchewan, *R. v. Germain*, the Saskatchewan Court of Appeal allowed the Crown appeal and reversed the decision of Kalmakoff J. The Court of Appeal disagreed with the trial judge's conclusion that the suspicion that was acted upon was not a reasonable suspicion. In *Germain*, the trial judge was presented with the information that the police relied upon to decide to target Mr. Germain in an undercover operation and he then concluded that the information gave a basis for only a mere suspicion. At the Court of Appeal, the same information was referred to as "the body of fact and information upon which the police acted" and it was concluded that this <u>was</u> sufficient in the Court's opinion "to furnish the police with reasonable cause to suspect the accused was implicated in the criminal activity under investigation…" (*Germain* at para. 5) As the Court of Appeal didn't find that the trial judge erred in failing to consider particular evidence it must be concluded that the Court of Appeal took a different and less onerous approach towards the reasonable suspicion standard.

The Second Ground – Beyond Providing an Opportunity

The presence of a reasonable suspicion will cause the entrapment argument to proceed to the second ground where it must be determined if the conduct of the police crossed the line from opportunity to inducement. The argument in favor of entrapment on the second ground is much more fact based than on the first ground and reference to previous case law involving similar fact scenarios will prove very useful. Reference to paragraph 133 in *Mack*, is also mandatory as Lamer J. provides a list of factors to consider in determining whether the police have employed means which go further than providing an opportunity. According to Lamer J. the factors include:

- 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.

If a strong argument can be made for some "yes" answers to the above questions and if research turns up case law involving similar police practices found to be unacceptable an accused's chances of obtaining an appeal proof stay of proceedings will be much greater under this second ground of the entrapment argument.

Summary

If an accused suggests that they were entrapped, odds are that they weren't entrapped. If the accused was arrested as a result of an undercover operation they may have an entrapment argument. If the argument is that the police didn't have a reasonable suspicion, it's a difficult argument that will likely be appealed if successful at trial. It will be a difficult entrapment argument on appeal. If the argument is that the police induced the commission of the offence previous case law and a review of the *Mack* factors will determine the strength of the entrapment argument on the second ground.

It is predicted that the entrapment doctrine will continue to become more uncommon for two reasons. First, the decision of the Saskatchewan Court of Appeal in *Germain* may be a sign in Saskatchewan that a less onerous standard is preferred with regard to reasonable suspicion. Secondly, undercover operations are the source of the majority of entrapment arguments. These undercover operations are becoming more specialized and involve experienced officers that are more aware of the factors that have to be in place before offering an individual the opportunity to commit an offence. For the most part the undercover officers are also well instructed on what they can and can't do to provide the opportunity to commit and offence and the focus on target locations. Despite a decline in cases, situations involving potential entrapment issues will still arise. Defence lawyers must remain aware of the principles of the entrapment doctrine so that they can recognize the

situation where an accused has potentially been caught in a trap for the unwary innocent that should have been set for the unwary criminal.