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**THE MINISTER OF JUSTICE'S PROPOSAL FOR THE CODIFICATION OF THE
"DEFENCE" OF ENTRAPMENT (SECTION 39 OF THE PROPOSAL TO AMEND
THE CRIMINAL CODE - GENERAL PRINCIPLES).**

BY ÈVE-STÉPHANIE SAUVÉ, L.L.B., B.C.L.(OXON)

SYNOPSIS OF COMMENTS

The Minister of Justice's proposal for the codification of the "defence" of entrapment is a good codification of the existing Canadian law on this topic. The "defence" reflects well the underlining philosophy for the recognition of the doctrine of entrapment in Canada. I would nonetheless propose two main changes to the proposal:

- 1-I would delete the requirements that the state's agent be acting on reasonable suspicion or in the course of a *bona fide* investigation from sub-section 39(2);
- 2-I would add a defence of "crime detection".

More particularly, my conclusions on section 39 of the Minister of Justice's proposal are:

1.1-On the consequences of alleging entrapment in Canada (sub-sections 39(1) and (9)). The Minister of Justice has rightfully chosen to leave unchanged the policy decision of the Supreme Court of Canada and has not implemented a substantive defence of entrapment in Canadian criminal law.

The reference in sub-section 39(1) of the proposal to an "agent" of the state rather

than to a "police" officer is adequate since it is likely that the effect of this wording will be to make the "defence" of entrapment available to those defendants induced into crime by the activities of private individuals connected with state officials or used by them as agents.

The Minister of Justice was right to codify in the proposal the stay of proceedings as the appropriate procedural remedy when an accused has established that he was entrapped into crime by a state official.

The Minister of Justice made the right policy decision in deciding that entrapment is not a basis for a stay of proceedings in respect of an offence the commission of which requires the intentional or reckless causing of death or serious bodily harm.

1.2-On the definition and the proper test for entrapment (sub-section 39(2)). The test proposed by the Minister in section 39(2)b) would suffice in itself to provide an adequate test for entrapment in Canadian criminal law. I would simply add the following: "which the accused would not have committed without the involvement of the agent" to the phrase "the agent, in any situation, induces the person to commit the offence".

The Minister of Justice in the proposal rightfully refrained from codifying a list of criteria for defining entrapment.

1.3-On the procedural issues (sub-sections 39 (3), (4), (5), (6), (7) and (8)). The Minister of Justice proposes to codify the existing case-law in placing the burden of proving entrapment on the balance of probabilities on the accused's shoulders. It is my opinion that this burden would be constitutional since the "defence" of entrapment does not relate to the issue of guilt or innocence. The "defence" of entrapment does not operate to negate the existence of an essential element of the offence but grants a procedural remedy after the issue

of guilt has been settled.

The Minister of Justice was right to allow a judge to decide, in some cases, to hold an hearing on the issue of entrapment before the issue of guilt is settled. This favours a better administration of justice by allowing judges to save the costs and time of a lengthy trial in obvious cases. It will also empower judges to prevent witnesses (some of whom might be privileged informers) from testifying in vain or to prevent the imposition of greater unfairness to the accused.

2-There should be a defence of "crime detection". This defence granting immunity from convictions for aiding and abetting would be modeled on the Minister of Justice's proposal for a "defence" of entrapment. The defence of "crime detection" would then not be available when the commission of the crime aided or abetted requires the intentional or reckless causing of death or serious bodily harm.

Since procuring is given a wide understanding in Canadian criminal law the defence of "crime detection" should also excuse both the secondary participation in crime by counselling and procuring and the inchoate offence of procuring when the undercover agent merely provides an opportunity to commit a crime without trying to influence the mind of a person.

**The Minister of Justice's Proposal For the Codification of the "Defence"
of Entrapment (Section 39 of the Proposal to Amend the Criminal Code -
General Principles).**

by Ève-Stéphanie Sauvé, L.L.B., B.C.L.(Oxon)

"And the Lord God said unto the serpent,
Because thou hast done this, cursed art thou
above all cattle, and above every beast of
the field; upon thy belly shalt thou go, and
dust shalt thou eat all the days of thy
life...Unto the woman he said, I will greatly
multiply thy sorrow..."¹

This judgment from the Garden of Eden illustrates the two groups of problems created by entrapment: the first group relates to the activity of the entrapper (the snake) and the second relates to the criminal liability of the entrapped (Eve). The main concern of the former is the extent to which police officer may, without breaching the criminal law, participate in crime for the purpose of bringing criminals to justice while the latter is concerned with the course of action which should be adopted by the courts where there is evidence of entrapment of the person accused. In the Garden of Eden, both Eve and the snake were punished. The Minister of Justice's proposal to amend the Criminal Code deal mainly with the situation of the entrapped accused and do not, in my point of view, address sufficiently the issue of the criminal liability of state agents participating in crime for the purpose of bringing criminals to justice. In consideration of the Minister of Justice's proposal relating to secondary participation in crime and inchoate offences, there is indeed a need for minting a special status to state officials involved in crime detection work.

¹-Genesis, 3, 14 and 16.

I will start by discussing the proposal to amend the Criminal Code relating to the "defence" of entrapment granted to the entrapped accused. In the second part of this text, I will address the issue of the criminal liability of state officials involved in crime detection.

1-THE PROPOSAL FOR THE CODIFICATION OF THE "DEFENCE" OF ENTRAPMENT GRANTED TO THE ENTRAPPED ACCUSED.

1.1 The Consequences of Alleging Entrapment in Canada (sub-sections 39(1) and (9) of the Proposal).

Entrapment is often given a broad meaning encompassing a wide variety of police practices, but a widely accepted definition of the term in the context of criminal law is the one formulated in *Sorrells v. United States*²:

"Entrapment is 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 trickery, persuasion, or fraud of the officer".

The "procurers" who induces such crimes are called "agents provocateurs".

In *Mack*³, the ruling of principle on the "defence" of entrapment, Lamer J. (as he then was) drew from the motives of Estey J. dissenting in *Amato*⁴. Sharing the opinion of his

²-(1932) 287 U.S. 435, at 454.

³-*R. v. Mack*, [1988] 2 S.C.R. 903.

⁴-*R. v. Amato*, [1982] 2 S.C.R. 418: In this case, Estey J. clearly stated that entrapment is not a defence in the traditional sense which would preclude an acquittal. Thus, the doctrine of entrapment does not provide an excuse or a justification for the presence of the *mens rea* and the *actus reus* necessary to establish the commission of an offence by the entrapped accused. Estey J. was of the opinion that the proper rationale for acknowledging entrapment was the protection of the purity of the process of justice when the circumstances are such that they will bring the administration of justice into disrepute. Despite the fact that Estey J. made it clear that

colleague, Lamer J. was of the opinion that entrapment is not a defence in the traditional sense recognized by our criminal law and took the view that "the true basis for allowing an accused the 'defence' of entrapment is not culpability". His reasons were that the essential elements of an offence are usually present in entrapment cases and the circumstances of the offence are not usually agonizing in the sense acknowledged by the defence of duress or necessity⁵. According to Lamer J., "the real problem is with the propriety of the state's agents employing such law enforcement techniques [as entrapment] for the purpose of obtaining convictions"⁶(underlined in the text). Both Estey J. and Lamer J. were of the opinion that entrapment does not provide an accused with a justification or an excuse for the commission of a crime albeit, in some cases, proceedings against an accused might be stayed on the basis of entrapment when registering a conviction would offend the court's sense of justice.

The concept of a defence of entrapment would not cause any conceptual innovation in our criminal legal tradition but the real issue is whether public policy justifies an acquittal when a crime has been manufactured by the state⁷. Lamer J. in *Mack* and Estey J. in *Amato* have answered this question of policy by a mitigated no. **The Minister of Justice in the proposal**

he considered entrapment to be of a different nature to a defence negating *mens rea*, he remarked that for "convenience and ease of reference as well as to conform to the present vocabulary of the law, I sometimes refer to the doctrine as the "defence of entrapment" although in strict law it is not a defence".

⁵-Mack, *op. cit.*, note 3, at 951.

⁶-*Ibid.*

⁷-Whether there should be in Canada a substantive defence of entrapment, as there is in the United States, is a question of policy. In R. v. Sang, [1980] A.C. 402, the House of Lords refused to recognize judicially the existence of a defence of entrapment. The main reason given by the House of Lords for rejecting the defence was that an accused in an entrapment situation has both the *actus reus* and the *mens rea* for the commission of the crime. Such an argument is glossing over the real question of policy for allowing an excuse or a justification as in the case of duress or rejecting it, as in Sang. It is then not surprising that Estey J. wrote in Amato that the judgments of their Lordships in Sang were "less than usually persuasive" (at 482) because they failed to address squarely the policy considerations involved when dealing with the doctrine of entrapment.

has chosen to leave unchanged the policy decision of the Supreme Court of Canada and has not implemented a substantive defence of entrapment in Canadian criminal law. I think this is sound policy.

Since the rationale for the recognition of the doctrine of entrapment in Canada is not related to culpability but to the protection of the purity of the process of justice, it is logical that the Canadian "defence" of entrapment should be limited to entrapment by the state's agents. Lamer J. in *Mack* made this point clearly when he restricted the application of the Canadian "defence" of entrapment to entrapment by the state⁸. This was picked up by the Minister of Justice's proposal since section 39 limits the application of the "defence" of entrapment to the entrapment performed by an agent of the state. The state can entrap an accused into crime either directly or indirectly by using lay informers, spies or decoys and neither practice should be condoned by the courts⁹. Thus the reference in section 39 of the proposal to an "agent" of the state rather than to a "police" officer is adequate since it is likely that the effect of this wording will be to make the "defence" of entrapment available to those defendant induced into crime by the activities of private individuals connected with state officials or used by them as agents as well as by other public servants responsible for the enforcement of some

⁸-*Op. cit.*, note 3, at 951.

⁹-In *R. v. Lemieux*, [1967] S.C.R. 492 on the evidence of the facts, a lay informer working for the police induced the accused to commit an offence which he would not have otherwise committed. In *Kirzner v. R.*, [1978] 2 S.C.R. 487, at 490-494 Laskin C.J.C. defines an "agent provocateur" as including lay spies, decoys and informers; in *R. v. Mack*, *op. cit.*, note 3, at 962: " the state's responsibility extends to those people who operate on its behalf in an entrapment situation; see also *Russell v. U.S.*, 411 US 423 (1973, U.S. S.Ct.), at 433-434 per Rehnquist J.; in England the practice of private individuals acting as "agent provocateur" on behalf of the State can be traced back to certain statutes of the 18th century. These statutes provided for rewards to persons who assisted in the discovery, apprehension and conviction of criminals. These statutes gave rise to abuse and some evidence was adduced of people trapping others into the commission of crimes merely to obtain rewards (*R. v. MacDaniels*, (1775) 19 S.T. 746). Consequently all these statutes promising rewards were repealed in the 19th century.(see W. Holdsworth, *History of English Law*, (Methuen & Co., London, 1938), vol. xi, at 552.

statutes and who don't have the status of police officer.

Until the decision of the Supreme Court in *Jewitt*¹⁰, the appropriate remedy to be granted when entrapment was established was not settled in Canada. In some cases, entrapment was taken to be a complete defence going to the issue of guilt of the accused¹¹ while other cases took entrapment as a doctrine relevant to sentencing only¹². The possibility of a Charter remedy was even suggested¹³. It is significant then that Dickson C.J. avoided the Charter avenue in *Jewitt* and chose the doctrine of abuse of process as a basis for staying proceedings in an entrapment case. In *Mack*, Lamer J. also endorsed the doctrine of abuse of process and chose to express no opinion on the possible application of the exclusion of evidence under section 24(2) of the Charter.

The disadvantage of a Charter remedy for entrapment lies mainly in the potential remedy for a breach of the Charter. If a breach of the Charter has been proved, then the trial judge will have the power to remedy the situation under section 24 of the Charter. The usual remedy under this section is the exclusion of evidence by application of sub-section 24(2) though section

¹⁰-[1985] 2 S.C.R. 128.

¹¹-R. v. Sirois, [1972] W.W.R. 119 (Alta. Sup. Ct.); R. v. Pratt, (1972) 19 C.R. (n.s.) 273 (N.W.T. Mag. Ct.); R. v. Baxter, (1983) 9 C.C.C. (3d) 555 (Que. C.A.); R. v. Dionne, (1987) A.P.R. 297 (N.-B. C.A.); R. v. Gingras, (1987) 61 C.R. (3d) 361 (Que Sup. Ct).

¹²-R. v. Chernecki, (1971) 4 C.C.C. (2d) 556 (B.C. C.A.); R. v. Steinberg, [1967] 3 C.C.C. 48 (Ont. C.A.); R. v. Price, (1970) 12 C.R. (n.s.) 131 (Ont. C.A.); it is interesting to note that the false allegation of entrapment was taken to be an aggravating factor of sentence in R. v. Sabloff, (1979) 13 C.R. (3d) 326 (Que S.Ct.).

¹³-In R. v. Jewitt, [1983] 4 W.W.R. 481, at 504 Anderson J. dissenting in the Court of Appeal of British Columbia expressed the opinion that the issue of staying proceedings in entrapment cases on the basis of the doctrine of abuse of process was academic "insofar as future cases are concerned, because in those cases the accused may raise the defence of entrapment pursuant to section 7 of the Charter of Rights and Freedoms". see also R. v. Jeanrie, [1984] R.J.Q. 1015, at 1019 (Que. S. Ct.); Re Uba and the Queen, (1983) 42 O.R. (2d) 454 (H.C.); M. I. Stober in "Entrapment in Canadian Criminal Cases", (Carswells, Toronto, 1985), at p.181.

24(1) does not preclude a stay of proceedings¹⁴. However, under section 24(1), the choice of a remedy, and perhaps even the application of a remedy itself, is in the judge's discretion¹⁵ which could generate an uneven application of the doctrine of entrapment. On the other hand, if the accused chooses to rely on sub-section 24(2) of the Charter in order to obtain a remedy for the infringement of his constitutional rights, the only available remedy will be the exclusion of evidence even if the judge is of the opinion that the exclusion of evidence is not the best remedy for entrapment.

In England, it was unsuccessfully argued before the House of Lords in *Sang* that the evidence obtained through entrapment should be excluded. In recent years, the argument for the exclusion of evidence obtained through entrapment has again been put forward before criminal courts in England. This time the argument is articulated around the Police and Criminal Evidence Act¹⁶ which, arguably, may grant the trial judge with a wider exclusionary discretion than the one already existing at common law¹⁷. The House of Lords has not yet had the occasion to rule on this new argument for the exclusion of evidence in entrapment cases. The English Court of Appeal, while it addressed the issue in some dicta, has been very reluctant to accept entrapment as a basis for the exercise of the exclusionary discretion granted by the

¹⁴-Sub-section 24(1) does indeed give jurisdiction to a court to grant a remedy that it "considers appropriate and just" in the circumstances.

¹⁵-D. Stuart, Charter Justice in Canadian Criminal Law, (Carswells, Toronto, 1991), pp. 357-366 at 360 the author writes: "The power to grant a remedy which is appropriate and just in the circumstances clearly allows for considerable discretion".

¹⁶-1984, c. 60.

¹⁷-By the combination of sub-section 78 (1) which provides that "In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the courts that having regard to all circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it" and of sub-section 82(3) "Nothing in this part of this Act shall prejudice any power of a court to exclude evidence (whether by preventing questions being put or otherwise) at its discretion".

Police and Criminal Evidence Act¹⁸. In New-Zealand¹⁹ and some states of Australia²⁰ it is nonetheless accepted that the evidence obtained through entrapment may be excluded by the courts. If the exclusion of evidence is chosen to be the appropriate remedy for entrapment, then one has the choice between excluding only the evidence of the "agent provocateur" or excluding all the evidence of the prosecution. Excluding only the evidence of the "agent provocateur" would create great anomalies. In a case where the informer does not give evidence there could not be any evidence to exclude even if the Court came to the conclusion that there had been unfairness in the state's involvement in crime. This suggests that upon a finding of entrapment, the conviction of the accused will turn solely on whether the prosecution has evidence from sources external to the entrapment such as the confession or evidence of a stranger.

In Canada, the issue would also depend on whether there exist some real evidence since under the test set out in *Collins*²¹ for the exclusion of evidence under sub-section 24(2) of the Charter, a distinction is made between real evidence and evidence going to the fairness of the trial, the former being more likely to be admitted²². In other words, the exclusion of the sole evidence of the "agent provocateur", while enhancing procedural fairness at trial, does not

¹⁸-The argument was rejected in dictum in *R. v. Harwood*, [1989] Crim. L.R. 285 (C.A.); the argument was accepted in dictum in *R. v. Gill and Ranuana*, [1989] Crim. L.R. 358 (C.A.); while it is not certain which view the Court of Appeal took in *R. v. Edwards*, [1991] Crim. L.R. 45 (C.A.): in this dictum the Court of Appeal seems to have been more favourable to a wider exclusionary discretion allowing for the exclusion of evidence in entrapment cases and in *R. v. Christou*, [1992] 3 W.L.R. 228 (C.A.): in dictum the Court of Appeal seems to have been less favourable to an expansion of the court's exclusionary discretion.

¹⁹-*R. v. Loughlin*, [1982] 1 NZLR 236; *R. v. Katipa*, [1986] 2 NZLR 121; *Police v. Lavalley*, [1979] 1 NZLR 45; *R. v. Capner*, [1975] 1 NZLR 411.

²⁰-*R. v. Coward*, (1985) 16 A. Crim. R. 257; *Hunt v. Wark*, (1986) 40 S.A.S.R. 489; *R. v. Vuckov*, (1986) 40 S.A.S.R. 498; *R. v. Papoulias*, [1988] V.R. 858; *R. v. Venn-Brown*, [1991] 1 Qd. R. 458.

²¹-[1987] 1 S.C.R. 265.

²²-but see also *R. v. Genest*, [1989] 1 S.C.R. 59, where C.J.C. Dickson sets out to reject the trend to automatically admit real evidence.

address the core of the remedial issue which is to prevent the conviction of a defendant for a crime which he may not have committed otherwise. The better approach would be to exclude all evidence of the offence tendered by the prosecution since it is, arguably, the whole of the evidence that is tainted by the involvement of an "agent provocateur". However, as pointed out by the House of Lords in *Sang*, this would amount to recognizing indirectly a substantive defence of entrapment by procedural means²³. Why then risk giving the option of such an unsatisfactory remedy as the exclusion of evidence when a stay of proceedings could provide for a regular application of the law in every situation where entrapment is established? For all these reasons, it seems to me that the issue should be taken out of the purview of the Charter and the only remedy that should be available to a court dealing with entrapment should be the stay of proceedings justified by abuse of process.

In *Jewitt*, Dickson C.J. rendering the decision for the Court, explained why a stay of proceedings is a good choice in entrapment cases when he wrote:

"While a stay of proceedings of this nature has the same result as an acquittal and will be such a final determination of the issue that it will sustain a plea of *autrefois acquit*, its assimilation to an acquittal should only be for purposes of enabling an appeal by the Crown. Otherwise the two concepts are not equated. The stay of proceedings for abuse of process is given as a substitute for an acquittal because, while on the merit the accused may not deserve an acquittal, the Crown by its abuse of process is disentitled to a conviction. No consideration of the merits -that is whether the accused is guilty independently of a consideration of the conduct of the Crown- is required to justify a stay."²⁴

In *Mack*, Lamer J. reiterated the position of Dickson C.J. that the accused is not entitled to an acquittal -and is not in any way less guilty - but that it is the Crown that is disentitled to a conviction. Both Lamer J. and Dickson C.J. were of the opinion that a stay of proceedings should be entered only "in the clearest of cases".

²³-*Sang*, *op. cit.*, note 10, this was most evident at 432H per Diplock.

²⁴-*op. cit.*, note 10, at 148.

It is my opinion that the Minister of Justice was right to codify in the proposal the stay of proceedings as the appropriate procedural remedy when an accused has established that he was entrapped into crime by a state official. As pointed out by Estey J. in *Amato*, a mitigation of sentence would not be a satisfactory remedy for entrapment: such a solution would produce unsound results since the judiciary would then be powerless in the face of fundamentally unfair proceedings²⁵. The exclusion of evidence, while being concerned with the fair administration of justice, renders justice specifically to the accused; a stay of proceedings for its part is ordered strictly for the protection of the judicial process from abusive practices and does not negate the culpability of the accused. I favour the stay of proceedings as a remedy not only because it applies better to entrapment than the mitigation of sentence or the exclusion of evidence, but also because it serves well the philosophy for acknowledging entrapment in Canada. When entrapment is established, the public interest in preventing the state from manufacturing crimes in order to obtain prosecutions outweighs the public interest in convicting an entrapped accused. It is then right that the loss suffered by entering a stay of proceedings rather than a conviction in entrapment cases should be born by society as a whole.

It might not be the case that this overbearing public interest should require a stay of proceedings in all entrapment cases. Undercover police investigation is typically used for the detection of consensual crimes (or victimless crimes) thought to be threatening to general public order²⁶. It is frequently used in Canada for the detection of such crimes as solicitation by

²⁵-*op. cit.*, note 4, at 462.

²⁶-It is the difficulty of enforcing these crimes due to their lack of complainants, their low visibility and the consequent difficulty in obtaining evidence that is usually put forward as the justification for the use of undercover agents: *Kirzner v. R.*, *op. cit.*, note 9, at 493; see also generally: L.P. Tiffany, D.M. McIntyre, Jr., D.L. Rotenberg, *Detection of Crimes*, (F. J. Remington ed., Little, Brown & Co., Boston, 1967), at 208 and seq.

prostitutes²⁷ and the illegal sale of drugs²⁸.

Not all crimes investigated by undercover police operations have the same impact on society: prostitution and, arguably, possession of some "soft" drugs (e.g. marijuana) belong more to the domain of the enforcement of morality and do not pose a tremendous threat to society while others such as dealing in "hard" drugs (e.g. cocaine, LSD) and subversive conspiracies²⁹ may result in added fear and violence in the community. It is questionable whether public interest extends so far as to require a stay of proceedings in cases where the accused is found guilty of grave bodily harm and manslaughter even if he proves that he has been induced to commit such a crime or that he was given an opportunity outside of a *bona fide* investigation and without reasonable suspicion. It is really a matter of balancing different public interests: the public interest of convicting dangerous offenders and the public interest in forbidding the state to manufacture crimes. How this balance should be struck and for which crimes should a stay of proceedings be precluded is a matter of policy. **The Minister of Justice in the proposal has chosen the following policy: "Entrapment is not a basis for a stay of proceedings in respect of an offence the commission of which requires the intentional or reckless causing of death or serious bodily harm" (section 39(9)). This policy decision seems right.** The proper course of conduct in the situations covered by section 39(9) should rather be to find both the principal offender and the police officer guilty of a criminal offence. As argued by Smith and Hogan, it is doubtful that public interest would go so far as to endorse the lack of intervention of a police officer who lets his "target" commit irreparable damages such as grave bodily harm or death. A policeman who assists an offender to commit a murder in order

²⁷-e.g. R. v. Dubois, (1990) 111 A.R. 289. (Alta. Pr. Ct.).

²⁸-e.g. R. v. Mack, *op. cit.*, note 3; R. v. Amato, *op. cit.*, note 4.

²⁹-in England informers have been used to investigate the activities of the I.R.A. see O'Brien, (1974) 59 Cr. App. R. 59 and the story of the informer involved in this case related in G. Robertson, Reluctant Judas, (Temple Smith, London, 1976).

to bring him to justice must also be guilty of murder as a secondary party³⁰. I will discuss this point more extensively in the second part of this text.

1.2-The Definition and the Proper Test for Entrapment (sub-section 39(2) of the Proposal).

In section 39(2) of the proposal, the Minister of Justices proposes to give some indications as to the sort of conduct likely to amount to entrapment. It is then appropriate to pause at this point and define the objectionable practice likely to amount to entrapment.

In Canada, even after the Charter, the utility of resorting to undercover work to cope with criminals involved in "consensual crimes" is accepted³¹. An independent administrative body has control over the use of informers in situations dealt with by the Canadian Security Intelligence Service³². It is only when such informers or undercover police officers become "agents provocateurs" that the issue of entrapment will arise. The distinction between crime detection and crime incitement was embedded in the "classic" definition of entrapment laid down by the Supreme Court of the United States in *Sorrells*³³ and was adopted up by Laskin J. in Kirzner when he wrote:

"There is no doubt that it may be difficult in particular cases to draw the line between mere use of spies, decoys or informers and the use of agents provocateurs who go beyond mere solicitation or encouragement and initiate a criminal design for the purpose of entrapping a person in order to prosecute him."³⁴

³⁰-J. Smith and B. Hogan, Criminal Law, (7th edn., Butterworths, London, 1992), at 158-159.

³¹-this is clearly true in entrapment cases: Mack, *op. cit.*, note 3, at 917. However, less leeway is given to the police when they resort to informers for the obtention of confessions: R v. Hebert, [1990] 2 S.C.R. 151 and R. v. Broyles, [1991] 3 S.C.R. 595.

³²-set up by the Canadian Security Intelligence Service Act, S.C. 1984 32-33 Elizabeth II, c. 21, s. 20.

³³-*Op. cit.*, note 2.

³⁴-Kirzner, *op. cit.*, note 9, at 494.

I would like to illustrate the distinction between acceptable crime detection and entrapment by using the facts of *Amato*³⁵. Victor Amato was charged with trafficking in cocaine. Under a police scheme to get at drug dealers, Amato's employer, a police informer, introduced Amato to an undercover police agent. There was no reasonable cause to suspect that Amato would be in contact with a drug dealer. It took nearly two months of daily contact, at home and at work, to induce Amato to sell two small amounts of cocaine. Now, if the undercover police agent had been a by-stander in a bar or on the street and had been offered some drugs by Amato, the undercover agent would have been perfectly entitled to arrest Amato for trafficking in drugs. The activity of the undercover agent would then be limited to one of crime detection. In other words, to take the colloquialism used by the English Court of Appeal³⁶, the undercover police agent would have participated in a crime already "laid on". However, in the case of Amato, there was clear evidence that the undercover agent had induced Amato to sell him drugs. Even if Amato might have been in possession of cocaine, it is not at all sure that he was willing to sell cocaine. Dealing in drugs is a different offence from being in possession of illegal drugs, and is punished more severely. There was thus clear evidence of entrapment in *Amato*.

Albeit it is accepted that entrapment will exist only when the activity of the undercover agent extends beyond mere crime detection and results in an actual inducement to commit a crime, how one should evaluate whether the conduct of the state's agent amount to entrapment is not settled. In the United States, three approaches have been proposed: the subjective

³⁵-*op. cit.*, note 4.

³⁶-*R. v. Birtles*, [1969] 1 W.L.R. 1047 (C.A.).

approach³⁷, the objective³⁸ approach and the "Due Process" approach³⁹.

³⁷-The subjective view finds that entrapment arises only when the defendant is a person otherwise innocent "whom the government is seeking to punish for an alleged offence which is the product of the creative activity of its own officials" Sorrells, *op. cit.*, note 2, at 451, per Hughes J. Consequently, on the issue of whether the accused is "otherwise innocent" the emphasis is put on the accused's predisposition: a lack of predisposition to commit the crime at bar is a prerequisite to the availability of the defence. Accordingly, at trial the accused will be subjected to "an 'appropriate and searching inquiry' into his own conduct and predisposition as bearing on his claim of innocence" Sherman v. U.S., 356 U.S. 369 (1958, U.S. S. Ct.) at 373, per Warren J. This view was first expressed by the majority in Sorrells and Sherman. Most academics favour the objective approach but a very influential article in support of the subjective approach has been written by R. Park, "The Entrapment Controversy" (1975-76), 60 Minn. L.R. 163,

³⁸- The objective approach, for its part does not consider the predisposition of the accused to be an issue. According to the objective approach, the emphasis must be on the conduct of the state officials. The question is whether or not inducements by law enforcement officials are likely to cause a non predisposed hypothetical person to commit the offence with which a particular accused stands charged. The sole issue according to the objective approach is thus "whether the police conduct revealed in the particular case falls below standards to which common feelings respond for the proper use of governmental power" (Sherman, *ibid.*, at 382, per Frankfurter J.) and not whether the criminal design originated with the accused or with the government officers (Sherman, *ibid.*, at 382 per Frankfurter J.). The objective approach was the view the minority in Sorrells and Sherman. It is also the view endorsed by the American Law Institute in its Model Penal Code (Official Draft, 1962), par. 2.13.

³⁹- The "Due Process" approach, or the later objective view, takes the "Due Process" clause of the Fifth amendment- "No person shall...be deprived of life, liberty or property without due process of law"- as barring a prosecution in entrapment cases. This third view does not measure the agent's conduct against any defendant, real or hypothetical. It rather operates in situations where the courts feel able to say that the government's conduct through its agent is so bad that the prosecution cannot proceed. The foundation of this view was first established in a dictum of Rehnquist J. in Russell v. U.S., *op. cit.*, note 9. However in Hampton v. U.S., 425 U.S. 484 (1976, U.S. S.Ct.), Rehnquist J., refused to apply the "Due Process" clause to an accused who was predisposed to commit an offence thereby seeking to close the door he had left ajar in Russell. The concurring and dissenting judges did not follow Rehnquist J. on this point and acknowledged that due process in the context of entrapment might bar prosecution of even a predisposed defendant. Academics have endorsed this approach, see amongst other: P. Marcus, "The Due Process Defense in Entrapment Cases: The Journey Back", (1990) 27 Am.Crim L.R. 457, 458; G. Greaney, "Crossing the Constitutional Line: Due Process and the Law Enforcement Justification", (1992) 67 N.D.L.R. 745.

In *Mack*, Lamer J. rejected the defence proposed by the subjective view as being "fundamentally flawed" and inconsistent with the proper rationale of the doctrine of entrapment as understood in Canada⁴⁰. Since the doctrine of entrapment has nothing to do with the culpability of the defendant, the focus of the enquiry must be on an objective assessment of the police conduct rather than the accused's state of mind. Lamer J. made it clear however, "that the central issue is not the power of a court to discipline police or prosecutorial conduct but, as stated by Estey J. in *Amato*, the avoidance of the improper invocation by the state of the judicial process and its powers"⁴¹. The particular accused's disposition will never be relevant to the question of whether the police went beyond an offer of an opportunity, since the question is to be assessed with regard to what a non-predisposed person would have done⁴². The purpose of the "defence" of entrapment is to prevent the state from manufacturing crime in order to bring the entrapped criminals before its courts. This is further exemplified by the fact that the Supreme Court has persisted in basing the "defence" of entrapment on abuse of process despite the advent of the Charter. Lamer J. in *Mack* avoided the avenue of a constitutional remedy preferring the common law doctrine of abuse of process. Lamer J. does not endorse any of the American views on entrapment albeit his position has a strong objective content. In *Mack*, Lamer J. proposed the following test for determining when police conduct will be "so shocking and outrageous as to bring the administration of justice into disrepute":

- "(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 that commission of an offence"⁴³

⁴⁰-*op. cit.*, note 3, at 956.

⁴¹ *Ibid.*, at 942.

⁴² *Ibid.*, at 955; the same was held in Showman, [1988] 2 S.C.R. 893, decided on the same day as Mack where it was said that the accused's disposition will never be relevant to the objective assessment of the conduct of the police.

⁴³- Mack, *op. cit.*, note 3, at 964-965.

In the proposal, the Minister of Justice mirrors the two legs of the test: section 39(2) a) codifies the first leg of Lamer J.'s test:

"(a) the agent (i) does not have a reasonable suspicion that the person is already engaged in committing that offence or is engaged in a connected criminal activity, and, (ii) is not acting in the course of a *bona fide* investigation, and provides the person with an opportunity to commit the offence; [thereby engaging in "random virtue testing"]"

Section 39(2) b) is the partial codification of the second leg of Lamer J.'s test:

"(b) the agent in any situation, induces the person to commit the offence."

The first leg of the test creates two categories of offenders: those offenders whom the police is entitled to provide with an opportunity to commit a crime and those offenders whom the police should not even tempt with an opportunity to commit a crime. This component of the test opens the door to some subjectivism and even, it is submitted, to inequality before the law. This part of the test might make it easier to justify the oppressive police conduct to which certain categories of citizen could be subjected. For example, undercover agents might be allowed to incite drug users to sell them drugs originally intended for personal consumption (as might have happened in *Amato*). The justification for such an inducement would be that the police had reasonable suspicion that the individual was in possession of illegal drugs. The danger for discriminating against certain categories of citizens is greater since the decision in *Barnes*⁴⁴, a drug dealing case, where Lamer J. specified what he meant by "random virtue-testing":

"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 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 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* investigation.

McLachlin J., dissented on this point, perceptively noting that if the target area were to extend

⁴⁴- *R. v. Barnes*, [1991] 1 S.C.R. 449.

to a whole city, the police would be justified in trying to induce into crime anyone it pleases. Considering that in the case of *Barnes*, the accused was approached by the undercover officer on the sole basis of his appearance, she concluded that such a position would constitute an unacceptable invasion of the security of the person which she branded the "right to be left alone".

The view adopted by the majority in *Barnes* suggests that the predisposition and the previous conduct of the accused might be given undue importance under the first leg of the test proposed in *Mack*. In *Iati*⁴⁵, an unreported decision of the Ontario Court of Appeal, the Court was satisfied that the police had acted on a reasonable suspicion since: "Before targeting the appellant and others in their investigation the police did background checks. It is reasonable to infer that in the appellant's case the background check must have revealed the appellant's lengthy criminal record, which included a conviction only several months earlier, for trafficking in narcotics". In *Cahill*⁴⁶, the accused was suspected by the police of being involved in the drug trade. There was some evidence of the use of violence by the informer to obtain cocaine from Cahill. Nonetheless, the trial judge refused to enter a stay of proceedings, taking the view that the conduct of the accused as demonstrated by the evidence was "inconsistent with a terrified person who is induced and threatened into the commission of illegal acts"⁴⁷. The decision was upheld by the Court of Appeal, Wood J.A. being of the opinion that the trial judge did not "misapply the doctrine of entrapment in this case by giving effect to a subjective evaluation of the appellant's predisposition to commit the offence in question, as opposed to an objective evaluation of Barry's [the informer] conduct."⁴⁸

⁴⁵-*R. v. Iati*, Unreported, Ontario court of Appeal, Morden J., Tarnopolsky J. and Galligan J., 5 December 1989.

⁴⁶-*R. v. Cahill*, (1992) 13 C.R. (4th) 327 (B.C. C.A.)

⁴⁷-*Ibid.*, at 342.

⁴⁸-*Ibid.*, at 345; see also *R. v. Dubois*, (1990) 111 A.R. 289 (Alta. Pr. Ct.), where the conduct of the accused was not evaluated in comparison with the conduct of an average person but, rather, with the conduct of an average person inclined to sell sexual favours.

In *Mack*, Lamer J. wrote that, in his opinion, the first leg of his test will rarely be applied since it is likely that the police would not waste valuable resources in attempting to attract unknown individuals into commission of offences⁴⁹. One can then question the adequacy of keeping this component of the test when, admittedly, it does not add much to it. **When one considers, in addition, the potential harm that the first leg of the test might do to the principle of equality before the law, then the argument for amputating the test of its first leg is surely very strong.**

In my point of view, the test proposed by the Minister in section 39 (2) b) would suffice in itself to provide an adequate test for entrapment in Canadian law. I would simply add the following: "which the accused would not have committed without the involvement of the agent" to the phrase "the agent, in any situation, induces the person to commit the offence". This would convey clearly the idea that the state agent must have induced a crime rather than merely detect it for there to be entrapment. This test would also sufficiently express the rationale for the recognition of the doctrine of entrapment in Canada. If sub-section 39 (2) b) were the sole test for entrapment, however it would however mean that whenever a person would succumb to an opportunity to commit a crime provided by the state, the "defence" of entrapment will not be available to him. Apparently, this would not create any greater unfairness in the community than there is at present, since, according to Lamer J., normal law-abiding citizen are not usually presented with an opportunity to commit a crime. On the off chance that a normally law-abiding person would succumb to an opportunity to commit a crime offered to him by a state agent acting on no reasonable suspicion, it is questionable whether the "defence" of entrapment should extend so far as to warrant a stay of proceedings in every situation where the accused was merely presented with an opportunity to commit a crime.

The better view is surely to provide enough leeway to the judiciary so that each case can be evaluated on its own merit. In *Mack*, Lamer J. listed criteria to help evaluate whether the

⁴⁹-*Mack, op. cit.*, note 3, at 958.

conduct of the police would have induced the average person into committing the crime⁵⁰. The Minister of Justice in the proposal rightfully refrained from codifying this list of criteria. This would force the judiciary to actively evaluate in each case whether the conduct of the State agent manufactured a crime or whether the agent merely helped in the detection of a crime already "laid on"⁵¹. If a list of criteria was to be codified, the risk would be that the judges would blindly apply those criteria without further consideration for the rationale behind the acceptance of the doctrine of entrapment in Canada⁵². Furthermore, there is a suggestion in post-*Mack* decisions from appellate courts that a trial judge's failure to consider one of the criteria enunciated in *Mack* or to make a sufficient finding on one of them will entail a reversal of its finding of entrapment on appeal⁵³.

1.3-The Procedural Issues (sub-sections 39(3), (4), (5), (6), (7) and (8)).

In *Mack*, Lamer J. decided that since the rationale for the recognition of the doctrine of entrapment is not related to the culpability of the accused, the issue of entrapment should not

⁵⁰-*Mack*, *op. cit.*, note 3, at 966.

⁵¹-to take the illustrative colloquialism used by the Court of Appeal in *Birtles*, [1969] 1 W.L.R. 1407.

⁵²-This seems to have occurred in *R. v. Thrasher*, Unreported, Yukon Territorial Court, Brusher J., 27 May 1991 and *R. v. Elzein*, (1993) 82 C.C.C. (3d) 455 (Que. C.A.).

⁵³-*R. v. Laverty*, (1990) 80 C.R. (3d) 231 (B.C.C.A.): entrapment was set aside because there was no finding of facts on the issue of threats; *R. v. Maxwell*, (1990), 61 C.C.C. (3d) 289 (Ont. C.A.), at 297-298.

be left to the jury but decided by the judge⁵⁴ Lamer J. was also of the opinion that the burden to prove entrapment rests on the accused's shoulders. The accused must prove entrapment on the balance of probabilities. This is a heavy burden, but nonetheless justified in the opinion of Lamer J. since entrapment is a very serious allegation against the state and "[t]o place a lighter onus on the accused would have the result of unnecessarily hampering state action against crime"⁵⁵. **The Minister of Justice proposes to codify this procedure in sub-sections 39(3),(6) and (8). One can safely think that this burden is constitutional⁵⁶ since the "defence" of entrapment does not relate to the issue of guilt or innocence. The "defence" of entrapment does not operate to negate the existence of an essential element of the offence but grants a procedural remedy after the issue of guilt has been settled⁵⁷.**

The very essence of entrapment involves the commission of an offence by the accused. It makes sense then that the question of entrapment should arise only after the Crown has shown beyond reasonable doubt that the accused has committed all the essential elements of the offence. According to Lamer J. in *Mack*, if it is not clear that the accused has committed the offence, "the guilt or innocence of the accused must be determined apart from evidence which is relevant

⁵⁴-Quoting from the motives of Anderson J.A. in *Jewitt*, *op. cit.*, note 13, Lamer J. gave two main reasons why this should be so: "The courts have always been the master of their own process and it is for the courts alone to determine whether there has been an abuse of process...As a matter of policy, the issue of entrapment should be left to the courts so that standards and guidelines may be established by case law. Such a development will be impossible if issues of entrapment are left to juries". *Mack*, *op. cit.*, note 3, at 970-71.

⁵⁵-*Mack*, *op. cit.*, note 3, at 976.

⁵⁶-it is submitted that the "defence" of entrapment does not infringe section 11d) of the Charter. But if it were found to be in contravention of section 11d) of the Charter it would nonetheless be redeemed by section 1 of the Charter in consideration of the decision in *R. v. Chaulk*, [1990] 3 S.C.R. 1303.

⁵⁷-such a burden would not be a novelty since section 24(2) of the Charter puts on the accused the burden of proving on the balance of probabilities that a right entrenched by the Charter has been infringed.

only to the issue of entrapment"⁵⁸. This point was criticized by Professor Stuart in his comment of *Mack*. He wrote:

"Is it really practicable, for example in a lengthy drug conspiracy trial, to separate the issue of guilt from that of entrapment? Is it wise to force a judge to postpone the question of a stay for entrapment until after the jury has come to a determination of guilt? It may be that entrapment typically arises when the guilt of the accused is clear or admitted. In such case there will be no need for a postponement of the issue of entrapment. In other cases, what of a pre-trial motion based on a violation of section 7?"⁵⁹

The Minister of Justice obviously agrees with Professor Stuart since it added a rider to its proposed section 39(4) which provides that the hearing on the issue of entrapment should be held only after the accused has been found guilty of the offence. Subsection 39(5) of the proposal indeed stipulates "The judge may, if satisfied that the interests of justice so require, hold the hearing referred to in subsection (3) at an earlier stage of the trial than as provided by subsection (4)". **Again, this choice is correct: it favours a better administration of justice by allowing judges to save the costs and time of a lengthy trial in obvious cases. Furthermore, in such obvious cases, it will empower judges to prevent witnesses (some of which might be privileged informers) from testifying in vain or to prevent greater unfairness to be done to the accused.**

Since the question of unlawful involvement by the state in the instigation of criminal

⁵⁸-*Mack*, *op. cit.*, note 3, at 972.

⁵⁹-D. Stuart, "Resolving Many but not all Questions of Entrapment", 67 *C.R.* (3d) 68.

conduct is one of law or mixed law and facts⁶⁰, there should exist a right to appeal from the judge's decision on the issue of entrapment. For greater certainty, the Minister of Justice has specified this point in section 39(7) of the proposal. **This was done for the inchoate offence of attempt. In consideration of the past application of section 24(2) of the Criminal Code, one can think that section 39(7) will ensure a fair application of the "defence" of entrapment.**

⁶⁰-Mack, *op. cit.*, note 3, at 967; and Jewitt, *op. cit.*, note 10, at 145 per Dickson C.J.C.

2-THE CRIMINAL LIABILITY OF STATE OFFICIALS INVOLVED IN CRIME DETECTION.

In *Kirzner*, the accused not only alleged the defence of entrapment but he also alleged a sort of defence of "detecting crimes". Howard Kirzner was indeed putting forward as a justification for being found in possession of cocaine and heroine, that he was acting as a police informer. Laskin C.J., dismissed the existence of such a defence in Canada when he wrote:

"The police, or the agent provocateur or the informer or the decoy used by the police do not have immunity if their conduct in the encouragement of a commission of a crime by another is itself criminal. Of course, whether they are prosecuted is a matter for the Crown Attorneys and ultimately for the Attorneys-General."⁶¹

The House of Lords held a discourse to the same effect in *Sang*⁶². The English Law Commission in its Report on Defences of General Application⁶³ also proposed the creation of an offence of entrapment but this recommendation has yet to be enacted. In my opinion, there is no need for such an offence since the usual principles of criminal liability could be sufficient to make undercover agents liable for their participation in crime.

There is no reason why 'agent provocateurs' should not have to answer before a court of Justice for the crimes they have caused by their advice or inducements. As Heydon noted, "the police immunity from prosecution is only a *de facto* immunity, which does not imply legal immunity as a matter of logic"⁶⁴. Police officers and informers are subject to the law as are

⁶¹-*Kirzner*, *op. cit.*, note 9, at 491.

⁶²-*Op. cit.*, note 7, at 432 per Diplock, at 444 per Salmon and at 451 per Scarman.

⁶³-Law Commission, Criminal Law: Report on Defences of General Application (Law Com. no. 83), (H.M.S.O., London, 1977), part V.

⁶⁴-J. Heydon, "The Problems of Entrapment", [1973] C.L.J. 268, at 275, quoting R. v. Commissioner of Police of the Metropolis, Ex Parte Blackburn, [1968] 2 Q.B. 118 and ibid. (no. 3), [1973] Q.B. 241.

ordinary citizens⁶⁵. Accordingly, if the principles of criminal law are strictly applied they might be infringing the law in the course of their undercover work.

One should not be so much concerned with the principal offence. It is indeed very likely that the undercover agent's intention will fall short of the required *mens rea*. Thus when a police officer engages in conversation with a prostitute or poses as a prostitute, he or she does not have the required purpose of "engaging in prostitution or obtaining the sexual services of a prostitute"⁶⁶. The possession of controlled drugs by a police officer is for its part, lawful under the Narcotic Control Regulation. Undercover police officers in possession of controlled narcotics should not be found to have the required intent of engaging in trafficking. However, *Ormerod*⁶⁷, seems to point to the contrary. In *Ormerod*, it was contended on behalf of the accused that if the jury found that he was in fact working for or assisting the R.C.M.P. under an arrangement with members thereof, or honestly believing that he was an undercover agent by reason of such arrangement, this afforded a defence in law. Laskin J. hearing the case in the Court of Appeal of Ontario decided that there is no common law or statutory excuse of public duty for the police if they engage in trafficking of narcotics and thus:

"Where, however, a police agent (the status claimed by the accused) has himself been charged, as a result (I am prepared to assume) of activities *bona fide* considered to be in furtherance of the police agency, it is impossible to say that he has a defence if his superiors or the other members of the police force would not have one if they had been prosecuted for the same activities"⁶⁸

In his address, the trial judge told the jury that even if they accepted the evidence as establishing the kind of arrangement alleged by the accused or as establishing that the accused honestly believed that the arrangement existed and he acted in the two transactions in the honest belief

⁶⁵-Roncarelli v. Duplessis, [1959] S.C.R. 121 (police officer); Poitras v. R., [1974] S.C.R. 649 (lay informers acting as agents of the police).

⁶⁶- s. 213 Criminal Code.

⁶⁷-R. v. Ormerod, [1969] 2 O.R. 230.

⁶⁸-R. v. Ormerod, [1969] 2 O.R. 230, at 241.

that he was carrying it out, this afforded no defence. With respect, the better view would have been to direct the jury that the honest belief in the existence of an arrangement with the police, bore on the issue of whether the accused had the appropriate *mens rea* for the offence of trafficking in drugs. Once the jury decides that it does not believe the accused's explanation, then it is true to say that there exist no defence of public duty likely to excuse the existence of the appropriate *mens rea* for the offence of trafficking in drugs. In the words of McGillivray J.A., this would amount to seeking some established relation with the police in order to disarm the jury's observation of the accused's own activities⁶⁹.

However, it is less than certain that undercover police officers could be immune from prosecutions of inchoate offences or of secondary participation in crime. If the undercover activity of the police officers or their agents does not amount to crime incitement, that is to say entrapment, they are nonetheless very likely to engage in a positive act of assistance or encouragement of the principal offence. This would in turn amount to aiding, abetting, counselling or procuring the principal offence. If the conduct of the police officer or informers goes further and results in entrapment, then an inchoate offence will have been committed since the sole essence of entrapment is to induce someone to commit an offence which he would not otherwise have committed. If the offence is not carried out by the principal, then the undercover agent can be found guilty of the inchoate offence of counselling or procuring an offence in contravention of section 464 of the Criminal Code.

Under the Canadian rules on conspiracy, an undercover police agent will not be found guilty of conspiracy. Although the undercover agent might appear to agree to commit an

⁶⁹-Ibid., at 236; see also R. v. Samsom, (1977) 35 C.C.C. (2d) 258 (C.A. Que) where the trial judge had instructed the jury not to believe the accused's explanation that he was a police officer acting in the course of his duties. The Court of Appeal decided that the trial judge had ventured on "dangerous grounds" but nonetheless upheld the conviction since the fact that the accused was lying was supported by plenty of evidence.

unlawful act, the ruling in *O'Brien*⁷⁰ is to the effect that one who appears to agree to a conspiracy with the intent of frustrating the common enterprise does not have the required *mens rea* for the commission of the offence of conspiracy. This should not be altered by the Minister of Justice's proposal since section 24.2 (1) provides that: "A person conspires to commit an offence where the person agrees with one or more persons that a common intention to commit the offence be carried out" (emphasis added). The same lack of *mens rea* should prevent the conviction of an undercover agent under the doctrine of common purpose for crimes committed in the pursuit of the common enterprise.

On the other hand, there is no reason why an 'agent provocateur' should not be convicted of the inchoate offence of counselling or procuring an offence (section 464 Criminal Code) or as a secondary party when the offence is committed by the principal. The concept of entrapment is by definition very close to the concept of counselling and procuring: to entrap is to actively induce someone to commit an offence he would not otherwise have committed, while to incite at common law is "to influence the mind of another to the commission of a crime"⁷¹. In a case like *Glubitz (No. 2)*, where an undercover agent introduced himself as a contract killer to a man who had made it known that he wished his wife to be killed, an inchoate offence was committed by the agent in that he sought to influence the accused to carry out his wishes. Despite the fact that the accused's defence was that he had been frightened by the undercover officer, the British Columbia Court of Appeal did not address the liability of the undercover agent. Although the case was decided on another issue, in *Madigan* there was clear evidence that the undercover police officer had acted as an accessory to the offence in that he counselled

⁷⁰-*R. v. O'Brien*, [1954] S.C.R. 666, at 668: "A common design necessarily involves an intention. Both are synonymous. The intention cannot be anything else but the will to attain the object of the agreement."; in *R. v. Kotysyn*, (1949) 95 C.C.C. 261 (Que. K.B.), it was held that undercover agents involved in crime detection lack the common intention to carry out the crime.

⁷¹-Smith and Hogan, *op. cit.*, note 30, at 265.

the offence of trafficking in drugs⁷². Had the undercover police officer been prosecuted for participating in the offence, I see no reason why he should not have been found guilty. However, as our Canadian law on incitement stands, there is a risk that undercover agents be found guilty of counselling and procuring when their conduct does not amount to entrapment. Our law on counselling and procuring has evolved from its common law origin and is now an offence of an "extreme width"⁷³. Merely advising or recommending was held to be counselling⁷⁴. In *Glubitz (No. 2)*, it was decided that procurement may consist of no more than the brief acceptance of an offer to commit a crime with the promise of reward for doing so. One can see that an undercover agent merely engaging in crime detection without going so far as entrapping could nonetheless be found guilty of the inchoate offence of procuring a crime on the rationale of *Glubitz*. Since section 21 (3) of the Minister of Justice's proposal provides that: "if the person who counselled was aware of a substantial risk that the commission of that offence would be a consequence of counselling" (emphasis added) undercover agents involve in *bona fide* detection work might also be convicted of counselling or procuring the principal offence.

In *Smith*⁷⁵, a decision of the English Court of Queen's Bench, it was made clear that a private citizen, acting independently of the police, can be convicted as a party to the offence which the principal offender commits if he participates in the criminal enterprise for the sole purpose of trapping a criminal. It is indeed established that "the *mens rea* [for the purpose of

⁷²-*R. v. Madigan*, (1969) 6 C.R. (n.s.) 180 "There was evidence that an undercover police officer had met and cultivated the acquaintance of the respondent over a period of time. He had on a number of occasion without success, asked the respondent to obtain controlled drugs for him."

⁷³-D. Stuart, *Canadian Criminal Law: A Treatise*, (2nd edn., Carswell, Toronto, 1987) at 590-591.

⁷⁴-*McLeaod*, (1970) 12 C.R. (n.s.) 193 (B.C. C.A.).

⁷⁵-[1960] 2 Q.B. 423.

aiding and abetting] is a matter of intent only and does not depend on desire or motive."⁷⁶ Under the Canadian principles of criminal law, motive is also irrelevant to the issue of *mens rea* in cases of secondary participation to crime⁷⁷ and indeed in *Ormerod*⁷⁸, any notion of a defence based on proper motive was rejected by Laskin J. It is clear that under the present subsections 21 (1) b) and 21 (1) c) of the Canadian Criminal Code, any type of conduct, including mere words or gestures, may suffice if it encourages the perpetrator in the commission of the offence⁷⁹. However, there must be more than a mere presence of passive acquiescence for the *actus reus* of aiding or abetting to be established⁸⁰. On the other hand, an omission to act may suffice to establish the *actus reus* of aiding and abetting if the person acting as an accessory had a duty to act⁸¹. Thus in *Nixon*⁸², the British Columbia Court of Appeal upheld the decision of the trial judge who had found a police officer guilty of aiding and abetting an aggravated assault by omitting to fulfil his statutory duty to act:

" An accused who is present at the scene of an offence and who carries out no overt acts to aid or encourage the commission of the offence may none the less be convicted as a party if his purpose in failing to act was to aid in the commission of the offence. Section 21(1)(b) extends by its very terms to such an omission in that it makes a person a party to an offence who 'omits to do anything for the purpose of aiding [in the commission of the offence]. A failure to act in accordance with a duty to act may be an omission to do

⁷⁶-National Coal Board v. Gamble, [1959] 1 Q.B. 11, per Devlin.

⁷⁷-*Lewis*, (1979) 47 C.C.C. (2d) 24 (S.C.C.): The mental element of a crime ordinarily involves no reference to motive.(Dickson J.)

⁷⁸-*op. cit.*, note 67, at 244.

⁷⁹-Dunlop and Sylvester, (1979) 47 C.C.C. (2d) 93 (S.C.C.): "Abets, that word abets means encourages, supports, upholds. It is another way of expressing a person giving assistance to someone committing the offence. Every one who aids and encourages the person in the commission of the offence is as guilty as the person who commits the actual crime"(at 106).

⁸⁰-D. Stuart, Canadian Criminal Law: A Treatise, *op. cit.*, note 73, at 504-505.

⁸¹-D. Stuart, Ibid., at 505.

⁸²-R. v. Nixon, (1990) 57 C.C.C. (3d) 97.(B.C. C.A.).

something for the purpose of aiding or abetting."⁸³

Since section 21(1) b) of the proposed legislation reinstates that a person can be guilty of aiding and abetting a crime by omission, it is very likely that an undercover police officer could be found guilty of aiding and abetting if he refrains from intervening while under cover. An undercover police officer or his agent might also be found guilty of actively aiding or abetting drug offences⁸⁴ if the agent knowingly intended to assist a drug seller⁸⁵.

There used to be a special rule in Canadian criminal law whereby the actual perpetrator must have committed the *actus reus* of the crime before anyone can be found an accessory⁸⁶. However, our Canadian criminal law has the particularity that an aider or abettor can be convicted of a more serious offence than the one committed by the principal offender⁸⁷. Section 23.1 seems to propose to take the law one step further when it proposes: "that the person whom

⁸³-*Ibid.*, at 109.

⁸⁴-*R. v. Vinette*, [1969] 3 C.C.C. 172 (B.C. C.A.): The evidence, in the absence of any explanation by the appellant, led to the inference that his intent and purpose was to promote a sale to the officer and to lend his aid to that end. While he may have been assisting the officer to obtain marijuana his activities constituted aiding and abetting the supplier in the offence of trafficking; *R. v. Lecapoy*, (1974) 18 C.C.C. (2d) 496 (Ont. C.A.): the accused acted as middle man and arranged for an undercover purchaser to meet with drug trafficker. The accused was found guilty of aiding and abetting the drug seller's offence since he understood the nature of the transaction and assisted the attainment by seller; *R. v. Barr*, (1975) 23 C.C.C. (2d) 116 (Ont C.A.).

⁸⁵- *Morgan*, (1993) 80 C.C.C. (3d) 16 (Ont. C.A.): "In our view, the trial judge's instructions suggested that the appellant's liability as an aider rested entirely on whether his conduct had the effect of aiding the seller in the sale of cocaine. The trial judge should have made it clear that the appellant was only liable if he intended to assist the seller".

⁸⁶-D. Stuart, *Canadian Criminal Law, A Treatise*, *op. cit.*, note 73, at 507.

⁸⁷-*R. v. Remillard*, (1921) 35 C.C.C. 227 (S.C.C.); this was recently reaffirmed in *R. v. Davy*, Unreported, 16 December 1993, McLachlin J., No. 228808. This principle was even extended to the doctrine of common purpose by the Supreme Court of Canada.

the accused aids, encourages or counsels or receives, comforts or assists cannot be convicted of the offence, has been acquitted of the offence, or is otherwise relieved of criminal responsibility for the offence". Thus an undercover police officer would likely be punished twice for not investigating a crime properly. Furthermore, if the "target" offender misunderstands the undercover police officer, the undercover agent may nonetheless be guilty as an accessory to crime under section 21 of the proposal: "notwithstanding, in the cases of paragraphs b) and d) that the offence was committed in a way different from that which was aided, encouraged or counselled".

As seen from *Kirzner* above, complete reliance is put on prosecutorial discretion for excusing the undercover agent's secondary participation in crime. This seems to be done since very few reported cases deal with the criminal liability of police officers involved in crime detection work. Apart for the decision in *Samsom*⁸⁸, the cases mentioned above dealt with the criminal liability of accused persons alleging to be lay informers. The complete reliance on prosecutorial discretion can be understood in the context of the Canadian prosecutorial system where Crown prosecutors form an organism independent of the police and have full authority and responsibility over criminal matters both in and out of Court once a charge has been laid⁸⁹. The Crown does then act as a sort of "quasi-judicial" tribunal of the manner in which police officers perform their duties before the formal judicial trial process begins. Even if this position can be understood, it does not mean that it is the best solution. **It is submitted that it would be better to have an express defence of "crime detection" in our criminal law which would excuse police officers involved in *bona fide* investigations from aiding or abetting the commission of a crime.** This is beginning to be done in England in some instances where judges have refused to convict of aiding and abetting undercover agents participating in crime

⁸⁸-*op. cit.*, note 69.

⁸⁹-W. McCarroll, "The Prosecutor's Duty of Fairness" in Criminal Justice, (S. Oxner editor, Carswell, Toronto, 1985) at 21.

with a motive to frustrate a criminal enterprise⁹⁰. An express defence would mean that the judicial process would not be estranged from the debate. Furthermore, expressly recognizing a defence for secondary participation in crime would allow boundaries to be drawn for this defence. There are clear public policy grounds for allowing immunity to be granted to police officers involved in crime detection. However, it is questionable whether public interest extends so far as to endorse the lack of intervention of a police officer who would let his "target offenders" commit irreparable damages. As argued by Smith and Hogan, a policeman who assists an offender to commit a murder in order to bring him to justice must also be guilty of murder⁹¹. **Thus this defence should be modeled on the Minister of Justice's proposal for a "defence" of entrapment and there should be no excuse for aiding or abetting the commission of an offence the commission of which requires the intentional or reckless causing of death or serious bodily harm.**

In addition, the defence of "crime detection" should not be available to an undercover

⁹⁰-In Clarke, (1984) 80 Cr. App. R. 344: the appellant alleged that he took part in a burglary solely to assist the police and denounce his associates. At trial, Clarke was found not guilty of burglary but guilty of aiding and abetting burglary. The Court of Appeal quashed the conviction on the grounds that the alternative count of aiding and abetting should not have been added by the trial judge and that the jury should have been addressed on the possibility of a "defence of entrapment". Macpherson J. delivering the judgement of the Court stated that entrapment had to be recognized as a possible defence available to the 'agent provocateur' otherwise criminally liable. In McPhillips, Unreported, 20 September 1989, Court of Appeal (Criminal Division), Lord Lowry C.J. of the Northern Ireland Court of Appeal, decided that McPhillips was lacking the necessary *mens rea* for a conspiracy to murder since "the fact that the appellant had the intention, which he could reasonably have expected to implement, that murder would not take place destroys the possibility of finding the necessary *mens rea* on his part". The acquittal on the charges of conspiracy is not so surprising as McPhillips lacked the proper *mens rea*; what is surprising is that McPhillips was also acquitted of aiding and abetting the conspiracy to murder on the same lack of intent on the grounds that "someone who participates in a criminal enterprise without the least intention of playing any part in the ostensibly agreed criminal objective but rather with the purpose of frustrating and exposing the objective of the other parties' is not guilty of conspiracy to commit that crime or of aiding and abetting such a conspiracy".

⁹¹-Smith and Hogan, *op. cit.*, note 30, at 158-159.

police agent who induces an offence which the principal commits⁹². The secondary criminal liability for inciting a crime that is in effect committed falls in the purview of the conduct forbidden by the doctrine of entrapment. The inchoate offence of counselling and procuring would also fall in the purview of the activities prohibited by the doctrine of entrapment if procuring is understood to be influencing someone to commit a crime he would not have otherwise committed. Consequently, if cogency in the law is to be preserved, there should not be an immunity for those who induce the crime committed by the principal offender or those who try to influence the commission of a crime albeit it is not committed. It would indeed be odd to grant a stay of proceedings for those induced into committing crimes while having an express defence excusing those who induce such crimes. **However, since procuring is given a wide understanding in Canadian criminal law and since there is no way of knowing how section 21(3) of the proposed legislation will be applied, it would be better to have a defence of "crime detection" excusing both the secondary participation in crime by counselling and procuring and the inchoate offence of procuring (section 464 of the Criminal Code) which would be available to undercover agents who merely provide an opportunity to commit a crime without trying to influence the mind of a person.**

Whether or not the defence of "crime detection" should also excuse those who participate in crime by encouragement is not obvious to me (and it is submitted bringing the debate into the open would allow for the public policy issues to be addressed). I would tend to think that the defence should also grant immunity for secondary participation in crime by encouragement.

⁹²-the inducement being such that the principal would successfully invoke the defence of entrapment.