File Number: 38165 & 38304

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

JAVID AHMAD

APPELLANT
(Appellant)

and

HER MAJESTY THE QUEEN

RESPONDENT
(Respondent)

and

BRITISH COLUMBIA CIVIL LIBERITIES ASSOCIATION
CRIMINAL LAWYERS' ASSOCIATION OF ONTARIO
CANADIAN ASSOCIATION OF CHIEFS OF POLICE

INTERVENERS

AND BETWEEN:

LANDON WILLIAMS

APPELLANT
(Appellant)

and

HER MAJESTY THE QUEEN

RESPONDENT
(Respondent)

and

BRITISH COLUMBIA CIVIL LIBERITIES ASSOCIATION
INDEPENDENT CRIMINAL DEFENCE ADVOCACY SOCIETY

INTERVENERS

FACTUM OF THE RESPONDENT,
HER MAJESTY THE QUEEN
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I: STATEMENT OF FACTS

A. Overview

1. Lethal drugs are delivered today like pizza: consumers call their dealer, who drives to meet them with their chemical of choice.[1] Fentanyl, methamphetamine and crack cocaine are now all distributed through this modern model, known as the 'dial-a-dope' scheme.[2] The anonymity offered by avoiding fixed locations and using cheap pre-paid cellphones shields these enterprises from easy identification and detection. They pose a significant public health and safety concern.[3]

2. Police combat this crime in the one way possible: when they get information that a particular number is a dial-a-dope line, they call it and pose as a customer. If the person who answers responds receptively to a complete stranger speaking the distinctive language of the drug subculture, police know they've found a dial-a-doper, and move on to attempting a drug purchase.

3. Far from being "conduct that the citizenry will not tolerate",[4] this is "the kind of fair and effective law enforcement that the public hopes for and expects."[5] The police techniques at issue here are the antithesis of random, arbitrary policing, and run *zero* risk of ensnaring the otherwise innocent. However, a mutation in the jurisprudence has led a number of trial judges to brand these common-sense investigations "entrapment" and quash them with the ultimate remedy – a stay of proceedings – despite the absence of anything resembling abusive behaviour.

4. This departure of entrapment from its core purpose and the principles of abuse of process has attracted severe judicial and academic criticism, being variously described as "far removed from the screening from 'random virtue testing' that was at the core of *Mack*",[6] "neither coherent nor sensible",[7] "nonsensical",[8] and "absurd".[9]

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[1] *R. v. Le*, 2016 BCCA 155 at para. 69, leave to appeal refused, [2016] 2 S.C.R. ix.
[2] See *e.g. R. v. Dube*, [2017] N.W.T.J. No. 83; *R. v. Aubichon*, 2015 ABCA 242; *R. v. Khan*, 2017 SKPC 102; *R. v. Taylor*, 2015 NSSC 296, *R. c. Cortez*, 2010 QCCQ 3693.
[3] See *e.g. R. v. Rutter*, 2017 BCCA 193 at paras. 12, 28; *R. v. Mann*, 2018 BCCA 265 at para. 1; *R. v. Franklin*, 2001 BCSC 706 at para. 46.
[4] *R. v. Mack*, [1988] 2 S.C.R. 903 at pp. 917-918.
[5] *R. v. Reid*, 2016 ONSC 954 at para. 48.
[6] *R. v. Williams*, 2014 ONSC 3005 at para. 23.
[7] S. Penney, Entrapment Minimalism: Shedding the "No Reasonable Suspicion of Bona Fide Inquiry" Test (2019) 44:2 Queens LJ. 95 ["S. Penney"].
[8] *R. v. Henneh*, 2017 ONSC 4835 at para. 24.
[9] C. De Sa, "Entrapment: Clearly Misunderstood in the Dial-a-Dope Context", (2015) 62 Crim. L.R. 200 at p. 203 ["C. De Sa"].

5. The culprit for this judicial confusion lies in the misapplication of the 'reasonable suspicion' standard. The trial-level error in *Williams*, and its progenitors, was to apply 'reasonable suspicion' in a way that demands a measurable *likelihood* or *probability* that a *specific individual* be involved in crime, yielding entrapment applications that looked more like *Garofoli* hearings.[10] This trend towards applying 'reasonable suspicion' as a form of "probable-grounds-lite" both misapplies this Court's guidance on the standard generally,[11] and loses sight of the purposes of entrapment. It also entirely misses this Court's intention that *bona fide* police investigations are not intended to be captured by the random virtue-testing branch of entrapment.

6. In these two cases, the Ontario Court of Appeal attempted to rectify this situation, as had the British Columbia Court of Appeal before it.[12] Each variant of approach represents an attempt to articulate the test for entrapment that reflects the rationale of *Mack* and the underlying reality that police investigations into dial-a-dope operations are simply not abusive in any way.

7. These cases provide the Court with an opportunity to dictate a unified national approach to this issue. Two paths to a solution are available: (i) applying the concept of "reasonable suspicion" in a contextually correct way (the approach taken by Himel J. in this case and the British Columbia Court of Appeal in *Le*); (ii) modernizing the *bona fide* inquiry concept to fit the digital age and applying it in a way that recognizes that the police conduct in these cases falls exactly within the bounds of permissible conduct Lamer CJC contemplated in *Mack*, long before cell phones were accessible to the general public (the approach of the majority in this case, also adopted by the BCCA in *Le* and several lower courts).

8. Each of these paths leads to the principled result that proper and indeed essential police investigations are not declared abusive and stayed.

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[10] *R. v. Virgo*, 1992 CarswellOnt 4059 at paras. 48-52, *rev'd* [1993] O.J. No. 2618.
[11] *R. v. Chehil*, 2013 SCC 49, [2013] 3 S.C.R. 220 at para. 27.
[12] *R. v. Le*, 2016 BCCA 155, leave to appeal refused, [2016] 2 S.C.R. ix.

B. Facts of the Cases before the Court

i. Williams – A Specific Tip Quickly Confirmed

9. In 2011, a confidential informant told Constable Fitkin of the Toronto Police Service (TPS) that cocaine was being sold from a specific phone number and delivered to a specific area of Toronto. The informant gave police that one number and told them the dealer goes by "Jay".[13]

10. Constable Fitkin conducted an investigation and correctly identified the appellant Williams as the likely dealer operating from this number. How he determined that connection was not before the court. This information was passed to Detective Brooke Hewson of the TPS Drug Squad. She happened to be personally familiar with Williams, having arrested him for trafficking in 2009, which resulted in him ultimately pleading guilty to simple possession of cocaine.[14] Hewson in turn tasked veteran Detective Tony Canepa to pose as a drug dealer, call the number, and determine if it was in fact a dial-a-dope line.[15]

ii. "Jay" answers to his name in the first seconds

11. When a male answered the number, the first word out of Canepa's mouth was the question: "*Jay*?" The immediate response came: "*Yeah*."[16]

iii. "Jay" responds to drug-language from a stranger

12. 'Jay' then asked: "*Who is this*?" and Canepa went into his drop story to explain who he was, saying: "*Vinny. Jesse from Queen and Jarvis gave me your name….your number. Said you could help me out. I need 80*."[17] In response to this drug-lingo from a total stranger, 'Jay' responded unhesitatingly: "*You have to come to me*."[18] There was no exchange on any social pleasantries, no questioning as how exactly Jay could "help out" this stranger, and no inquiry as to what "80" meant.

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[13] *R. v. Ahmad*, 2018 ONCA 534 at para. 5 [Record of Appellant Williams ("WR"), Vol. I, Tab 2, p. 16].
[14] Evidence of Detective Constable Brooke Hewson, April 7, 2014, p. 79, line 15-p. 91, line 28 [WR, Vol II, Tab 5, pp. 81-93].
[15] *R. v. Ahmad*, 2018 ONCA 534 at paras. 6-10 [WR, Vol I, Tab 2, pp. 16-18].
[16] *R. v. Ahmad*, 2018 ONCA 534 at para. 11 [WR, Vol I, Tab 2, pp. 18-19].
[17] *R. v. Ahmad*, 2018 ONCA 534 at para. 11 [WR, Vol I, Tab 2, pp. 18-19].
[18] *R. v. Ahmad*, 2018 ONCA 534 at para. 11 [WR, Vol I, Tab 2, pp. 18-19].

13. A meeting was shortly arranged. Williams showed up and sold Canepa crack cocaine. A second sale was similarly arranged ten days later. Williams was arrested a few months thereafter, while walking down the street carrying a concealed handgun and a box of ammunition.[19]

iv. Ahmad – An Eager Dealer Asks What a Stranger Needs

14. In 2012, a TPS officer got a tip that a specific phone number was being used to sell cocaine, and answering to the name "Romeo". This information went to the Drug Squad, which tasked Detective Limsiaco with calling the number. He began the ensuing call with his cover story, saying: "*Hey, It's Mike. Matt said I can give you a call. This is Romeo?*" The stranger on the other end of the line was unfazed, responding: "*He did, did he?*"[20]

15. Detective Limsiaco in turn carried on with coded-language typical to such buys,[21] saying: "*Yeah, said you could help me out.*"[22] 'Romeo' continued on without asking anything about the context of the call or the identity of the person calling him. Rather, he responded: "*What do you need?*" Continuing the dance of the drug sub-culture, the officer replied: "*Two soft.*" 'Romeo' ultimately called the undercover back and arranged a meet where he delivered the cocaine.[23]

v. The Trial Judge in Williams Bemoans the State of the Law

16. The trial judge in *Williams* found that he was obliged to parse Detective Canepa's conversation word-by-word, and found that his resort to specifying that he needed "80" crossed the line into entrapment.[24] He stayed the trafficking charges, and then went on to consider Williams' request to also exclude the handgun found on him later at the time of his arrest, as a purported *Charter* remedy. The trial judge found no infringement of Williams' rights, as he had committed a crime and was arrestable.[25]

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[19] *R. v. Ahmad*, 2018 ONCA 534 at paras. 11-14 [WR, Vol I, Tab 2, pp. 18-19].
[20] *R. v. Ahmad*, 2018 ONCA 534 at paras. 19-21 [WR, Vol I, Tab 2, pp. 21-22].
[21] *R. v. Ahmad*, 2018 ONCA 534 at para. 22 [WR, Vol I, Tab 2, p. 22].
[22] *R. v. Ahmad*, 2018 ONCA 534 at para. 20 [WR, Vol I, Tab 2, pp. 21-22].
[23] *R. v. Ahmad*, 2018 ONCA 534 at paras. 21-25 [WR, Vol I, Tab 2, pp. 22-23].
[24] *R. v. Williams*, 2014 ONSC 2370 at para. 21 [WR, Vol I, Tab 1, p. 8].
[25] *R. v. Williams*, 2014 ONSC 3005 at para. 14.

17. However, he nonetheless performed a section 24(2) analysis and made a number of telling findings critical of the state of the law regarding entrapment. Specifically, he held that:[26]

> While I do not purport to revisit my previous ruling in any way, I cannot say that the actions of the police in this case amounted to a particularly egregious example of entrapment. It was a close call. After grappling with the subtle distinctions made in the evolving case law (mostly from this Court), I found that the actions of the undercover officer crossed the line. However, had the officer's conversation with Mr. Williams gone in a slightly different direction, the case might have fallen on the other side of the line. This analytical exercise may appear far-removed from the screening for "random virtue-testing" that was at the core of *Mack*; however, it is what the modern law of entrapment now seems to require. [emphasis added]

vi. The Trial Judge in Ahmad Finds No Entrapment

18. The trial judge in *Ahmad* also felt compelled to resort to the same word by word 'parsing approach' performed in *Williams*. In Ahmad's case, however, she found that the sequence of the undercover's words made them a lawful investigatory step. She held that when 'Romeo' asked what the undercover wanted, he was, "showing a willingness to engage in what he understood to be a drug-related conversation," crystallizing the police's suspicion (indeed certainty) that he was a drug dealer.[27]

vii. The Majority of the Court of Appeal for Ontario

19. The majority of the Court of Appeal found that the police had done nothing wrong or offensive, and no entrapment occurred in either case. The court concluded that this police work was, "not a random call, but rather a focused investigation".[28] They began with a clarion call for a principled focus on the rationale of entrapment:[29]

> …courts must not lose sight of the underlying purpose of the entrapment doctrine, which is to prevent the state from investigating possible illegal activity in a way that offends our sense of decency and fair play…. While courts must be careful not to condone unfair police practices, an overly technical approach to the entrapment

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[26] *R. v. Williams*, 2014 ONSC 3005 at para. 23.
[27] *R. v. Ahmad*, 2015 ONSC 652 at paras. 43-44 [Record of Appellant Ahmad ("AR"), Vol. I, Tab 3, p. 28].
[28] *R. v. Ahmad*, 2018 ONCA 534 at para. 74 [WR, Vol I, Tab 2, p. 46].
[29] *R. v. Ahmad*, 2018 ONCA 534 at para. 39 [WR, Vol I, Tab 2, p. 29].

> doctrine risks detaching the doctrine from its purpose and unduly restricting police conduct. [emphasis added]

20. The majority held that both investigations were *bona fide* inquiries driven by a reasonable suspicion that two specific phone lines were virtual 'places' where the drug trade was being carried out. Justices Brown and Hourigan called for courts to recognize the challenges of modern technology and adapt the *bona fide* inquiry doctrine to fit with this changing technological paradigm:[30]

> *Barnes* was, of course, decided at a time when cell phones were not as ubiquitous as they are today….Modern technology, including cell phones, has changed the way that some crime is committed. In the drug trafficking trade, cell phones have become an indispensable tool for dial-a-dope operators.
> …
> The absence of a set location in a dial-a-dope scheme presents challenges to the existing entrapment framework…..In my view, however, the absence of a set location in dial-a-dope schemes should not foreclose the possibility that the police may be engaged in a *bona fide* inquiry when they contact a telephone line associated with a dial-a-dope scheme and provide the opportunity to sell drugs. While *Barnes* considered a physical location, it did not foreclose the possibility that the police may be engaged in a *bona fide* inquiry even in the absence of a set location.
> …
> The entrapment doctrine must be sensitive to the particular context in which crime occurs…. A rigid rule that there can be no *bona fide* inquiry unless the police target a specific geographic location is inconsistent with the principles underlying the doctrine. The mischief the entrapment doctrine seeks to prevent is the danger that police conduct will amount to random virtue-testing and attract innocent and otherwise law-abiding individuals to commit a crime that they would not have otherwise committed…. Entrapment seeks to prevent arbitrary and abusive police tactics, not the legitimate investigation of a tip concerning suspected drug trafficking activity.
>
> Today's drug dealers conduct their business in both physical and virtual spaces. Limiting *bona fide* police inquiries to a specific physical location would unduly restrict their ability to combat dial-a-dope schemes in a manner inconsistent with the entrapment doctrine. [emphasis added]

21. The majority found an objective factual basis to establish a *bona fide inquiry* in both cases: (i) there was no dispute the police were acting from proper motives; (ii) tipsters had identified specific numbers, with specific names associated to them; (iii) the persons answering confirmed or accepted those names; (iv) the persons answering made no real inquiries about who the strangers

[30] *R. v. Ahmad,* 2018 ONCA 534 at paras. 52-57, 69-79 [WR, Vol I, Tab 2, pp. 34-38, 44-48].

calling them were; and (v) the persons answering "engaged in a conversation with an apparent stranger, using coded language familiar to the drug trade."[31]

22. The majority held that this reasonable suspicion extended to telephone numbers, but not to the appellants as individuals.[32]

viii. Himel J.'s Concurrence Finds Reasonable Suspicion Across the Board

23. Justice Himel concurred that reasonable suspicion existed in both cases, both to found a *bona fide* inquiry and as against the appellants individually. She began by restating the test for reasonable suspicion, emphasizing this Court's instruction in *MacKenzie* that, "[w]e are looking here at possibilities, not probabilities."[33] Through this lens, she could discern reasonable suspicion arising from the same facts relied on by the majority. In *Williams*, "the reliability of the tip was confirmed when the officer called the phone number and the person who answered immediately acknowledged that he was Jay."[34] Moreover, she pointed out that the police's suspicion was rendered objectively reasonable by virtue of the simple common sense fact that:[35]

> Mr. Williams did not respond [to Canepa's drug-overture] by saying, "What are you talking about?" or by hanging up, as one would expect an innocent person to do…

24. She echoed Bennett J.A.'s conclusion for the British Columbia Court of Appeal in *Le* that: [36]

> It defies common sense to suggest that asking whether an individual is willing to sell specific types, quantities, or values of illicit drugs runs the "serious unnecessary risk" that an otherwise innocent person would then go out, procure the drugs, meet with and sell them to a stranger. [emphasis added]

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[31] *R. v. Ahmad*, 2018 ONCA 534 at paras. 70-78 [WR, Vol I, Tab 2, pp. 45-48].
[32] *R. v. Ahmad*, 2018 ONCA 534 at paras. 65-68 [WR, Vol I, Tab 2, pp. 42-44].
[33] *R. v. Ahmad*, 2018 ONCA 534 at para. 103 [WR, Vol I, Tab 2, p. 46] citing *R. v. Mackenzie*, 2013 SCC 50, [2013] 3 S.C.R. 250 at para. 72.
[34] *R. v. Ahmad*, 2018 ONCA 534 at para. 105 [WR, Vol I, Tab 2, p. 58].
[35] *R. v. Ahmad*, 2018 ONCA 534 at para. 121 [WR, Vol I, Tab 2, p. 67].
[36] *R. v. Ahmad*, 2018 ONCA 534 at para. 127 [WR, Vol I, Tab 2, p. 69] citing *R. v. Le*, 2016 BCCA 155 at para. 95, leave to appeal refused, [2016] 2 S.C.R. ix.

25. In *Ahmad*, she found that the tip was confirmed by the person on the line not objecting to being referred to by the drop-name, being content to continue with what was clearly a drug conversation, and responding to the undercover officer's drug-lingo in kind.[37] She adopted the British Columbia Court of Appeal's conclusion in *Olazo* that a, "demonstrated…familiarity with drug terminology helped to confirm the tip and…established a reasonable suspicion."[38]

ix. Himel J. Rejects Micro-parsing of Conversations in Favour of a Holistic Approach

26. Justice Himel rejected the micro-parsing of undercover conversations which characterized the impugned line of Ontario jurisprudence. Focusing on the underlying reasons for the entrapment doctrine having been created, she emphasized that, "[t]he court must never lose sight of the core question: is the police conduct really offensive?", because, "[s]taying cases in which there is no actual offensive conduct is harmful to the integrity of the administration of justice."[39]

27. Further adopting the British Columbia Court of Appeal's approach in *Le*, she concluded that a principled approach to the entrapment analysis required a holistic consideration of the entire interaction between the undercover officers and the person answering the suspected drug phone, all of which confirmed that these were dial-a-dopers:[40]

> As *Le* indicates, it is inconsistent with the core principles underlying *Mack* to try to parse the language of undercover officers by distinguishing veiled statements asking if the other party is a drug dealer from specific requests for quantities of drugs. In other words, there is no meaningful distinction between asking someone "Can you hook me up?" — which is not an opportunity to commit a crime (see *Imoro*, at para. 16; and *Le*, at para. 92) — and specific requests such as "I need 80" or I need "two soft". Accordingly, it is my view that an opportunity to commit an offence was not provided when the undercover officers in the cases at bar stated that they needed "80" and "two soft". Neither had an opportunity been provided prior to that point. [emphasis added]

28. Having tethered her analysis to the core values outlined in *Mack*, Justice Himel found that the police conduct in these cases bore no resemblance to entrapment or abuse of process:[41]

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[37] *R. v. Ahmad*, 2018 ONCA 534 at para. 106 [WR, Vol I, Tab 2, pp. 58-59].
[38] *R. v. Ahmad*, 2018 ONCA 534 at para. 107 [WR, Vol I, Tab 2, p. 59] citing *R. v. Olazo*, 2012 BCCA 59 at paras. 26, 30.
[39] *R. v. Ahmad*, 2018 ONCA 534 at para. 126 [WR, Vol I, Tab 2, pp. 68-69].
[40] *R. v. Ahmad*, 2018 ONCA 534 at para. 119 [WR, Vol I, Tab 2, pp. 65-66].
[41] *R. v. Ahmad*, 2018 ONCA 534 at para. 128 [WR, Vol I, Tab 2, p. 70].

> Neither Mr. Williams' case nor Mr. Ahmad's case is one of those "clearest of cases" warranting a stay based on entrapment: see *Mack*, at pp. 976-77. The police conduct in these cases did not carry the risk that innocent persons would commit a crime that they would have not otherwise committed. Neither was this conduct that the citizenry cannot tolerate. On the contrary, the police relied on legitimate investigative techniques that are responsive to the modern realities of the drug trade and its reliance on virtual spaces to evade police scrutiny. [emphasis added]

29. The Ontario Court of Appeal thus unanimously held that no entrapment or abuse of process existed in either of these cases.

* * *

PART II: ISSUES

30. The present appeals are concerned with the application of the entrapment doctrine to dial-a-dope investigations and, in particular, the first branch of the test of entrapment which involves the concepts of reasonable suspicion and *bona fide* inquiries.[42] The respondent's position to resolve these questions is as follows:

i. Entrapment is about preventing substantively offensive police conduct. This is the correct lens through which allegations of entrapment must be viewed. The police here had the requisite basis to act as they did in both cases. When the reasonable suspicion standard is correctly applied in the entrapment context, the police were not acting arbitrarily or on improper bases, but rather that the tip, coupled with the response they received to it, provided strong objective reason to think that these were *possibly* dial-a-dope lines;

ii. A tip localizing suspicion to a single number, coupled with the immediate willingness of the person answering that number to engage with a stranger in the language of the drug-dealing sub-culture, satisfies the reasonable suspicion standard. There is no risk of anyone other than a dial-a-doper being caught by this investigative technique;

iii. Both police investigations also fit precisely into the *bona fide* inquiry framework established by this Court in *Mack* and *Barnes.* Knowledge that dial-a-doping is taking place in the virtual space of digital communications, coupled with an objective basis to suspect one specific number within that space, gave police grounds to conduct a *bona fide* inquiry. Their investigative technique immediately separated dial-a-dopers from law-abiding citizens, and ran zero risk of entrapping individuals not already dealing over the phone. There is no entrapment.

* * *

[42] Mr. William's factum at p. 10; Mr. Ahmad's factum at p. 9.

PART III: ARGUMENT

31. For ease of reference, it is useful to state the entrapment test devised by this Court in *Mack*, as well as its rationale:[43]

> As explained and mentioned 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. […]
>
> 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.

A. The Police Had What *Mack* Requires – A Good Factually Grounded Reason to Investigate

i. The Forest for the Trees – Keeping a Focus on the Rationale for Entrapment

32. A discussion of entrapment must begin by recalling the problem it was invented to solve. The entrapment doctrine is a species of abuse of process.[44] It exists because "the administration of justice must be kept free from disrepute" arising from "judicial condonation of unacceptable conduct by the investigatory and prosecutorial agencies."[45]

33. Within this framework, the first branch of the entrapment doctrine was created to guard against the combined effect of two mischiefs: (i) police conduct that is arbitrary or driven by discriminatory motives, that (ii) runs a risk of causing otherwise innocent citizens to commit crimes they would not otherwise engage in.[46] This purpose was succinctly captured by Bennett J.A in *Le*:[47]

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[43] *R. v. Mack*, [1988] 2 S.C.R. 903 at pp. 964-965.
[44] *R. v. Mack*, [1988] 2 S.C.R. 903 at pp. 938-942; *R. v. Amato*, [1982] 2 S.C.R. 418 at p. 445; *R. v. Jewitt*, [1985] 2 S.C.R. 128 at p. 145; *R. v. Pearson*, [1998] 3 S.C.R. 620 at para 8.
[45] *R. v. Mack*, [1988] 2 S.C.R. 903 at p. 940; See also *R. v. Henneh*, 2017 ONSC 4835 at para. 30.
[46] *R. v. Mack*, [1988] 2 S.C.R. 903 at pp. 956-957.
[47] *R. v. Le*, 2016 BCCA 155 at para. 94, leave to appeal refused, [2016] 2 S.C.R. ix.

> In *Mack*, the Court stated the mischief of random virtue-testing is "the serious unnecessary risk of attracting innocent and otherwise law-abiding individuals into the commission of a criminal offence" (at 957). "Ultimately, ...there are inherent limits on the power of the state to manipulate people and events for the purpose of ... obtaining convictions" (emphasis added) (at 941).

34. When the test for entrapment captures investigations that lack either of these characteristics, the problem is with its application, not with the work of the police. This is why the line of cases culminating in decisions of the Court of Appeal below has attracted such uncommonly blunt and decisive criticism.[48]

35. Not a single court has ever found that an undercover call to a single, specific, suspected dial-a-dope line is in any *substantive* way abusive, irrespective of the outcome of their individualized reasonable suspicion analysis. Yet, the line of cases that brought this matter before the Court have seen many perfectly sound charges stayed needlessly.[49]

36. The forest must not be lost for the trees: where police have acted for sound, objective reasons, to combat known and pernicious crime, through a technique that runs *no risk* of ensnaring the innocent, there is no abuse and no entrapment.

37. The respondent's position is that, properly applied, the approach to entrapment established in *Mack* can perform the task of distinguishing proper police work from abusive conduct, as the Court of Appeal demonstrated. To find entrapment 'constructively' – where nothing the police have done would offend any informed and right-thinking citizen – does violence to the integrity of the administration of justice and serves no proper legal purpose.[50]

ii. Recalling this Court's Example of the "Mischief" Entrapment Was Meant to Solve

38. Recalling the classic example of random virtue testing in *Mack* is instructive. There, Lamer CJC posited the police planting a wallet full of money in a bus depot, without any reason to think that theft was a problem there. This scenario presented two important points, both salient to assessing the investigative approach followed in dial-a-dope cases.

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[48] See paragraph 4 above.
[49] S. Penney, at p. 109, fn 82 (and cases cited therein).
[50] *R. v. Ahmad*, 2018 ONCA 534 at para. 126 [WR, Vol I, Tab 2, pp. 68-69].

39. First, planting a wallet full of money truly tempts even the honest law abiding citizen who might be tempted to think 'losers weepers, finders keepers.' It potentially makes criminals even out of those not disposed to commit crimes. This is truly random, and truly tests virtue, on a broad and unfocussed basis. Secondly, this Court *approved* of this technique if theft was shown to be a problem at that particular location.

40. These features from *Mack* are significant. They show the Court was prepared to risk making criminals out of ordinary citizens by allowing police to offer substantial temptation when they have a good reason for doing so. The kind of dial-a-dope investigation at issue here is much less controversial. First, it can only be undertaken on a specific phone line that is the subject of a tip that drug trafficking happens there. Unlike the bus station of Lamer CJC's imagination, the general public is not exposed to the technique, only a very focused group of individuals associated with a single number. Randomness plays no role.

41. Second, unlike the abandoned wallet, the 'temptation' posed by an undercover officer speaking in coded drug language across the distance of a phone-line is exceptionally unlikely to tempt anyone not already in the business.

42. The way police speak on these calls renders the temptation opaque to anyone not versed in the local hard-drug trade. Courts have repeatedly concluded that, in contrast to the example in *Mack*, dial-a-dope investigations bear zero risk of 'manufacturing' crime.[51]

iii. <u>'Elevating' the Reasonable Suspicion Standard to Probable Grounds Misses the Point of Entrapment</u>

43. Critically, entrapment neither excuses guilty conduct nor vindicates any individual rights.[52] The accused who invoke it have committed serious crimes of their own free will.[53] Unlike the *Charter*/judicial pre-authorization context, where the question is whether police have 'enough' to

[51] See discussion below at para. 77 *et seq.*
[52] *R. v. Mack*, [1988] 2 S.C.R. 903 at pp. 942-944; See also *R. v. Mills*, 2019 SCC 22 at para. 63 (per Karakatsanis J.); *R. v. Henneh*, 2017 ONSC 4835 at para. 14, fn 1.
[53] *R. v. Mack*, [1988] 2 S.C.R. 903 at p. 951.

do something invasive to an individual,[54] the entrapment context is concerned with the nature of the police conduct and what *kind* of behaviour they are engaged in.[55]

44. Empirical data has shown that cases without any abusive conduct have been stayed even on the 'reasonable suspicion' standard,[56] where it has been misapplied to wrongly resemble a *Garofoli* analysis.[57]

45. The Alberta approach to entrapment in the dial-a-dope context provides a good example of adopting an elevated reasonable suspicion standard as illustrated by *R. v. Gladue*,[58] recently affirmed in *R. v. Pucci*.[59] The former of these was an oral endorsement, the latter a brief memorandum of judgment. In *Pucci,* the Court affirmed its previous holding that reasonable suspicion cannot stem from the contents of the call between an undercover and drug suspect. As stated by the court: [60]

> Under the principles in *Gladue*, the police cannot elide the reasonable suspicion requirement within what otherwise may well be a legitimate preliminary investigation. It may be that the police will need to make a second call to verify what the first call suggested, a circumstantial evidence phenomenon raised by Fish J in *R v Baldree*, 2013 SCC 35 (CanLII) at paras 71 to 72, [2013] 2 SCR 520. It may be that the police will have to do other inquiries or checking about the phone number or any named target. It may be that the original informer or some other source will have provided a constellation of details which can be checked as to whether they give rise to a 'locational' reasonable suspicion. Other alternatives can be imagined.

46. In *Gladue*, the undercover officer used the phrase "are you rolling?" which was local jargon used to ask if the person answering the phone was working in a drug capacity. Not only did the stranger on the line respond *positively*, he quickly asked what the undercover officer wanted.[61] Despite this, the Court of Appeal upheld the trial judge's finding that no reasonable suspicion had been established.

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[54] *R. v. Kang-Brown*, 2008 SCC 18, [2008] 1 SCR 456 at para. 8.
[55] *R. v. Pearson*, [1998] 3 SCR 620 at para. 11.
[56] S. Penney, at 107-108.
[57] S. Penney, at 108-114.
[58] *R. v. Gladue*, 2012 ABCA 143, leave to appeal refused, [2012] 3 S.C.R. xii.
[59] *R. v. Pucci*, 2018 ABCA 149.
[60] *R. v. Pucci*, 2018 ABCA 149 at para 11.
[61] *R. v. Gladue*, 2012 ABCA 143 at para. 4, leave to appeal refused, [2012] 3 S.C.R. xii.

47. None of the Alberta appellate jurisprudence on entrapment has reviewed this Court's guidance on the reasonable suspicion standard.[62]

48. The correct path to a principled outcome runs the opposite direction of that urged by the appellants, through a correct application of the reasonable suspicion standard, as done by Justice Himel in the Court of Appeal, and not through an elevation of the threshold to one where police need to have grounds that the crime has been committed before even beginning to investigate.[63]

B. Reasonable Suspicion was Present against Accused and Phone Line Alike

49. Justice Himel was correct that the facts established reasonable suspicion on all fronts in these cases. She applied the most important teachings about this standard, specifically that it:[64]

- "addresses the *possibility* of uncovering criminality, and not a *probability* of doing so"; per *Chehil* and *Kang-Brown*[65] [original emphasis]
- involves "a reasonable belief that an individual *might* be connected to a particular offence, as opposed to a belief that an individual *is* connected to the offence"; per *Mackenzie*[66] [original emphasis]
- is "necessarily…low" and not "unduly onerous"; per *Barnes*, *Mack*, and *Cahill;*[67]
- involves "a minimal level of belief which does not rule out the possibility of innocent conduct or other reasonable possibilities"; per *Williams and US v. Gould*;[68]
- "will not be stymied when the factors giving rise to it are supportive of an innocent explanation"; per *MacKenzie*.[69]

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[62] See, *inter alia*, *R. v. Chehil*, 2013 SCC 49, [2013] 3 S.C.R. 220 at paras. 25-35; *R. v. Kang-Brown*, 2008 SCC 18, [2008] 1 S.C.R. 456 at paras. 75-79; *R. v. MacKenzie*, 2013 SCC 50, [2013] 3 S.C.R. 250 at paras. 71-74.
[63] Mr. Ahmad's factum at para. 25.
[64] *R. v. Ahmad*, 2018 ONCA 534 at paras. 101-103 [WR, Vol I, Tab 2, pp. 56-58].
[65] *R. v. Chehil*, 2013 SCC 49, [2013] 3 S.C.R. 220 at para. 32; *R. v. Kang-Brown*, 2008 SCC 18, [2008] 1 S.C.R. 456 at para. 75.
[66] *R. v. MacKenzie*, 2013 SCC 50, [2013] 3 S.C.R. 250 at para. 74.
[67] *R. v. Barnes*, [1991] 1 S.C.R. 449 at p. 460; *R. v. Mack*, [1988] 2 S.C.R. 903 at p. 958, *R. v. Cahill*, 1992 CarswellBC 465 at para. 35.
[68] *R. v. Williams*, 2010 ONSC 1698 at para. 44, citing *United States v. Gould*, 364 F. (3d) 578 (5th Cir. 2004) at p. 593.
[69] *R. v. MacKenzie*, 2013 SCC 50, [2013] 3 S.C.R. 250 at para. 72.

i. Born of a Tip, these Are Never *Random* Tests of Virtue

50. In most dial-a-dope cases, the genesis of the investigation is a specific tip telling police that one single number is a source of drugs, usually together with the details needed to get a wary drug-dealer to engage, such as his street-name or other details to legitimize the undercover officer's reasons for having the number.

51. This factor is significant for three reasons. First, the originating tips are objective, review-able, external facts that rule out any improper or discriminatory motive by the police. There are no "hunches" in the mix, or assumptions stemming from how a target looks, his ethnicity, clothing, etc. This is responsive policing, driven by information from the community.

52. Second, what follows is the antithesis of randomness – it is a "tightly focused investigation". [70] Importantly, in a context where the underlying purpose of the screening test is to stop arbitrary police conduct, the mere *existence* of a tip matters more than it does in the context of a rights-based analysis or reasonable and probable grounds analysis, where the tip's reliability is what matters more. As this Court has always said: context matters when tests are being applied.[71]

53. Third, all tips bear some probative value and inherent likelihood of truth,[72] because tipsters virtually never receive a benefit unless their information proves-out. The best example being the *Crime Stoppers* model which, in the words of the Ontario Court of Appeal, is a "source that has earned an appreciable degree of respect."[73] Tips are the life-blood of drug interdiction and a time-proven tool. Their significance in meeting the reasonable suspicion threshold in this context should not be underestimated.

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[70] *R. v. Ahmad*, 2018 ONCA 534 at para. 74 [WR, Vol I, Tab 2, p. 46]; *R. v. Henneh*, 2017 ONSC 4835 at para. 18.
[71] *R. v. MacKenzie*, 2013 SCC 50, [2013] 3 S.C.R. 250 at para. 32; *R. v. Chehil*, 2013 SCC 49, [2013] 3 S.C.R. 220 at para. 39.
[72] *See R. v. Sveinbjornson*, 2015 SKQB 210 at para 29 *et seq*.
[73] *R. v. Virgo*, [1993] O.J. No. 2618 at para. 2.

ii. The Proverbial "Friendly Stranger" on the Other End of the Line

54. Not a single dial-a-dope case would ever have made it to court if the person answering the phone had responded like a normal, law-abiding person to a cryptic call from an unknown individual. Anything approximating an ordinary, quizzical response to an undercover cold-call will dissipate suspicion immediately. But that's not what happened. Instead, both of these appellants engaged with strangers as if that was normal to them. Who does that? Dial-a-dopers do. Once the call is met with this type of response, innocent explanations for the tip begin to rapidly evaporate.[74]

55. Dial-a-dope lines are answered in a unique way that instantly distinguishes them. Unlike ordinary people, dial-a-dopers are not quizzical about why the stranger is calling – they assume the reason for the call and rarely ask what normal people would when someone new to them calls – namely *why* are you calling me? Rather, they are open to new business but are concerned with how the caller knows them, and in particular whether they might be the police. This contrast between how a dial-a-dope worker answers a phone call from a stranger, and what an ordinary person would do, is of seminal importance and precisely serves the purposes of investigation approved of by this Court in *Imoro*.[75]

56. Moreover, in this case, Williams responded *directly and positively* to the drop name provided by the tipster, immediately verifying that core elements of the information were true. As Ducharme J. observed in another case where the person who answered responded to the name in the original tip, this is a significant factor in finding no entrapment:[76]

> While it is possible that someone other than "James" might answer the phone, this does not make the inquiry random. Indeed, the investigation is quite focused. It is not at all like the example of random virtue-testing used in *Mack* of the police leaving a wallet full of money in a park to see if someone might take the money. Moreover, after James replies in the affirmative, it becomes an even more focused investigation. [emphasis added]

57. Taken purposively, in the context of what the entrapment doctrine is trying to achieve, these facts conclusively make the suspicion of police objectively reasonable.

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[74] See *R. v. Le*, 2016 BCCA 155 at para. 95, leave to appeal refused, [2016] 2 S.C.R. ix; *R. v. Henneh*, 2017 ONSC 4835 at para. 20; S. Penney, at p. 114.
[75] *R. v. Imoro*, 2010 SCC 50, [2010] 3 S.C.R. 62.
[76] *R. v. Henneh*, 2017 ONSC 4835 at para. 18.

iii. "Drugs" Spoken Here

58. Beyond the 'friendly stranger' reception, both appellants quickly showed they spoke the language of the drug subculture. Being Toronto cases from the 2010s, both fact scenarios involved the phrase "can you help me out". Other locales and eras will have their own hallmark phraseology, such as "are you rolling?", "can you hook me up?", and "can I check you". Responsiveness to drug lingo has no explanation other than involvement in the drug trade.[77]

59. The fact that verification of the tip happens very quickly, with a minimum of words, does not undermine its substantive value. In fact, it is precisely *because* these conversations get down to business so quickly that police know they are dealing with a dial-a-doper. Where a tipster, seeking a reward from true information, gives a specific number and drop name, and the stranger on the line responds to that name, acts nothing like a normal person in a 'wrong number' scenario, and responds to coded drug language, there is manifestly a ***possibility*** that they are speaking to a dial-a-dope drug dealer. Justice Himel was correct, and this is sufficient to dispose of these appeals.

iv. Courts Have Erroneously Applied a Far Higher Probability Standard

60. In his recent critique of the state of the law of entrapment, Professor Penney notes that the reasonable suspicion standard has been applied in entrapment cases in degrees ranging from, "barely more than a hunch to just shy of reasonable grounds," and have resulted in scenarios where "courts have demanded thorough reliability assessments and corroboration."[78] Indeed, the anomalous results in this area have stemmed largely from courts applying a standard that looks much more like a search for reasonable and probable grounds. As a result, entrapment hearings in the dial-a-dope context have come to resemble *Garofoli* hearings, where the credibility of informants is tested and the degree of probability that the accused was a known drug dealer are substantively weighed as if a search warrant was being reviewed.[79] This is not what *Mack* asked or intended.

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[77] *R. v. Olazo*, 2012 BCCA 59 at para. 26.
[78] S. Penney, at p. 110.
[79] See *R. v. Sawh*, 2016 ONSC 2776 at paras. 80-94; *R. v. Virgo*, [1993] O.J. No. 2618 at paras. 7-10.

61. A proper application of the reasonable suspicion standard shows that the police actions in these cases were far from arbitrary, and based on objectively verifiable facts that showed a clear possibility that the numbers being called were dial-a-dope lines.

C. The *Bona Fide* Inquiry Approach

62. The majority in this case found that police had an objectively reasonable basis to place a drug-call to both appellants.[80] The majority did so by adapting the *bona fide* inquiry doctrine to the modern dial-a-dope context.[81]

i. *Bona fide* Inquiry as the Alternative to Individualized Suspicion

63. In *Mack* and *Barnes*, this Court made it clear that there are two paths to police legitimately offering a suspect the opportunity to commit a crime. The first of these is an individualized reasonable suspicion that that specific person is already involved in the contemplated criminal activity. The second, *alternative* path is through a *bona fide* investigation. Lamer CJC made it clear that this approach operates notwithstanding the absence of individualized suspicion about the accused:[82]

> The accused argues that although the undercover officer was involved in a *bona fide* inquiry, she nevertheless engaged in random virtue-testing since she approached the accused without a reasonable suspicion that he was likely to commit a drug-related offence. She approached the accused simply because he was walking near Granville Street.
>
> In my respectful opinion, this argument is based on a misinterpretation of *Mack*. I recognize that some of my language in *Mack* might be responsible for this misinterpretation. In particular, as noted above, I stated, at p. 956:
>
> > In those cases [where there is a particular location where it is reasonably suspected that certain crimes are taking place] it is clearly permissible to provide opportunities to people associated with the location under suspicion, even if these people are not themselves under suspicion. This latter situation, however, is only justified if the police acted in the course of a *bona fide* investigation and are not engaged in random virtue-testing.
>
> This statement should not be taken to mean that the police may not approach people on a random basis, in order to present the opportunity to commit an offence, in the course of a *bona fide* investigation. The basic rule articulated in *Mack* is that the police may only present the opportunity to commit a particular crime to an individ-

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[80] *R. v. Ahmad*, 2018 ONCA 534 at paras. 69-78 [WR, Vol I, Tab 2, pp. 44-48].
[81] *R. v. Ahmad*, 2018 ONCA 534 at para. 66 [WR, Vol I, Tab 2, pp. 42-43].
[82] *R. v. Barnes*, [1991] 1 S.C.R. 449 at pp. 462-463.

> ual who arouses a suspicion that he or she is already engaged in the particular criminal activity. An exception to this rule arises when the police undertake a *bona fide* investigation directed at an area where it is reasonably suspected that criminal activity is occurring. When such a location is defined with sufficient precision, the police may present any person associated with the area with the opportunity to commit the particular offence. Such randomness is permissible within the scope of a *bona fide* inquiry. [emphasis added]

64. This Court has emphasized throughout that police must be given the flexibility to combat evolving forms of crime in responsive and effective ways.[83] The majority took heed of this instruction and effectively transposed the principles from *Barnes* to the problem of dial-a-doping. Notably, this approach found support in the very first case where a trial judge used the first-branch of *Mack* to find entrapment in a dial-a-dope case. Reversing her *Garofoli*-like analysis of reasonable suspicion, the Ontario Court of Appeal had no difficulty transposing the *bona fide* inquiry approach to this context, and holding it to be a separate and distinct analysis from individualized reasonable suspicion:

> It is not necessary in this case to further review the findings of the trial judge on the individual bases of reasonable suspicion and *bona fide* inquiry. These were put forward in *Mack* as separate considerations. The present case involves both aspects and I see no reason why they should not be weighed together rather than individually. Considered together, this was anything but a random inquiry: it was a very specific inquiry directed at a person named George with a specific physical description, using a pager with a specific number and operating in Teesdale Place, a location notorious for its drug trade. In my respectful view, there was nothing whatever random about the invitation to him to enter into unlawful transactions. [84]

ii. The Application of 'Reasonable Suspicion' Adapted to the *Bona Fide* Inquiry Context

65. The *bona fide* inquiry approach fulfills the twin purposes of screening for arbitrariness and avoiding the risk of ensnaring the otherwise innocent through a different mechanism than simple individualized suspicion, but does so no less effectively. This is seminally consistent with this Court's guidance in *Mack* that:[85]

> 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

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[83] *R. v. Campbell*, [1999] 1 S.C.R. 565 at para. 43; *R. v. Mack*, [1988] 2 S.C.R. 903 at p. 916.
[84] *R. v. Virgo*, [1993] O.J. No. 2618 at para. 9.
[85] *R. v. Mack*, [1988] 2 S.C.R. 903 at p. 965.

> by a court relate to the underlying reasons for the recognition of the doctrine in the first place. [emphasis added]

66. In a *bona fide* inquiry, reasonable suspicion is not grounded in knowledge about an individual's criminal activity. Rather, it forms from a broader police awareness of how and where crime is taking place in their community,[86] coupled with an individual associating themselves with that 'place' or other known indices of the criminal activity under legitimate investigation. Critically, this Court emphasized in *Barnes* that once the overall police operation passes-muster, "[t]he notion of being 'associated' with a particular area for these purposes does not require more than being present in the area."[87]

iii. Defining the Reasonably Suspected Virtual Space

67. There can be no doubt that mobile drug-dealing, driven by highly anonymous mobile phone technologies, is a dominant criminal and social problem. Courts throughout Canada have adjudicated dial-a-dope cases,[88] and the jurisprudence is replete with descriptions of this simple but sophisticated business. In *R. v. Le*, the court described the problem thusly: [89]

> The dial-a-dope system has made it easy for drug dealers to invade neighbourhoods, community parks and schools. There is no set "location" that drug dealers inhabit thanks to the use of the mobile telephone. The drug dealers travel throughout communities, and deliver their drugs as easily as someone would deliver a pizza. It goes without saying, and is apparent in the hundreds of reported cases in this province, that it is highly profitable, organized and insidious. It is also unfortunately difficult to investigate and detect.

68. Similarly, in *R. v. Franklin*, the British Columbia Supreme Court described the insidious nature and impact of this very 21st century criminal enterprise model: [90]

> Traditionally, drugs were disseminated at the street level by purchasers going to certain areas of town and taking the initiative to seek out those who sold the drugs on street corners and in back alleys. This, to some extent, constrained the dissemination of the product. A Dial-A-Dope operation is different. Anyone, anywhere

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[86] *R. v. Barnes*, [1991] 1 S.C.R. 449 at pp. 460-462.
[87] *R. v. Barnes*, [1991] 1 S.C.R. 449 at pp. 463-464.
[88] See *e.g. R. v. Mitchell*, 2017 NLCA 26; *R. v. Sawatsky*, 2007 ABCA 353; *R. v Peters*, 2015 MBCA 119; *R. v. Jones*, 2006 NSCA 50; *R v McIntyre*, 2012 SKCA 111.
[89] *R. v. Le*, 2016 BCCA 155 at para. 69, leave to appeal refused, [2016] 2 S.C.R. ix.
[90] *R. v. Franklin*, 2001 BCSC 706 at paras. 18-21, 45-46.

> in the Lower Mainland, can place a telephone call to a vendor of narcotics and, after establishing his or her credibility by satisfying the vendor that he or she is not an undercover officer, make an arrangement to have the drugs delivered to wherever the purchaser happens to be. Typically, the drugs are delivered within fifteen or twenty minutes and handed over in exchange for cash.
>
> This has several significant results.
>
> First, it makes these drugs, and I refer primarily to cocaine and heroin, more readily accessible throughout the Lower Mainland than they have been in the past. It makes them accessible with less effort on the part of the purchasers. Purchasers, and here I think of adolescents, who might feel intimidated at the thought of seeking out a drug dealer in the recesses of the Main and Hastings area may nevertheless, in the relative comfort and safety of suburban locations, easily purchase cocaine and heroin as long as Dial-A-Dope operators are willing to oblige them.
>
> …
>
> On the other hand it must be said that the Lower Mainland of British Columbia is overrun with cocaine and heroin. Those who are willing to disseminate drugs through the community by Dial-A-Dope operations are responsible for the ready availability of these drugs. People such as Mr. Franklin, who engage in Dial-A-Dope operations, are lured into them by the high profits available with little effort. It is easy money.
>
> The destructive potential of these drugs is so well known as not to require comment.

69. Police knowledge that drugs are being sold in the virtual space of dial-a-doping is the first of two objectives, factual ingredients that comprise the basis for a *bona fide* inquiry in this context. Police *know* that trafficking is commonly taking place in this space. That knowledge is then combined with the specificity of a tip about a specific number.

70. Indeed, the strength of the analogy between a suspected dial-a-dope line, and the physical drug-sales areas contemplated in *Barnes*, is made even stronger by the fact the dial-a-dope operations frequently involve a single phone manned by a rotating group of dealers working together under the common 'brand' of that number. This model was succinctly described by a Manitoba trial court in *La Trace*:[91]

> The Operation was sophisticated and involved <u>numerous dealers working around-the-clock shifts and conducting sales from various motor vehicles</u>.

[91] *R. v. La Trace*, 2017 MCQB 75 at paras. 5-6.

> The Operation was no different than other dial-a-dealer networks in Winnipeg…[t]he sales teams typically would not carry more than 50 rocks of crack cocaine in their vehicle at any time and would return to stash locations in a different part of the City to resupply their inventory as needed. The Operation used only one phone number for all of its transactions… [emphasis added]

71. In the virtual space inhabited by dial-a-dopers, a *bona fide* inquiry begins when police receive information that pinpoints the exact 'place' that criminal activity is taking place.

iv. Localizing Suspicion to a Specific Virtual Place

72. As with most transpositions of bricks-and-mortar concepts to virtual spaces, a further step is needed to complete the analogization of Granville Mall in *Barnes* to the specific phone numbers in this case. That crucial second element comes in the form of the tip. That piece of objective information localizes the knowledge that drugs are being sold in this 'space' to a specific reasonable suspicion that that particular number is a source, and the *bona fide* inquiry criteria are met.

73. The functional reality of dial-a-dope operations, coupled with a specific tip, does what this Court asked in *Mack* – they provide a good faith, factually-based, reason to investigate, in a manner entirely consistent with public expectations of proper police conduct. As explained in *Henneh*:[92]

> This does provide a sufficient basis for [the undercover] to place the telephone call. Moreover, keeping in mind the nature of a dial-a-dope operation, I think an analogy can be drawn between a particular telephone number and a geographic location. Indeed, I think the use of a phone number…may be a more accurate than a general geographic description. [emphasis added]

v. General *Bona Fides*

74. Police have a clear and pressing imperative to proactively investigate and interdict this pernicious form of crime. In the contemporary reality of the ascendancy of fentanyl and other lethal opiates, that imperative is elevated to a matter of life and death.[93] Thus, the broader concern that police be acting for a proper purpose, and motivated by objective, non-discriminatory criteria, are thoroughly met. In simple terms, there is nothing abusive about these investigations.

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[92] *R. v. Henneh*, 2017 ONSC 4835 at para. 15.
[93] *R. v. Loor*, 2017 ONCA 696 at para. 33; *R. v. Olvedi*, 2018 ONSC 6330 at paras. 13-15; *R. v Thorn*, [2017] O.J. No. 5021 at para. 2.

vi. These Cases Offer a Superior Adherence to the *Mack* Principles

75. The following chart demonstrates that the police conduct in these cases offers superior protection from random virtue-testing and the risk of being manipulated into committing crimes than the practices this Court sanctioned as a *bona fide* inquiry in *Barnes*. Indeed, they even answer each of the concerns raised by McLachlin J (as she then was) in her dissent from the result in *Barnes*.

‖**'McLachlin Factors' in *Barnes*‖**

Factual Feature	***BARNES***	***WILLIAMS/AHMAD***
Basic Source of reasonable suspicion	Experience of drug purchases/drug sales in Granville market	Experience of the prevalence of dial-a-doping
Scope of targeted area	6 square blocks of downtown Vancouver	1 phone number
Individualized association with the general suspicion	Barnes found on street in the area and officer "had a feeling" based on his appearance	Tip that this specific number was a drug source
First Contact	Undercover officer asks if Barnes has any "weed"	Suspects respond to the name given in the tip
Further corroboration of criminal involvement	None	Suspect responds to coded drug language
Physical circumstances of the police interaction	Undercover office stands inches away from the target	Suspect is an unknown person in unknown place, can simply hang up anytime.
Further events before arrest of suspect	Accused arrested on the spot	Suspect only arrested if they drive to the meet location and deliver the drugs
Number of person affected by the investigative technique	"literally thousands"[94]	One
Seriousness of the Crime being investigated	Small amount of hash	Larger retail quantity of crack cocaine
Alternative investigatory techniques available?	Observation/surveillance	None

[94] *R. v. Barnes*, [1991] 1 S.C.R. 449 at p. 484 (per McLachlin J.).

76. These facts, in their totality, demonstrate that the majority of the Ontario Court of Appeal was precisely correct in holding that the police in these cases were conducting *bona fide* inquiries. Reasonable suspicion is definitively established by (i) the knowledge of a pervasive criminal problem in a virtual space; (ii) localization of that suspicion to a single specific telephone number; and (iii) the immediate responsiveness of that number to the names contained in the tip and/or the coded language of the drug sub-culture.

77. Going even further in service of the *Mack* goals, the technique of calling a suspected dial-a-dope line and having a drug-related conversation eliminates the risk of randomly tempting an otherwise law-abiding person into committing a 'manufactured crime'. Put simply, the way police investigate suspected dial-a-dope tips is the antithesis of random virtue-testing; it is *ultra-focused drug-dealer testing*. The goals of protecting against abusive police conduct are fully met.

vii. Broad Support for the *Bona Fide* Inquiry Approach

78. Entrapment was never intended to hamper police from investigating specific tips about specific drug sources.[95] This has been clear since the Ontario Court of Appeal reversed the first fallacious entrapment argument of this kind in *Virgo* in 1992.[96] Two courts of appeal, numerous trial level courts, and academic commentators, have endorsed applying the *bona fide* inquiry analysis to this dial-a-dope context.[97]

viii. The British Columbia Approach

79. In *Le,* the Royal Canadian Mounted Police ("RCMP") in Surrey acted on a Crime Stoppers tip regarding a phone line that was being utilized by a drug trafficker. The tip advised that an Asian male was monitoring the phone line. An undercover RCMP officer called the number, noted that

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[95] C. De Sa, at p. 203.
[96] *R. v. Virgo*, 1992 CarswellOnt 4059, *rev'd* [1993] O.J. No. 2618.
[97] *R. v. Ahmad*, 2018 ONCA 534 at para. 59 *et seq.* [WR, Vol II, Tab 2, p. 33]; *R. v. Le*, 2016 BCCA 155 at paras 94-96, leave to appeal refused, [2016] 2 S.C.R. ix; *R. v. Henneh*, 2017 ONSC 4835 at para. 14 *et seq.*; *R. v. Henry-Osbourne*, 2017 ONSC 6714, at para. 21 *et seq.*; C. De Sa, at p. 203.

the male who answered the phone had a heavy Asian accent and had a brief drug-related conversation with the male subject.

80. The court found that the police had reasonable suspicion to act for a number of reasons:[98]

- The police had confirmed some aspect of the tip before or at the time the call was placed (i.e., the police confirmed that an Asian male answered the phone); and

- Even if no reasonable suspicion existed at the time the call was placed, the minimal conversation between the undercover and the Asian male was sufficient to generate reasonable suspicion (i.e., the accused's own willingness to engage in a drug transaction was sufficient to amount to reasonable suspicion).

81. The court in *Le* rejected parsing the language of the exchange between the undercover officer and the Asian male. In assessing the RCMP's conduct, the court looked at the totality of the circumstance as opposed to dissect the precise order of words spoken:[99]

> Defence counsel argued that there is a meaningful distinction between veiled statements asking if the other party is a drug dealer and more specific requests for types, quantities, or values of drugs. It was argued that the former statement is an investigatory step while the latter is an offer to commit an offence. Parsing the language of undercover drugs calls in dial-a-dope investigations in this way takes an unnecessarily narrow approach. It ignores the surrounding circumstances, but more importantly, it strays far from the core principle underlying *Mack*. [emphasis added]

82. Thus, the approach in British Columbia, as articulated in *Le*, is to assess police conduct in the context of the call between an undercover and drug suspect and avoid parsing the precise words of the exchange. The totality of the exchange is the basis for the analysis.

ix. Ontario Trial Courts have Strongly Supported the *Bona fide* Inquiry Approach

83. Since the trial judgment in *Williams*, most Ontario trial courts have adopted the holistic approach pursuant to which the totality of the exchange is analysed. In *Henneh*, Ducharme J. adopted the British Columbia Court of Appeal's guidance in *Le*, and also found the police conduct

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[98] *R. v. Le*, 2016 BCCA 155 at paras 91-92, leave to appeal refused, [2016] 2 S.C.R. ix.
[99] *R. v. Le*, 2016 BCCA 155 at para. 93, leave to appeal refused, [2016] 2 S.C.R. ix.

at issue to have been a *bona fide* inquiry, foreshadowing the majority's decision in this case.[100] Justice Ducharme's view was adopted and endorsed by another Superior Court trial judge in *Henry-Osbourne.*[101] Similarly, in *Shier* DiLuca J. noted the growing ambivalence towards the parsing approach and cited the British Columbia approach in *Le* in preference.[102]

84. As Justice De Sa wrote, prior to his appointment to the bench, "[i]n dial-a-dope cases, police are pursuing a specific lead….They are not engaged in random virtue-testing."[103] In *Reid*, decided after these cases, a drug-dealer, caught by a targeted dial-a-dope investigation, attempted to bring herself back within the confines of the individualized entrapment doctrine by testifying that but-for the undercover's call she would not have sold drugs. The trial judge rejected this outright, concluding that: "The techniques employed by [the undercover] carried no risk of causing an innocent person to sell drugs. [emphasis added]"[104] This simply isn't entrapment.

x. Individuals are Protected

85. The *bona fide* criterion provides proper protection if the police step out of line in dial-a-dope-cases, as illustrated by the finding of entrapment for the random-calling seen in *Swan*[105]. All of the purposive protections that this Court intended to erect in *Mack* are respected within the *bona fide* inquiry approach. As the British Columbia Court of Appeal held in *Le*[106]:

> Third, Constable Wark's phone call did not amount to entrapment given the analysis and conclusions in *Swan*. The call was not part of hundreds of random calls, like *Swan*, but fell within a *bona fide* investigation or inquiry, having regard to the difficulty of investigating dial-a-dope offences and not confining dial-a-dope to a known location because of the mobile nature of the crime. Therefore, the conduct of the police in this case did not amount to entrapment. [emphasis added]

86. The *bona fide* criterion adapted to the dial-a-dope context, and not the misguided standard-elevating approach urged by the appellants, offer the right balance between protecting citizens from

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[100] *R. v. Henneh*, 2017 ONSC 4835 at paras. 14-24.
[101] *R. v. Henry-Osbourne*, 2017 ONSC 6714 at para. 20.
[102] *R. v. Shier*, 2018 ONSC 2425 at para. 10, 12.
[103] C. De Sa, at p. 203.
[104] *R. v. Reid*, [2018] O.J. No. 5185 at para. 18.
[105] *R. v. Swan*, 2009 BCCA 143.
[106] *R. v. Le*, 2016 BCCA 155 at para. 96, leave to appeal refused, [2016] 2 S.C.R. ix.

abusive conduct, while giving police the tools they need to combat crime driven by ever-changing technologies.

xi. The UK Supreme Court Follows a Similar Path

87. Dealing with the dial-a-dope context, the UK Supreme Court in *Looseley* also found that placing cold-calls to specific numbers is an entirely legitimate investigative technique.[107] Relying in part on Canada's analysis of entrapment, the court in *Looseley* outlined a number of factors that can be considered in assessing entrapment, with no one factor being controlling. The factors include the nature of the crime, the police's basis of action, how the police behaved (i.e., did they behave in a way any other person in the context would have), the basis of the police's actions (i.e., the basis for suspicion) and whether the police conduct was supervised and monitored.[108]

88. In *Looseley*, several members of the UK Supreme Court emphasized that in assessing whether the crime has been manufactured by the state, courts should examine whether the police behaved like any other member of the public would have in the circumstances: [109]

> On this a useful guide is to consider whether the police did no more than present the defendant with an unexceptional opportunity to commit a crime. I emphasise the word unexceptional. The yardstick for the purpose of this test is, in general, whether the police conduct preceding the commission of the offence was no more than might have been expected from others in the circumstances. Police conduct of this nature is not to be regarded as inciting or instigating crime, or luring a person into committing a crime. The police did no more than others could be expected to do. The police did not create crime artificially. [emphasis added]

89. This case supports the position that undercover officers placing phone calls to specifically suspected numbers and, using the coded language of the drug culture, asking "*are you a drug dealer*?" is a legitimate investigative method, that offends no ideal of fair police conduct.

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[107] *R. v. Looseley*, [2001] UKHL 53.
[108] *R. v. Looseley*, [2001] UKHL 53 at paras. 26-28, 50-66, 100.
[109] *R. v. Looseley*, [2001] UKHL 53 at para. 23 (per Lord Nicholls of Birkenhead), see also para. 102 (per Lord Hutton).

PART IV: COSTS

90. In accordance with the usual practice in criminal matters, no costs should be ordered.

PART V: NATURE OF ORDER SOUGHT

91. The respondent requests that the appeal be dismissed, without costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED at the City of Ottawa, in the Province of Ontario, this 3rd day of May 2019.

Nick Devlin	David Quayat

Counsel for the respondent

PART VI: TABLE OF AUTHORITIES