

## CANADIAN THESES ON MICROFICHE

## THÈSES CANADIENNES SUR MICROFICHE



National Library of Canada  
Collections Development Branch

Canadian Theses on  
Microfiche Service

Ottawa, Canada  
K1A 0N4

Bibliothèque nationale du Canada  
Direction du développement des collections

Service des thèses canadiennes  
sur microfiche

### NOTICE

The quality of this microfiche is heavily dependent upon the quality of the original thesis submitted for microfilming. Every effort has been made to ensure the highest quality of reproduction possible.

If pages are missing, contact the university which granted the degree.

Some pages may have indistinct print especially if the original pages were typed with a poor typewriter ribbon or if the university sent us an inferior photocopy.

Previously copyrighted materials (journal articles, published tests, etc.) are not filmed.

Reproduction in full or in part of this film is governed by the Canadian Copyright Act, R.S.C. 1970, c. C-30. Please read the authorization forms which accompany this thesis.

THIS DISSERTATION  
HAS BEEN MICROFILMED  
EXACTLY AS RECEIVED

### AVIS

La qualité de cette microfiche dépend grandement de la qualité de la thèse soumise au microfilmage. Nous avons tout fait pour assurer une qualité supérieure de reproduction.

S'il manque des pages, veuillez communiquer avec l'université qui a conféré le grade.

La qualité d'impression de certaines pages peut laisser à désirer, surtout si les pages originales ont été dactylographiées à l'aide d'un ruban usé ou si l'université nous a fait parvenir une photocopie de qualité inférieure.

Les documents qui font déjà l'objet d'un droit d'auteur (articles de revue, examens publiés, etc.) ne sont pas microfilmés.

La reproduction, même partielle, de ce microfilm est soumise à la Loi canadienne sur le droit d'auteur, SRC 1970, c. C-30. Veuillez prendre connaissance des formules d'autorisation qui accompagnent cette thèse.

LA THÈSE A ÉTÉ  
MICROFILMÉE TELLE QUE  
NOUS L'AVONS REÇUE

ENTRAPMENT IN CANADIAN CRIMINAL LAW

by

MICHAEL I. STOBER

Thesis presented to the School of Graduate Studies  
of the University of Ottawa towards  
a Masters in Public Law

Ottawa, Ontario  
Canada

April 1983



Michael I. Stober, Ottawa, Canada, 1984.



UNIVERSITÉ D'OTTAWA  
UNIVERSITY OF OTTAWA

TABLE OF CONTENTS

<i>Acknowledgements</i>	iv
<i>Preface</i>	v
<u>INTRODUCTION</u>	1
A. <i>The Police</i>	1
1. <i>Maintenance of Order and the Rule of Law</i>	2
2. <i>Crime Detection</i>	6
a) <i>Crimes Without Victims</i>	6
b) <i>Police Practices</i>	8
3. <i>Police Liability</i>	13
B. <i>The Prosecution</i>	19
C. <i>The Judiciary</i>	22
<u>PART I</u> - <i>JUDICIAL CONTROL: PRACTICAL APPLICATIONS OF THE DOCTRINE OF ENTRAPMENT</i>	26
<u>Chapter I</u> - <i>U.S.A.</i>	26
A. <i>Judicial Development and Theoretical Bases</i>	27
1. <i>The Subjective Approach</i>	27
2. <i>The Objective Approach</i>	41
3. <i>Other Approaches</i>	53
<u>Chapter II</u> - <i>England</i>	64

<u>Chapter III - Canada</u>	89
A. Cases in which Entrapment has been Avoided	90
1. Accomplice Cases	92
2. Agency Cases	96
3. Cases Involving the Absence of a Constituent Element of the Offence	104
B. Cases in which Entrapment has been Considered	111
<u>PART II - IN SEARCH OF A THEORETICAL BASIS FOR THE DOCTRINE OF ENTRAPMENT</u>	155
<u>Chapter I - The Doctrine of Abuse of Process</u>	157
<u>Chapter II - The Common Law Defences</u>	179
<u>Chapter III - The Canadian Charter of Rights and                     Freedoms</u>	187
A. Scope of the Charter	188
1. Application	188
2. Guaranteed Rights and Freedoms	190
3. Reasonable Limits	194
4. Section 7	198
B. Redress in the Event of Charter Violations	211
1. Section 24(1)	213
2. Section 24(2) and Illegally Obtained Evidence	214
3. Analogy with the American Bill of Rights	234
4. Remedies in the Event of Entrapment	238

<u>CONCLUSION</u>	242
<u>FOOTNOTES</u>	253
<u>BIBLIOGRAPHY</u>	317

ACKNOWLEDGEMENTS

A project of this nature involves various people and is not undertaken without many sacrifices. I am grateful, first and foremost, to my mother and father, and also to Patrick J. Knoll, Frank Gillman, Robert H. Davie and Barbara Jane Yule, for their support and encouragement.

I would also like to acknowledge the members of the judiciary, bar and police forces in the Judicial District of Calgary, Alberta, through whom, in my work there as a Crown prosecutor, I derived much inspiration.

In addition, the assistance and patience of Professor André Jodouin, the Faculty of Law, Civil Law Section and the School of Graduate Studies, all of the University of Ottawa, and of the Department of Justice, Government of Canada (Duff-Rinfret Scholarship Programme) are much appreciated.

Finally, I wish to express my thanks to Arlene Watson for her excellent and speedy work in typing and proof-reading the manuscript.

## PREFACE

The purpose of this paper is to examine police investigative practices amounting to entrapment and to explore existing and potential bases of control.

Although a literal definition of entrapment is broad in meaning and would encompass a wide variety of police practices, the universally accepted definition in the context of criminal law is that formulated by Roberts J. in Sorrells v. United States (1).

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 the trickery, persuasion, or fraud of the officer. (2)

In terms of analysis a logical sequence is required. Hence, social, legal and moral perspectives must be considered in order to comprehend the full impact of entrapment in the criminal justice system.

The Introduction draws attention to the police in general in order to magnify the dilemma between the rule of law and the maintenance of order, particularly with regard to the investigation of specific categories of crimes in specific social settings. The police decision to invoke the criminal process against an individual brings into play the prosecution

and the judiciary, other parties to the machinery of the criminal justice system who may, in fact, exercise control over police behaviour.

A legal study of police entrapment and its effects will draw basically from its main source, the judiciary. Part I discusses in detail comparative applications of judicial control of such unconscionable police conduct in the United States, England and Canada, whereas Part II analyzes theoretical underpinnings for such control in Canada and concentrates on the new Constitution.

Finally, entrapment, whether or not it is accepted as a bar to conviction for a criminal offence, will continue to have an effect on the decisions of Canadian courts particularly in view of the new constitutional era and may, as a result of its perversity, influence future legislation. This thesis endeavours to state the law on April 11, 1983.

Michael I. Stober

## INTRODUCTION

A democratic criminal justice system should strive for freedom and security of all persons in the community. In order to accomplish this goal, the public must be protected by the repression of crime and the safeguarding of individual liberties. In exercising the means to achieve the ultimate result, the parties to the criminal justice system should ensure that persons guilty of criminal offences are dealt with without endangering innocent persons.

Police, prosecutorial, judicial and correctional institutions are the parties to the complex criminal justice system in modern society and they are essential. Although these components are organizationally separate, they are functionally interrelated as the actions of one may directly affect the operations of the others (3).

### A. The Police

As a public agency responsible for law enforcement and the protection of life and property, the police are of great significance to the community. The increasing complexity of our society, with its urbanization, industrialization, technological advances and mobility has increased the need for laws and efficient police protection. The police are on the "front line"

and are usually the initial point of contact between an individual and the criminal law. Police conduct and accomplishments are therefore highly consequential as they greatly affect public attitudes towards the law and the criminal justice system as a whole (4).

Police act before the other parties to the criminal justice system and generally control entrance to it. The first formal contact a person has with the system will be his arrest by a police officer. Initial arrest decisions are significant as they determine the scope of enforcement of substantive criminal law and the involvement of other components of the criminal justice system.

Since it is impossible to enforce all the laws all the time, police officers, particularly those at lower levels of the police hierarchy, exercise a considerable amount of discretion whether or not to invoke the criminal process. Although there may not be established criteria for such an exercise of discretionary decision-making power, it does depend upon a multitude of variables (5).

#### 1. Maintenance of Order and the Rule of Law

Police behaviour and detection methods are patterned in function with their goals as public protectors. Overzealous law enforcement officers, however, may bring their goal of maintenance of order into conflict with the rule of law and

individual liberties. Hence arises the question of undesirable police practices and unsavoury methods of crime detection such as entrapment.

Police and spokesmen for law enforcement stress the importance of social order. Thus it is in the public interest that the police should be strong and effective in preserving law and order and preventing crime.

In the policeman's hierarchy of values, highest priority is given to their law enforcement crime-fighting role, more so than broader peacekeeping and public service activities (6). Furthermore, arrest and subsequent conviction are more important "the bigger the pinch" (7). It may be feared that questionable practices that can be justified for purposes of expediency would tend to subsist unless expressly forbidden. Norms located within police organizations are more powerful than court decisions or statutes in shaping police behaviour with regard to such practices. However, ultimately it is the process of interaction among such norms, laws and court decisions that actually accounts for how police behave (8).

Various opinions have been expressed, usually outside police circles, demanding that police adhere strictly to the rules governing the legal system, that they ultimately be accountable to the legal order, irrespective of their "practical" needs as law enforcers (9).

Professor Packer's examination of the criminal process utilizes two models, the "Crime Control Model" and the "Due Process Model", representing two separate value systems that compete for priority in the operation of the criminal process (10).

The value system that underlies the Crime Control Model is based on the proposition that the repression of criminal conduct is by far the most important function to be performed by the criminal process. The failure of law enforcement to bring criminal conduct under tight control is viewed as leading to the breakdown of public order and hence to the disappearance of an important condition of human freedom. The perspective is on the interests of the broader community, as opposed to the individual, in order to preserve public order. With such a view, the emphasis is on factual guilt and the efficiency with which the criminal process as a whole operates to screen suspects, determine guilt and secure appropriate dispositions of persons convicted of crime (11).

Professor Packer indicates that if the Crime Control Model resembles an assembly line, the Due Process Model looks very much like an obstacle course (12). Each of its successive stages is designed to present formidable impediments to carrying the accused any further along in the process and thereby limits official power and its modes of exercise. The Due Process Model views the criminal process as conforming to the rule of law and therefore emphasis is on legal guilt over factual guilt by the

rejection of informal fact-finding processes as definitive of factual guilt and an insistence on formal, adjudicative, adversary fact-finding processes in which the factual case against the accused is publicly heard by an impartial tribunal and is evaluated only after the accused has had a full opportunity to discredit the case against him (13). An inevitable conclusion to be drawn from this model is that although the accused is factually guilty, he may nonetheless be legally innocent (14).

Professor Skolnick examines the dilemma confronted by police officers, between efficient enforcement of prohibitive norms of substantive criminal law and a commitment to the rule of law even if the latter may result in a reduction of social order. He wrote:

The police in democratic society are required to maintain order and to do so under the rule of law. As functionaries charged with maintaining order, they are part of the bureaucracy. The ideology of democratic bureaucracy emphasizes initiative rather than disciplined adherence to rules and regulations. By contrast, the rule of law emphasizes the rights of individual citizens and constraints upon the initiative of legal officials. This tension between the operational consequences of ideas of order, efficiency, and initiative, on the one hand, and legality, on the other, constitutes the principle problem of police as a democratic legal organization. (15)

As Professor Skolnick succinctly phrased it, "Law is not merely an instrument of order, but may frequently be its adversary" (16).

Thus legal guarantees designed to safeguard individual liberties regulate conduct of law enforcement officials and may hinder police productivity (convictions). As a result, these officials may view such guarantees as unjustifiable obstacles imposing more difficult working conditions. Nevertheless, the setting of the policeman's role and the low visibility of much of his conduct offer great opportunities to behave inconsistently with the rule of law and maximize productivity (17):

Against what crimes and in which social milieu do police utilize dubious techniques such as entrapment and what is the status of these various techniques with regard to the rule of law.

## 2. Crime Detection

### a) Crimes Without Victims

Society has deemed certain actions criminal in situations where there is no aggrieved complainant. It is in the field of these victimless crimes that aggressive, intrusive and repeated police contact are most evident.

Crimes without a direct or apparent victim may be defined as those "offenses that do not result in anyone's feeling that he has been injured so as to impel him to bring the offense to the attention of the authorities" (18), or more precisely, as those crimes in which "the offending behaviour involves a willing and private exchange of strongly demanded yet officially

proscribed goods and services; this element of consent precludes the existence of a victim - in the usual sense of the word" (19).

Crimes without victims are characterized by the consensual nature of the illegal conduct and include abortion, certain commercial frauds, bribery and corruption-related offences and vice crimes such as prostitution, illegal gambling and drug offences. Certain of these crimes are "problems" with certain legal as well as perhaps medical, psychological and sociological aspects (20). The harm seen in the proscribed transaction seems to be harm to the particular individuals and to society as a whole (21).

One feature which seems to be common to all victimless crimes is the unenforceability of the laws surrounding them. Offenders are usually sufficiently knowledgeable to avoid being detected by ordinary methods such as routine surveillance (22). Such unenforcement stems directly from the lack of a complainant, the low visibility of these offences, organized subcultural methods of operation and the consequent difficulty in obtaining evidence (23). These problems tend to drive police officers to excesses in the pursuit of evidence and may engender arbitrary police discretion, undesirable investigatory and detection measures and consequently offer possibilities for blackmail and police corruption.

The problem of enforcement is coupled with ambivalence on the part of many members of the community, including some

trial judges as to the gravity of consensual crimes and whether they are properly within the purview of the criminal law (24). As a result, sentences following convictions may be minimal. Thus the difficulties the police encounter in prosecution are very great and the impact of convictions may be negligible. Since strong pressure continues from certain segments of society especially when such criminal conduct is exposed to public view and when there is involvement of organized crime, police maintain their often peculiar investigatory measures in order to detect offenders (25).

b.) Police Practices

Wide variations exist in police practices reflecting numerous crimes, different police standards and objectives and various rules of criminal law and procedure. In many areas police fulfill their duties without sacrificing integrity or decency. In others, police investigatory measures such as illegal searches and arrests, electronic surveillance and entrapment are short cuts to efficiency although they may bypass limitations on police power and offend values of privacy and human dignity.

The use of police stratagems and subterfuge have traditionally been judicially recognized as necessary and appropriate methods of crime detection:

To any one at all familiar with the history of our criminal jurisprudence the suggestion that such special agents have not been employed from legal time immemorial will come as a surprise, for the contrary is notorious, and unless special means were employed to secure convictions in special classes of cases the law could not be enforced and would become a mischievous laughing stock or dead letter. (26)

Mr. Justice Lamer of the Supreme Court of Canada recently acknowledged this, stating that "the investigation of crime and the detection of criminals is not a game to be governed by the Marquess of Queensbury rules" (27) and further that "the authorities, in dealing with shrewd and often sophisticated criminals, must sometimes of necessity resort to tricks or other forms of deceit ..." (28).

In order to rigorously enforce consensual crimes, the police fashion their detection methods to the characteristics of each particular crime and it is inevitable that the police must take some initiatives. Thus police or their agents often put themselves in a position to be offended or simulate participation in a crime as a means to obtain evidence for purposes of prosecution. To do so, law enforcement officials must rely heavily upon undercover agents, spies, "stool pigeons", decoys, informers and "agents provocateurs" (29). Their value in crime detection was recognized in the old English practice called "approvement", although this practice was abused (30).

Generally, such measures are considered legitimate

as long as they are used to detect crimes, for example, by providing opportunities for the commission of offences by persons predisposed to commit such crimes (31). What has traditionally been frowned upon is conduct of police officers or their agents which crosses the line from investigating crimes to instigating crimes by inducing persons to commit crimes they had no pre-existing intention to commit and would not have committed but for the instigation (32). It is this latter type of activity that is usually associated with agents provocateurs. Informers, on the other hand, are recognized as traders of information for gain as distinct from ordinary citizens whose duty it is to provide the police with any information about crime that comes to their knowledge fortuitously (33). Informers include persons who deliberately and actively seek out and obtain information pertaining to crime by observation or participation and subsequently relate their acquired knowledge to the police.

Informers (this term will be utilized generally here to refer to all civilian police agents) are a major source of evidence and are most prevalent in narcotics cases. They "set up" dealers by arranging for them to sell drugs to an undercover police officer or to the informer, alone or in the presence of an undercover police officer; in addition to identifying dealers and furnishing information about the movement of drugs. The identity of informers is generally not disclosed. Some are volunteers or salaried "special employees", whereas others are addicts or persons involved in the drug trade, facing drug

charges who, although they may be subject to grave underworld reprisal, cooperate with the police and assist in the conviction of others in order to save themselves from punishment for their crimes or simply as a result of their need for funds and drugs to continue their drug habit or to traffic. The specific arrangement entered into between police and the informer varies according to local practice and the personalities involved (34).

In some jurisdictions or situations, the police may defer prosecution on the understanding that charges will not be laid if the informer "comes across". Elsewhere or in other circumstances, a charge is laid on the same conditions which, if met, may result in the withdrawal of the charge or a reduction in sentence (35).

Where informers are compensated only when they produce results and their survival depends upon the fruits acquired from their activities, they have strong reasons to induce the commission of an offence by an addict, for example, whose habits may have resulted in the first place from his initiation by the informer (36). Informers, therefore, have every motive to testify falsely. By compensating informers, law enforcement agencies, at least indirectly at times, support the addiction and crime of certain informers in order to uncover other drug offenders (37).

The undesirability of such practices is that police often fail to acquire leads on professional hard-care narcotics

dealers because the informers, fearing violent retaliation, refuse to divulge information regarding such persons. What happens is that the informer, lacking moral fibre and under pressure to produce, may trick a person (often an addict) who is not dealing, into committing an offence, usually trafficking, in order to result in an arrest (38). Consequently, officially directed activities may initiate narcotics transactions with individuals who were not previously trafficking (39) or involved with (40) drugs. These situations may amount to classic cases of entrapment and the question arises whether such activity is a bar to conviction or an excuse for the crime alleged.

Active and aggressive police measures account for entrapment, traps and frames. Entrapment occurs when an individual has been incited or persuaded by agents of the state to commit an offence which he had no previous intent or design of his own to commit. The agent will usually, by his actions, suggest his willingness to be a "victim" and actually communicates this feigned willingness to the person later accused, who had no pre-disposition to engage in the criminal enterprise (41).

A trap exists where an agent of the state merely affords a person an opportunity to put his existing criminal purpose into effect. A frame refers to a situation where a person performs an act which he in no way believes to be criminal (delivers a package containing drugs while believing it

contains powdered milk).

Due to the absence of mens rea, frames would never attract criminal responsibility (42). A suspect, however, may be tested by being offered an opportunity to violate the law and this constitutes legitimate crime detection. The concern arises when an innocent-minded person is enticed to violate the law by perverse tactics.

There is no reason to conclude that there is legislative or judicial approval of entrapment in crime detection. The police have simply assumed, perhaps correctly, that due to a lack of controlling rules they have liberty of action. The only conceivably legal limitations upon police "encouragement" practices are those which may be found in the doctrines of entrapment, abuse of process and those implied in the definition of every criminal offence (43).

### 3. Police Liability

Misconduct by law enforcement officials in carrying out police functions raises the question of appropriate sanctions which will result in making these officials more conscious of their duty to stay within limits when combatting crime. Civil action and criminal prosecutions, the traditional avenues, as well as administrative channels, are available to an aggrieved person.

The delays, costs and pressures associated with a civil action and the poor prospects of success tend to restrict this recourse to a small number of persons, therefore the remedy is of limited effect (44). Any deterrent to the police occasioned by tort liability is further reduced by the payment of the damages awarded, not by the defendant police officer, but by his employer, for example, the municipality, in accordance with the maxim "respondeat superior" (45).

With respect to entrapment, it may be argued that the police activities constituted a false arrest as no arrest would have been possible without the police instigation. In the event of a conviction of the accused, however, the remedy may be restricted, although punitive damages might be considered by courts in common law jurisdictions (46):

Criminal prosecutions of police officers are subject to obstacles in view of police control over the investigative and charging apparatus and their considerable discretion in deciding whether or not to invoke it (47): Although it is good practice to appoint outside police officers and prosecutors to handle such matters, there must be sufficient motivation and objectivity on their part to prosecute vigorously (48). Furthermore, the courts may have difficulty convicting, with the exception of offences involving brutality or dishonesty, when the accused police officer was simply following departmental policy (49).

It is clear that police officers or other government

officials are subject to the law as are ordinary citizens (50). Entrapment practices may amount to criminal behaviour by the police, for example, when they counsel, procure or incite another person to commit an offence as per sections 22 and 422 of the Criminal Code. There are, however, statutory provisions that do justify certain police actions (51). Various defences based on public duty, crown immunity, necessity and absence of mens rea have been advanced on behalf of accused police officers, although their application is limited (52).

In R. v. Ormerod (53), the accused, who claimed he was a spy or agent acting on behalf of the police, was charged and convicted of drug offences as a result of activities of an undercover police officer. Laskin J.A., as he then was, rejected any notion of immunity based on a proper motive or public duty although he recognized that this may influence the initial decision to prosecute or the range of sentence. He reasoned as follows:

... a general want of intent to break the law is not a defence where a person carries out forbidden acts intending to do them or knowing what he is in fact doing. That he does them for a laudable purpose or from a high motive ... is beside the point. The assertion of want of intent to break the law is a potentially confusing one unless it is related to the very ingredients of the offence; otherwise, it is simply an assertion that notwithstanding that an offence has been committed, the offender was motivated or actuated by some benevolent design. It may be enough, in a particular case, to save him from prosecution or to result in mitigation of sentence if a

prosecution is lodged but I cannot see that he can be rescued from guilt if prosecution is undertaken.

In principle, the recognition of "public duty" to excuse breach of the criminal law by a policeman would involve a drastic departure from constitutional precepts that do not recognize official immunity, unless statute so prescribes ... How far such immunity exists in the exercise of discretionary power not to prosecute is unknown to me; but even if it be considerable, the fact that it does not reside in a settled rule is a safeguard. Legal immunity from prosecution for breaches of the law by the very persons charged with a public duty of enforcement would subvert that public duty. The matter is, in my view, more grave in relation to the criminal law than it is in any consideration of immunity from civil liability where policemen may incur it while in the discharge of their official duties. (54)

The same reasoning, it is submitted, would extend to the exercise of such a public duty under superior orders (55).

Improper police conduct amounting to entrapment led to convictions in an American case, Reigan v. People (56), where two game wardens, in order to enforce the games laws, told two youths they were fur buyers who could dispose of "hot" beaver hides. In this manner, they induced the youths to agree to trap beaver illegally. The wardens were convicted of unlawful conspiracy to trap beaver and possess hides and of becoming accessories before the fact to such crimes, having intended to induce persons, who would not otherwise have done so, to commit the games offences.

Absence of specific intent in offences which require it

would provide a successful defence to accused police officers (57). However, they would not be able to avail themselves of this mens rea defence in absolute liability offences where criminal intent is not an essential element of the offence. In R. v. Petheran (58), a police sergeant who gave marked money to a constable with which liquor was purchased illegally was himself convicted of unlawfully purchasing liquor, the prosecution having been instituted by the person who had sold it and was later convicted of unlawful sale. The defence of public duty was rejected and a defence argument raising absence of mens rea was denied, the Court implicitly treating the provincial liquor statute as one of absolute prohibition.

It appears unlikely that the notion of crown immunity (59) would assist an accused police officer, however, in special circumstances the defence of necessity (60) may lead to an acquittal. Since entrapment generally involves voluntary action by or on behalf of law enforcement officials in non-perilous situations, the application of such a defence would be greatly restricted.

Overzealous police officers may also be dealt with by internal police procedures or by municipal, provincial or federal boards or commissions (often having civilian members) which may conduct inquiries, the most recent example of which is the McDonald Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police. Such inquiries may be subject

to a great deal of publicity and thereby affect the public image of the police department concerned.

The above means of redress to sanction police misconduct are characterized by a need for initiative by a complainant or interested party, however, this initiative is not always taken (61). A more potent remedy and deterrent to police misconduct may be to deny them the fruits of their own wrongdoing through an exclusionary rule of evidence (62) - although its application would have to be balanced against the interest and security of the community - or by acceptance and application of a "defence" of entrapment.

The criminal justice system does not operate in a vacuum but must be responsive to the public and maintain a favourable public image. As the police are on the "front line" they are the most immediate and vulnerable representatives of the system and of the established social order and the manner in which they carry out their duties creates an impression which has profound effects.

As the Quimet Committee stated:

There is unanimity of opinion that the police cannot effectively carry out their duties with respect to law enforcement unless they have the support and confidence of the public. Not only is the cooperation

of the citizen necessary for effective law enforcement, but disrespect for the police creates a climate which is conducive to crime. (63)

The first stage in which police activities in a criminal case are reviewed or screened occurs in the Attorney-General's office with Crown prosecutors responsible for presenting evidence in criminal prosecutions. It has been said that "the policeman, like any other litigant, is to a large extent in the hands of his counsel; and to try to advance one's case by means of some unfair practice is not much good if one's counsel is not going to aid and abet" (64).

#### B. The Prosecution

There is constant interaction between the police and the Crown because Crown prosecutors rely upon the police to serve as investigators, gatherers of evidence and potential witnesses whereas police officers rely upon Crown prosecutors to present the evidence supporting their cases in court. The relationship may be strained at times since, although there is generally no review of police exercise of discretion not to arrest and invoke the criminal justice system, the decision by the police to lay a charge is screened and reviewable by the Crown whose decision whether or not to proceed with the charge is a form of control upon police practice (65).

Common law criminal procedure is accusatorial and the

process is an adversarial one between two opposing and conflicting parties, each presenting its case before an impartial tribunal conducting the process according to established rules and principles out of which it is hoped and expected that truth will emerge (66).

This contest is mitigated somewhat by the judicially endorsed concept of the prosecutor as a "quasi-judicial" officer of the court (67). As Rand J. stated in Boucher v. The Queen (68):

It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction; it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength, but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings. (69)

The Canadian Crown prosecutor, particularly those engaged full-time in major centres, is unlike his counterpart in England, who has traditionally been a barrister retained to prosecute yet remote from the investigatory and charging processes (70). The American system differs in the other direction as there, a district attorney, usually an elected official, may take an active part in the investigation of crime and

exercises a wide discretion over initiation of investigation, arrest and prosecution (71).

The Canadian Crown prosecutor, although ordinarily not part of the investigation, arrest and initial charging processes, may advise the police at all stages and has full authority and responsibility over a criminal matter both in and out of court once a charge has been laid (72). Crown discretion exists at many points throughout the process (73) and generally, the courts, subject to what will later be said regarding the doctrine of abuse of process (74), do not review the Crown's discretionary powers (75).

Since prosecutors are appointed in Canada, they are independent of political considerations, although the Attorney-General is accountable to the head of his government, the legislature, and ultimately the electorate. The Crown, therefore, is not an instrument of the police, a political group or anyone else and justice is the governing factor in the exercise of prosecutorial functions (76).

With this in mind, control by the Crown over police initiated charges is particularly significant where perverse police conduct has "created" rather than discovered Crown evidence because a subsequent prosecution would imply tacit approval by the Crown of these police measures (77). Ratification by the Crown of the manner in which police perform their duties brings into question the "quasi-judicial" nature of its office even before the formal judicial trial process begins.

### C. The Judiciary

The primary function of the judiciary is to adjudicate and, in the exercise of this function, to ensure that justice is achieved in individual cases. An independent and impartial judiciary is therefore essential. In the performance of their duties, judges must be immune from control by Parliament or the legislatures, executive organs of governments or any other source, although judges are often responsive to public desires and policy considerations (78).

The judge determines and applies the applicable law, procedural and substantive, imposes sentence in the event of a conviction and in addition, in non-jury trials, decides the facts and determines guilt or innocence (79).

The judiciary aims to accomplish the objectives of the criminal justice system and this is most apparent at a public trial where the mechanics of the system are exposed to public scrutiny and where the impartiality of the judge in the face of Crown and defence demands greatly contributes to the public image of the system (80). Moreover, as opposed to initial police and several prosecutorial decisions, decisions rendered by a court are public and are reviewable on appeal (81).

The trial judge is the centre of the adversary trial process and through interaction with Crown counsel and defence counsel, he must seek a fair balance between the protection of

the public through the rights of the Crown and the rights of the individual by fairly applying the rules of the adjudicatory process (82).

Entrapment is only a part of the broader problem of lawless law enforcement and notwithstanding the absence of legislative standards and controls, the courts in Canada have traditionally exercised restraint in interfering with law enforcement practices, particularly in the presence of relevant evidence of probative value.

Limits can be imposed by the courts on the effectiveness of certain police measures by utilizing evidentiary rules or by creating defences in appropriate circumstances. The predominant view of the American defence of entrapment, although it focuses on the predisposition of the accused, rather than on police conduct, is expected to have some effect on police practices. And American courts, in guaranteeing constitutional rights, have been extremely active in imposing controls by exclusionary rules of evidence in order to shield the integrity and purity of the judicial process.

As Stewart J. of the United States Supreme Court reasoned:

Even less should the federal courts be accomplices in the willful disobedience of a Constitution they are sworn to uphold. (83)

Recent events in Canada have seen a newly enacted Constitution and prior to that, expressions of concern by members of the Supreme Court of Canada for the integrity of the criminal Justice system (84). This indicates a greater role for the judiciary, although a more flexible one than the American experience, in order to ensure that the administration of justice is not brought into disrepute. It is said that the character of the criminal justice system and the values of society underpinning it will be preserved as a result. In this way, as in the United States, it is expected that police misconduct will be deterred, that the police will be encouraged to incorporate judicial guidelines into their activities and that prosecutors will scrutinize proposed prosecutions more carefully so that the courts will not be confronted with what they consider to be reprehensible conduct.

The following comments of Brandeis J. of the United States Supreme Court are not without significance :

Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the

means - to declare that the government may commit crimes in order to secure the conviction of a private criminal - would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face. (85)

PART I.

JUDICIAL CONTROL: PRACTICAL APPLICATIONS  
OF THE  
DOCTRINE OF ENTRAPMENT

Chapter I

U.S.A.

Entrapment is a recognized defence in the United States (86). It is intended to afford a remedy to victims of unconscionable police practices involving the inducement of innocent persons to commit crime in order to arrest, prosecute and ~~convict~~ them.

The defence of entrapment is one of man's earliest recorded "pleas". The Bible tells us that Eve, when accused of eating the forbidden fruit, protested, "the serpent beguiled me and I did eat" (87).

Entrapment was rejected by the New York Supreme Court in Board of Commissioners of Excise of Onundaga County v. Backus (88). Referring to Eve's allegation that the serpent had beguiled her, the court declared:

That defense was overruled by the great Lawgiver, and whatever estimate we may form, or whatever judgment pass upon the

character or conduct of the tempter, this plea has never since availed to shield crime or give indemnity to the culprit, and it is safe to say that under any code of civilized, not to say christian ethics, it never will. (89)

Although entrapment has since become entrenched in American law as an established defence, it has not been accompanied by a consistent and comprehensive basis underlying its application. The different versions of the defence which are substantially supported by the authorities are, examined below.

#### A. Judicial Development and Theoretical Bases

##### 1. The Subjective Approach

The version of the defence of entrapment accepted by federal and most state courts in the United States is based on a subjective view of the particular accused's intent and whether or not he was predisposed to commit the offence with which he stands charged. It is for this reason that it is also known as the origin of intent; genesis of intent or creative activity formulation.

The first case in which a United States federal court accepted the defence of entrapment was Woo Wai v. United States (90). Immigration officials suspected that the accused, a Chinese merchant and resident of San Francisco for many years, possessed

information regarding illegal importation of Chinese people into the United States from Mexico and the complicity therein of certain Immigration officers. In order to obtain a hold on him and make him tell what he knew, the officials set out to lure him into committing an immigration offence, for which he was to be indicted and convicted, all for the purpose of bringing pressure to bear upon him to make him "come through". The accused refused to comply with a number of schemes until persistent and repeated entreaties and promises of official protection won him over. He was later prosecuted on a charge of conspiracy to violate the immigration laws.

In reversing the conviction, the Circuit Court of Appeals applied a test of who conceived the original criminal design. In this case, the primary intention to commit the offence did not originate with the accused and he was induced along only by sustained pressure. The Court upheld a defence of entrapment, stating:

.... it is against public policy to sustain a conviction obtained in the manner which is disclosed by the evidence in this case, taking the testimony of the defendants to be true, and that a sound public policy can be upheld only by denying the criminality of those who are thus induced to commit acts which infringe the letter of the criminal statutes. (91.)

Although the accused, in fact, committed the offence with which he was charged, he was acquitted because, inter alia, of the degree of involvement of official conduct in the commis-

sion of the offence and specifically, the effect of such conduct on the accused's mind.

In 1932 entrapment was clearly recognized as a valid defence in federal courts, by the United States Supreme Court in Sorrells v. United States (92). A federal prohibition agent, passing as a tourist and accompanied by three acquaintances of the accused Sorrells, visited the latter at his home. The agent's purpose was to prosecute the accused for procuring and selling liquor. The conversation turned to World War I experiences as the accused, the agent and one of the acquaintances had been in the same armed forces division. During a 1-1½ hour period, the agent made repeated requests for a half gallon of whiskey to take back to a friend. No other person in the group mentioned liquor. Sorrells at first refused, stating that he did not have any and that he "did not fool with whiskey", but he finally obtained the liquor which he sold to the agent for \$5. The accused was subsequently charged for both possessing and selling the whiskey in violation of a federal statute.

At trial, testimony concerning the accused's reputation was conflicting. Some said it was good whereas others said he was a rum runner. There was no evidence that the accused had, in the past, ever possessed or sold any liquor. The trial court, ruling that as a matter of law there was no entrapment, denied a motion to direct a verdict in favour of the accused and further refused to submit the issue of entrapment to the jury. A verdict

of guilty followed and the Fourth Circuit Court of Appeals affirmed.

The question before the Supreme Court was whether the evidence was sufficient to go to the jury on the issue of entrapment. The Court held that upon the evidence, the defence of entrapment was available and should have been submitted to the jury. The judgement was therefore reversed and the case remanded for further proceedings.

Hughes C.J., who delivered the judgement of the Court, viewed the facts as follows:

It is clear that the evidence was sufficient to warrant a finding that the act for which defendant was prosecuted was instigated by the prohibition agent, that it was the creature of his purpose, that defendant had no previous disposition to commit it but was an industrious, law-abiding citizen, and that the agent lured defendant, otherwise innocent, to its commission by repeated and persistent solicitation in which he succeeded by taking advantage of the sentiment aroused by reminiscences of their experiences as companions in arms in the World War. (93)

In commenting on police practices, Hughes C.J. referred to acceptable conduct by government officials who merely afford opportunities or facilities for the commission of an offence and in so doing employ artifice and stratagem to reveal criminal designs and apprehend those engaged in criminal enterprises. The manufacturing of crime by government officials

however, was viewed as another matter altogether:

A different question is presented when the criminal design originates with the officials of the government and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute. (94)

The majority dealt with such a situation as a matter of statutory construction in that Congress could not have intended its statutes to apply to innocent persons who succumb to police instigation and violate a statute:

We think that this established principle of construction is applicable here. We are unable to conclude that it was the intention of the Congress in enacting this statute that its processes of detection and enforcement should be abused by the instigation by government officials of an act on the part of persons otherwise innocent in order to lure them to its commission and to punish them. We are not forced by the letter to do violence to the spirit and purpose of the statute. (95)

The majority rejected the concurring minority opinion which would treat the statute as applicable despite the entrapment, and the accused guilty, but would allow the court to grant immunity or adopt a procedure to that end. As Hughes C.J. reasoned:

It is the function of the court to construe the statute, not to defeat it as construed. Clemency is the function of the Executive. (96)

In order to successfully assert this defence of entrapment, the offence must be planned and instigated by government officials and committed by an "otherwise innocent" person, the accused, who was induced by these officials. The significant issue relates to the accused's predisposition and criminal design. The majority held that the controlling question is "whether the defendant is a person otherwise innocent whom the government is seeking to punish for an alleged offense which is the product of the creative activity of its own officials" (97).

In rejecting the contention of the government that the defence of entrapment must be pleaded in bar to further proceedings under the indictment and could not be raised under the plea of not guilty, Hughes C.J. stated, on behalf of the majority, that:

The defense is available, not in the view that the accused, though guilty, may go free, but that the government cannot be permitted to contend that he is guilty of a crime where the government officials are the instigators of his conduct. The federal courts in sustaining the defense in such circumstances have proceeded in the view that the defendant is not guilty. The practice of requiring a plea in bar has not obtained. (98)

And entrapment, if found to be disclosed by the evidence, takes the case out of the purview of the statute "because it cannot be supposed that the Congress intended that the letter of its enactment should be used to support such a gross perversion of its purpose" (99).

The United States Supreme Court next encountered entrapment in 1958 in Sherman v. United States (100). In August 1951, a government informer first met the accused Sherman at a doctor's office where apparently both were being treated for narcotics addiction. After numerous accidental meetings, either at the doctor's office or at the pharmacy, their conversations progressed to a discussion of mutual experiences and problems including their attempts to overcome addiction to narcotics. Finally, the informer asked the accused if he knew of a good source of narcotics. He requested the source because he was not responding to treatment.

Initially, the accused attempted to avoid the subject, however after several repeated requests, predicated on the informer's presumed suffering, the accused acquiesced. Frequently thereafter, the accused obtained a quantity of narcotics which he shared with the informer. Each time the accused told the informer that the total cost of the narcotics was \$25 and that the informer owed him \$15. In this way, the informer bore the cost of his share of the narcotics plus expenses incidental to obtaining the drug. After several such sales, the informer notified the Bureau of Narcotics that he detected a seller and on three occasions government agents observed the accused give narcotics to the informer in return for money supplied by the government. The accused was later charged with three sales of narcotics in violation of a federal statute.

7

The factual issue at trial was whether the informer had convinced an otherwise unwilling person to commit a criminal act or whether the accused was already predisposed to commit the act and exhibited only the natural hesitancy of one acquainted with the narcotics trade. The issue of entrapment was submitted to the jury and a conviction resulted. The Second Circuit Court of Appeals affirmed.

The issue before the Supreme Court was whether the accused's conviction should have been set aside on the ground that as a matter of law, the defence of entrapment was established. The Court held that entrapment was established as a matter of law and judgement was reversed and the case remanded. This conclusion was arrived at from the undisputed testimony of the prosecution's witnesses, therefore the Court did not choose between conflicting witnesses or judge credibility.

The Supreme Court adopted the majority judgement in Sorrells. Warren C.J., who delivered the opinion of the Court, recognized the necessity for police to resort to stealth and strategy in combatting crime. He pointed out however, that such practices become objectionable when used to manufacture crime as "Congress could not have intended that its statutes were to be enforced by tempting innocent persons into violations" (101).

As in Sorrells, the majority held that government agents merely providing opportunities or facilities for the commission of an offence does not constitute entrapment.

Entrapment arises only when the criminal activity was the product of the creative activity of law enforcement officials. In making such a determination, Warren C.J. stated that "a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal" (102). He further held, again following Sorrells, that both the conduct of the government agent and the conduct and predisposition of the accused may be examined at trial.

The government sought to overcome the defence of entrapment by claiming that the accused demonstrated a "ready complaisance" to accede to the informer's requests. It offered a record of two prior convictions, one for the illegal sale of narcotics in 1942 and the other for the illegal possession of narcotics in 1946. The Court pointed out that there was no evidence that the accused was in the trade and held that a nine-year old sales conviction and a five-year old possession conviction were insufficient to prove that the accused had a readiness to sell narcotics at the time the informer approached him, particularly when he was attempting to overcome his narcotics addiction.

The Court accepted the defence of entrapment as a matter of law in this case upon undisputed facts. Warren C.J. indicated that the informer (himself under criminal charges for illegally selling narcotics but not yet sentenced at that time) clearly induced the accused and not only procured a source of narcotics but apparently also induced the accused to return to the habit. He commented on the dangers of such a practice as

follows:

The case at bar illustrates an evil which the defense of entrapment is designed to overcome. The government informer entices someone attempting to avoid narcotics not only into carrying out an illegal sale but also into returning to the habit of use. Selecting the proper time, the informer then tells the government agent. The set-up is accepted by the agent without even a question as to the manner in which the informer encountered the seller. Thus the Government plays on the weaknesses of an innocent party and beguiles him into committing crimes which he otherwise would not have attempted. Law enforcement does not require methods such as this. (103)

He indicated as well that the government cannot make use of an informer and then claim disassociation through ignorance insisting it is not responsible for his actions.

More recently, the United States Supreme Court followed the subjective view espoused the Court in Sorrells and Sherman in United States v. Russell (104). An undercover narcotics agent, investigating the accused and his accomplices for illicitly manufacturing a drug, offered them metamphetaminè ("speed"), an essential ingredient which was difficult to obtain, though legally available. After the agent had observed the process and contributed the ingredient in return for a share of the finished product, the accused was charged with three counts of having manufactured and processed the drug and of having unlawfully sold and delivered the drug contrary to federal legislation. The accused was convicted by a jury which had been given the standard

entrapment instruction, however, the Ninth Circuit Court of Appeals reversed, concluding that there had been an intolerable degree of governmental participation in the criminal enterprise.

In the Supreme Court, arguments submitted on behalf of the accused for a reconsideration and extension of the traditional defence of entrapment were rejected (105), the Court adhering to the view that the principal element in the defence of entrapment is the accused's predisposition to commit the offence.

Rehnquist J., who delivered the opinion of the Court, refused to go beyond the Court's opinions in Sorrells and Sherman stating:

But the defense of entrapment enunciated in those opinions was not intended to give the federal judiciary a "chancellor's foot" veto over law enforcement practices of which it did not approve. The execution of the federal laws under our Constitution is confided primarily to the Executive Branch of the Government, subject to applicable constitutional and statutory limitations and to judicially fashioned rules to enforce those limitations. (106)

Furthermore, he confirmed the theoretical basis of the defence as follows:

Those cases establish that entrapment is a relatively limited defense. It is rooted not in any authority of the Judicial Branch to dismiss prosecutions for what it feels to have been "over-zealous law enforcement", but instead in the notion that Congress could not have

intended criminal punishment for a defendant who has committed all the elements of a prescribed offense but was induced to commit them by the government. (107)

The Court again stated that the fact that government officials merely provide opportunities or facilities for the commission of an offence, or use deceit as a law enforcement technique, does not defeat a prosecution. The Court held that "it is only when the Government's deception actually implants the criminal design in the mind of the defendant that the defense of entrapment comes into play" (108).

The Supreme Court therefore held that the Court of Appeals erred in seeking to extend the principle laid down in Sorrells and Sherman and since there was evidence to support the jury finding that the accused was predisposed to commit the offences in question, the judgement was reversed.

The defence of entrapment formulated by the United States Supreme Court is a creation of statutory construction. It is based on an implied intent of Congress to exclude from the purview of its legislation, the conviction of otherwise innocent persons induced by law enforcement officials into criminal behaviour, in violation of such legislation. The enforcement of statutes by law enforcement officials, in such

circumstances, is considered to be "foreign to the legislative purpose" (109). The defence of entrapment is treated as a substantive defence because, if proved, the accused is acquitted, notwithstanding the fact, however, that all the elements of the offence have been proved.

The United States Supreme Court recognized the use of artifice, stealth, stratagem and deceit, not amounting to entrapment, by law enforcement officials in the investigation and detection of crime. The Court approved official conduct leading to traps where mere opportunities or facilities are afforded for the commission of an offence (110).

Entrapment, as a defence to a criminal prosecution, occurs where the design or inspiration for the offence originates with law enforcement officials who procure its commission by an accused who was not predisposed to engage in such criminal activity and would not have otherwise perpetrated the offence except for the instigation or inducement of these officials. While predisposition is dispositive, government inducement is not irrelevant, as, in order to raise the entrapment defence, the accused must show that the government agent played some effective role in the commission of the offence (111).

Evidence relating to the conduct of law enforcement officials is certainly admissible and, since the predisposition and criminal design of the accused are relevant issues, evidence may be tendered subjecting the accused to "an appropriate and

searching inquiry into his own conduct and predisposition" (112). With respect to the question of a reply to the claim of inducement, Hand J. stated in the first Sherman appeal (113) (prior to the second trial):

Indeed, it would seem probable that, if there were no reply, it would be impossible ever to secure convictions of any offences which consist of transactions that are carried on in secret. (114)

The defence of entrapment is only available to accused persons entrapped by law enforcement officials or their agents. It is not available to an equally culpable accused who has been entrapped by a private individual unless this individual was connected with an official or used by him as an agent (e.g. an informer) (115). Moreover, the defence does not necessarily apply to all offences. As Hughes C.J. stated in Sorrells:

We have no occasion to consider hypothetical cases of crimes so heinous or revolting that the applicable law would admit of no exceptions. (116)

The defence of entrapment is raised after a plea of not guilty. Generally, the burden of production, not persuasion, on the issue of inducement is placed on the accused whereas the government has the burden of persuasion on the issue of predisposition (117). Furthermore, unless it can be clearly established as a matter of law, as in Sherman, where the facts were not in dispute (118), the issue of whether an accused has been

entrapped is for the jury to decide upon the facts disclosed in evidence (119).

In the majority of jurisdictions, an accused may not both deny committing the crime and claim entrapment, the reasoning being based on the inconsistency of the defences. In order to rely on the defence of entrapment therefore, an accused must admit the crime since this defence presupposes the commission of a criminal offence into which the accused was enticed (120).

An exception to this rule has been recognized where the case for the prosecution shows evidence of entrapment and the accused offers no evidence of entrapment inconsistent with his defence that he did not commit the crime. As a result, an accused in such circumstances, is not required to admit the commission of the crime in order to be entitled to a charge on entrapment (121).

## 2. The Objective Approach

The version of the defence of entrapment adopted in concurring minority opinions of the United States Supreme Court and some state courts (122) focuses on an objective view of police conduct and whether or not inducements held out by law enforcement officials are likely to cause a nondisposed hypothetical person to commit the offence with which a particular accused stands charged. It is, therefore, also referred to as

the police conduct or hypothetical person formulation.

In Sorrells v. United States (123), Roberts J. delivered a separate minority opinion, concurred in by Brandeis and Stone JJ. (124), agreeing with the majority that the judgment below should be reversed although for reasons and upon grounds other than those stated in the opinion of the Court.

Roberts J. recognized certain crime-detection techniques used by law enforcement officials in combatting crime:

Society is at war with the criminal classes, and courts have uniformly held that in waging this warfare the forces of prevention and detection may use traps, decoys, and deception to obtain evidence of the commission of crime. (125)

The extension of such methods to entrapment, he regarded in a different light, however:

There is common agreement that where a law officer envisages a crime, plans it, and activates its commission by one not theretofore intending its perpetration, for the sole purpose of obtaining a victim through indictment, conviction and sentence, the consummation of so revolting a plan ought not to be permitted by any self-respecting tribunal. (126)

The foundation of the defence, according to the minority opinion, lies not on the court's view of what the legislature is assumed to have meant, but in "the public policy which protects the purity of government and its processes" (127).

Roberts J. asserted:

The doctrine rests, rather, on a fundamental rule of public policy. The protection of its own functions and the preservation of the purity of its own temple belongs only to the court. It is the province of the court and of the court alone to protect itself and the government from such prostitution of the criminal law. (128)

The minority opinion would reject evidence of an accused's prior record or his reputation as a justification for the instigation and creation of a new crime since the sole issue is the conduct of the police rather than the character and disposition of the accused. It was stated that:

The applicable principle is that courts must be closed to the trial of a crime instigated by the government's own agents. No other issue, no comparison of equities as between the guilty official and the guilty defendant, has any place in the enforcement of this overruling principle of public policy. (129)

Entrapment, according to this approach, is seen as a matter for the court (the trial judge) to rule on alone and if is only where there is some doubt as to the facts that the issue may be submitted to the jury (130).

Frankfurter J., with whom Douglas, Harlan and Brennan JJ. joined, agreed with the majority in Sherman v. United States (131), that the undisputed facts disclosed entrapment as a matter of law, although they reached this result by a different route.

According to this minority opinion, the courts refuse to convict an entrapped accused, not because his conduct falls outside the proscription of the statute (a position which was considered to be "sheer fiction" (132) since the only intention of the legislature was to make criminal precisely the conduct in which the accused engaged), but because, even if his guilt be admitted, the methods employed on behalf of the government to bring about conviction could not be countenanced. Frankfurter J. felt that the courts have a responsibility to reject such methods:

Insofar as they are used as instrumentalities in the administration of criminal justice, the federal courts have an obligation to set their face against enforcement of the law by lawless means or means that violate rationally vindicated standards of justice, and to refuse to sustain such methods by effectuating them. They do this in the exercise of a recognized jurisdiction to formulate and apply "proper standards for the enforcement of the federal criminal law in the federal courts", .... an obligation that goes beyond the conviction of the particular defendant before the court. Public confidence in the fair and honorable administration of justice, upon which ultimately depends the rule of law, is the transcending value at stake. (133)

In order to determine whether or not courts should "set their face" against certain police methods, the crucial question pursuant to the minority opinion is "whether the police conduct revealed in the particular case falls below standards, to which common feelings respond, for the proper use of governmental power" (134). Consistent with this objective approach to police

conduct, "it is wholly irrelevant to ask if the 'intention' to commit the crime originated with the defendant or government officers, or if the criminal conduct was the product of 'the creative activity' of law-enforcement officials" (135). And it was noted that in every case of this kind, the intention that the particular offence be committed originates with the police, and would not have been committed without their inducement.

The minority approved accepted police measures designed to detect those engaged in criminal conduct and ready and willing to commit further crimes should the occasion arise. It would restrict the use of inducements likely to induce crime, to such persons only, not others who would normally avoid crime and, through self-struggle, resist ordinary temptations.

Frankfurter J. commented further on this approach, as follows:

This test shifts attention from the record and predisposition of the particular defendant to the conduct of the police and the likelihood, objectively considered, that it would entrap only those ready and willing to commit crime. It is as objective a test as the subject matter permits, and will give guidance in regulating police conduct that is lacking when the reasonableness of police suspicions must be judged or the criminal disposition of the defendant retrospectively appraised. It draws directly on the fundamental intuition that led in the first instance to the outlawing of "entrapment" as a prosecutorial instrument. The power of government is abused and directed to an end for which it was not constituted

when employed to promote rather than detect crime and to bring about the downfall of those who, left to themselves, might well have obeyed the law. Human nature is weak enough and sufficiently beset by temptations without government adding to them and generating crime. (135)

It is obvious, then, that in assessing police conduct, this opinion would refuse to consider a particular accused's general intention or predisposition to commit similar crimes by an examination of his reputation, record and criminal inclinations, but would focus on police conduct. Frankfurter J. stated:

Past crimes do not forever outlaw the criminal and open him to police practices, aimed at securing his repeated conviction, from which the ordinary citizen is protected. (137)

Frankfurter J. agreed with the position urged by Roberts J. in Sorrells that entrapment was an issue to be dealt with by the court and not the jury. He added that although a jury verdict may settle the issue in a particular case, it was only through court rulings developing explicit standards in accumulated precedents which can give significant guidance for official conduct that the wise administration of criminal justice demands.

In a dissenting opinion in United States v. Russell (138), Stewart J., with whom Brennan and Marshall JJ. joined, adopted the objective approach to entrapment espoused by the minority opinions in Sorrells and Sherman. In view of the

participation of the government agent, in particular his furnishing the accused with a scarce drug which was used to produce a drug resulting in the prosecution of the accused, Stewart J. held that the accused was entrapped regardless of his predisposition or "innocence".

Stewart J. found the terms "otherwise innocent" and not "predisposed", used in describing an accused, to be misleading and added that such an accused who commits acts which Congress has determined to be illegal is not innocent of the offence. He indicated that inducements by government agents do not make such an accused "any more innocent or any less predisposed than he would be if he had been induced, provoked or tempted by a private person - which, of course, would not entitle him to cry 'entrapment!'" (139). As Frankfurter J. stated on the same point in Sherman:

If he is to be relieved from the usual punitive consequences, it is on no account because he is innocent of the offense described. In these circumstances, conduct is not less criminal because the result of temptation, whether the tempter is a private person, or a government agent or informer. (140)

Stewart J. reasoned, as a result, that the significant focus must be on the conduct of the government agents, and not on the predisposition of the accused.

It is apparent then that, according to this opinion, the purpose of the defence of entrapment is to prohibit unlawful

governmental activity in instigating crime rather than to protect persons who are "otherwise innocent". The predisposition of the particular accused becomes irrelevant as the important question is whether the government's conduct, in inducing the crime, was beyond judicial toleration. Consequently, the accused's bad reputation or past criminal activity has no place in such an approach to the entrapment defence and should not be a factor in determining the acceptability of police behaviour since permissible police conduct does not vary according to the particular accused and his background. Moreover, consideration of such evidence, it was held, would be highly prejudicial especially if the matter is submitted to the jury.

As in other majority and minority opinions of the Court, Stewart J. recognized the government's use of undercover activity, strategy and deception, particularly with respect to victimless crimes. He added that government agents may engage in conduct that is likely, when objectively considered, to afford a person ready and willing to commit the crime an opportunity to do so. Entrapment, he held, occurs when police conduct extends beyond these acceptable limits:

But when the agents' involvement in criminal activities goes beyond the mere offering of such an opportunity, and when their conduct is of a kind that could induce or instigate the commission of a crime by one not ready and willing to commit it, then - regardless of the character or propensities of the particular person induced - I think entrapment has occurred. For in that situation, the

Government has engaged in the impermissible manufacturing of crime, and the federal courts should bar the prosecution in order to preserve the institutional integrity of the system of federal criminal justice. (141)

The objective approach to the defence of entrapment rests on a rule of public policy which aims to protect the purity and integrity of the government and its processes by forbidding a court to lend its processes for the consummation of a wrong.

Entrapment exists because practices utilized by law enforcement officials to secure the conviction of an accused cannot be countenanced when they fall below accepted standards, regardless of the predisposition of the accused. Prejudicial evidence of an accused's background supporting a criminal disposition would, therefore, be excluded.

The objective consideration becomes whether law enforcement officials (not private individuals) have overstepped the limits of appropriate behaviour by acting in a manner which is likely to induce the commission of an offence, not only by those already engaged in criminal activity and who are ready and willing to commit further crimes, but also by normally law-abiding persons, for example, by threats, persistent entreaties, appeals to sympathy, friendship, the possibility of exorbitant gain, etc.

The defence, according to this view, is treated as procedural and may be raised as a bar to prosecution. The burden of production and persuasion on the issue of entrapment would appear to rest on the accused (142) and the issue is dealt with by the trial judge in the absence of the jury (143).

In 1962, the American Law Institute adopted the objective approach in section 2.13 of its Model Penal Code (Proposed Official Draft) (143a) which reads as follows:

(1) A public law enforcement official or a person acting in cooperation with such an official perpetrates an entrapment if for the purpose of obtaining evidence of the commission of an offense, he induces or encourages another person to engage in conduct constituting such offense by either:

(a) making knowingly false representations designed to induce the belief that such conduct is not prohibited; or

(b) employing methods of persuasion or inducement which create a substantial risk that such an offense will be committed by persons other than those who are ready to commit it.

(2) Except as provided in Subsection (3) of this Section, a person prosecuted for an offense shall be acquitted if he proves by a preponderance of evidence that his conduct occurred in response to an entrapment. The issue of entrapment shall be tried by the Court in the absence of the jury.

(3) The defense afforded by this Section is unavailable when causing or threatening bodily injury is an element of the offense charged and the prosecution is based on conduct causing or threatening such injury to a person other than the person perpetrating the entrapment.

Section 702(2) of the new federal code proposed by the U.S. National Commission on Reform of Federal Criminal Laws, A Proposed New Federal Criminal Code (1971) (143b) (also known as the Brown Commission Proposal) was modeled on the Model Penal Code.

It provides that:

[e]ntrapment occurs when a law enforcement agent induces the commission of an offense, using persuasion or other means likely to cause normally law-abiding persons to commit the offense. Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment.

Both the subjective and objective approaches to the defence of entrapment have been criticized and supported, although the latter approach has been supported by a majority of commentators (144).

Opponents of the subjective approach argue that it is based on a fictional legislative intent invoked to acquit guilty persons, because in every instance of police solicitation, no matter how persuasive the inducement, the act of the accused, combined with his intention to do the act, brings him within the definition of the law.

This approach, it is said, does not take into proper account the necessity to exercise control over police practices

particularly since the issue of entrapment is decided by the jury. Identical conduct by the police may lead to different results according to the subjective approach, which is dependant upon the predisposition of the particular accused. No matter how unsavoury police practices may be, the subjective defence of entrapment is not available to an accused who was ready and willing to commit offences of the nature charged.

Since willingness and predisposition may be demonstrated by evidence of the accused's previous criminal record, his reputation and character, it has been argued that police officers, in the presence of such evidence, may consider themselves to have a licence to engage in unconscionable practices. Consideration of evidence of the accused's past conduct is a dangerous practice, it has been contended, especially before a jury, as, in effect, the accused would be tried for past conduct in addition to the offence with which he stands charged (145).

Although the subjective approach does not focus on police conduct, it only applies to police entrapment, as opposed to entrapment by private individuals. And, although the subjective defence of entrapment would fail in the latter case, can it be said that the innocence or culpability of the accused varies according to the status of his entrapper (146)?

Opponents of the objective approach argue that statutes are defeated by granting immunity to persons induced by police officers whose conduct falls below certain acceptable

standards. The result may be that accused persons who are not "otherwise innocent", but are often chronic offenders, may be acquitted because the nature of the police inducement fell below these standards (147). On the other hand, accused persons who are "otherwise innocent" will not be acquitted when they commit crimes because of police inducements, if the police conduct meets the acceptable standards (148).

This objective approach therefore, is especially risky for particularly susceptible persons, such as reformed drug addicts, with low levels of resistance, since less inducement would be needed to provoke them to commit the offence. Similarly, the careless or momentarily weak person might be induced by police conduct that would not induce the wary, but predisposed and willing criminal, or the hypothetical law-abiding person (149).

### 3. Other Approaches

In light of the variety of police practices, and the goals and related considerations involved in formulating a defence of entrapment, it is not surprising that there are approaches to the defence beyond the scope of the traditional views, although they command less support.

One such approach is referred to as the "reasonable cause" or "reasonable suspicion" defence. The question that arises here is whether law enforcement officials, who direct their

efforts at an accused, do so upon reasonable grounds that he was engaged in criminal activity, even, it has been held in some cases, where the accused is predisposed (150). On the other hand, it has been suggested that the prosecution may rebut the subjective defence of entrapment by demonstrating that, at the time of the inducement, law enforcement officials had reasonable cause to suspect that the accused was engaged in the commission of crime and evidence of reputation and prior convictions and perhaps hearsay, may be admissible (151).

This "reasonable suspicion" approach to the entrapment defence has been severely criticized and is generally unsupported by higher authority (152). Dean Hitchler wrote:

The validity or invalidity of the defense of entrapment has by some courts been made to depend upon the non-existence or existence, respectively, of a reasonable belief on the part of the officer that the accused was, or was about to be, engaged in the commission of a crime. This test is incorrect. If the criminal intent originated in the mind of the defendant, he should not be excused because the officer had no reasonable grounds to suspect him, and if the criminal intent originated in the mind of the officer and he induced the defendant to commit the crime, the defendant should be excused even though the officer had reasonable grounds to suspect him. (153)

Another approach beyond the scope of the traditional views is known as the "furnishing-contraband" defence. This defence has been made available to an accused charged with possessing or selling contraband furnished to him by a government agent, even if the accused was predisposed to commit the offence (154).

In United States v. Russell (155), the Ninth Circuit Court of Appeals expanded the traditional notion of entrapment which focuses on the predisposition of the accused. As a result of an undercover agent supplying a scarce essential ingredient for the manufacture of the drug forming the basis of the accused's conviction, the Court of Appeals applied a novel defence founded upon an intolerable degree of governmental participation in the criminal enterprise.

This new defence was held to rest on either of two alternative theories. One theory would find entrapment, regardless of predisposition, whenever the government supplies contraband to the accused. The second theory would apply when a government investigator was so enmeshed in the criminal activity that the prosecution of the accused would be repugnant to the American criminal justice system. The Court of Appeals held that "both theories are premised on fundamental concepts of due process and evince the reluctance of the judiciary to countenance 'overzealous law enforcement' ". (156).

In the United States Supreme Court, Douglas J., with whom Brennan J. concurred, dissented from the Court's reversal of this judgement, concluding as follows:

Federal agents play a debased role when they become the instigators of the crime, or partners in its commission, or the creative brain behind the illegal scheme. That is what the federal agent did here when he furnished the accused with one of the chemical ingredients needed to manufacture the

unlawful drug. (157)

The majority of the Court however, held that the Court of Appeals was wrong when it sought to broaden the traditional basis of the entrapment defence. With respect to the participation of law enforcement officials, Rehnquist J. stated, on behalf of the Court:

The illicit manufacture of drugs is not a sporadic, isolated criminal incident, but a continuing, though illegal, business enterprise. In order to obtain convictions for illegally manufacturing drugs, the gathering of evidence of past unlawful conduct frequently proves to be an all but impossible task. Thus in drug-related offenses law enforcement personnel have turned to one of the only practicable means of detection: the infiltration of drug rings and a limited participation in their unlawful present practices. Such infiltration is a recognized and permissible means of investigation; if that be so, then the supply of some item of value that the drug ring requires must, as a general rule, also be permissible. For an agent will not be taken into the confidence of the illegal entrepreneurs unless he has something of value to offer them. Law enforcement tactics such as this can hardly be said to violate "fundamental fairness" or "shocking to the universal sense of justice"..... (158)

Since the predisposition to commit the offences was conceded by the accused, the Court held no difficulty rejecting a defence of entrapment pursuant to traditional principles based on the accused's predisposition to commit such offences. It was further noted that the accused was an active participant in an illegal drug manufacturing enterprise before the appearance of

the government agent and after the agent's departure.

This case is significant because the accused's principal contention for a reconsideration of the traditional entrapment defence was that the defence should rest on constitutional grounds. It was argued that in view of the high degree of involvement of the agent, the prosecution violated fundamental principles of due process. It was further argued that the same factors that led the United States Supreme Court to apply the exclusionary rule to illegal searches and seizures and confessions should be considered here in order to deter undesirable official conduct. But it was suggested here that this could be accomplished by barring prosecutions because of the police involvement in criminal activity.

In fact, such an argument might even look for support to the Supreme Court itself which has equated entrapment with the unlawful search and the coerced confession. In Sherman v. United States (159), Warren C.J., in referring to the practice of entrapment stated, on behalf of the Court, that "then stealth and strategy become as objectionable police methods as the coerced confession and the unlawful search" (160).

Rehnquist J. responded to these contentions, however, by pointing out that the principle reason behind the adoption of the exclusionary rule was the government's failure to observe its own laws. And he observed that:

Unlike the situations giving rise to the holdings in Mapp and Miranda, the Government's conduct here violated no independent constitutional right of the respondent. Nor did Shapiro violate any federal statute or rule or commit any crime in infiltrating the respondent's drug enterprise. (161.)

The Court rejected such a due process defence in this case but alluded to a potential future application as follows:

While we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction . . . the instant case is distinctly not of that breed. (162.)

It was pointed out, however, that the defence of entrapment is not of a constitutional dimension and further that Congress could adopt any substantive definition of the defence.

The furnishing-contraband defence and supporting arguments based on constitutional due process arose again in Hampton v. United States (163). As a result of selling, to government agents, heroin allegedly supplied by an informer, the accused was convicted of two counts of distributing heroin contrary to a federal statute. The Eight Circuit Court of Appeals, relying on Russell, affirmed, rejecting the accused's argument that if the jury believed that the drug was supplied to him by a government informer, he should have been acquitted under the defence of entrapment, regardless of his predisposition to commit the offences.

The question then, before the United States Supreme Court, was whether an accused may be convicted for the sale of contraband which he procured from a government agent or informer. In affirming the judgement, the Supreme Court again maintained the classic subjective approach to the defence of entrapment and rejected any view of entrapment that does not focus on the predisposition of the accused.

Rehnquist J., in a plurality opinion in which Burger C.J. and White J. joined, referred to Russell and stated:

In Russell we held that the statutory defense of entrapment was not available where it was conceded that a Government agent supplied a necessary ingredient in the manufacture of an illicit drug. We reaffirmed the principle of Sorrells v. United States, . . . and Sherman v. United States, . . . that the entrapment defense "focus[es] on the intent or predisposition of the defendant to commit the crime", Russell, . . . rather than upon the conduct of the Government's agents. We ruled out the possibility that the defense of entrapment could ever be based upon governmental misconduct in a case, such as this one, where the predisposition of the defendant to commit the crime was established. (164)

It was noted that the accused, the informer and the government agents acted in concert with one another but, rather than resist, the accused encouraged them. In fact, on appeal, the accused's predisposition was conceded which, it was recognized, rendered the defence of entrapment unavailable to him.

The accused relied, however, on language in Russell

referring to a situation "in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction" (165).

Rehnquist J., however, restricted the scope of the due process clause of the Fifth Amendment of the United States Constitution - alluded to in the above statement taken from his judgement in Russell - to those situations in which the government activity in question violates some protected right of the accused (166). In his view, no such violation occurred in this case.

In effect, the plurality opinion amounts to confining remedies with respect to the acts of government agents to the traditional defence of entrapment alone. By referring to the Court's remarks in Russell that the defence of entrapment "was not intended to give the federal judiciary a 'chancellor's foot' veto over law enforcement practices of which it did not approve" (167), this opinion appears to suggest that it would also foreclose reliance on the Court's supervisory power to bar conviction of a predisposed accused because of outrageous police conduct. If the police engage in illegal activity in concert with an accused beyond the scope of their duties, Rehnquist J. held that "the remedy lies, not in freeing the equally culpable defendant, but in prosecuting the police under the applicable provisions of state or federal law" (168).

In a separate opinion, Powell J., with whom Blackmun J.

joined, found Russell controlling and concurred in the result of the plurality. This opinion, however, contrary to the plurality, would not foreclose reliance on due process principles or on the Court's supervisory power to bar conviction of an accused because of outrageous police conduct, in every case, no matter what the circumstances, where the government is able to prove predisposition. He emphasized, however, that cases in which proof of predisposition is not dispositive would be rare.

In a dissenting opinion, Brennan J., with whom Stewart and Marshall JJ. concurred, adopted the objective approach to entrapment and held that the police conduct in this case would constitute entrapment as a matter of law. With respect to due process principles and the Court's supervisory power, Brennan J. agreed with the reasoning of Powell J. but felt that the police activity, in setting up the accused by supplying him with contraband and then bringing him to another agent as a potential purchaser, was beyond permissible limits and would amount to the government "doing nothing less than buying contraband from itself through an intermediary and jailing the intermediary" (169).

In holding that conviction is barred as a matter of law, where the subject of the criminal charge is the sale of contraband provided to the accused by a government agent, it was noted, in the dissenting opinion, that it would be sufficient to adopt this rule under the Court's supervisory power and leave to another day whether it ought to be made applicable to the states under the due process clause.

Although the constitutional due process approach to entrapment was examined in "furnishing-contraband" cases, the United States Supreme Court, in Russell, while asserting that entrapment is not a constitutional defence, did appear to leave room for an application of due process in situations plagued with outrageous police conduct (170). However, by confining its remarks on this issue, in Hampton, to those situations where the police activity deprives an accused of a protected right and by inferring that such a deprivation of rights would not be caused by entrapment (for which an accused has a defence), a plurality of the United States Supreme Court, in effect, would rarely prevent the conviction of a predisposed accused, regardless of the outrageousness of the police behaviour, thereby greatly weakening any constitutional basis (which would be binding on the states) for entrapment or quasi-entrapment defences.

The impact of Hampton is unclear, however. The result of the plurality opinion of three Justices was concurred in by the separate opinion of two Justices. The three dissenting Justices, although arriving at a different result, agreed with the latter two Justices that due process principles and the Court's supervisory power could find application in the face of outrageous police conduct, notwithstanding the predisposition of the accused. Therefore, five Justices would favour this latter view (171).

This position has been reflected in lower court decisions subsequent to Hampton, particularly those dealing with the recent "Abscam" sting operation conducted by the F.B.I. (172).

It would seem, then, that apart from the traditional defence of entrapment which focuses on predisposition, other doctrines such as constitutional due process may serve to control intolerable and outrageous police conduct in appropriate circumstances. And in light of Russell and Hampton, the classic subjective approach to the defence of entrapment itself, which aims to protect otherwise innocent persons from being lured into criminal activity rather than to control police conduct, will not soon be abandoned, at least in federal courts and, in the absence of legislation.

Chapter II

England

A defence of entrapment has never been recognized in England. Informers and police agents have always been regarded as necessary tools in the detection and investigation of crime. When they have committed abuses in bypassing acceptable limits, judges have confined themselves to judicial exhortation.

In Brannan v. Peek (173), a constable placed bets with a reluctant accused in an attempt to secure evidence for a prosecution under the street betting legislation then in force. Although the accused's appeal from conviction was allowed because the premises in question were not a "public place" within the meaning of the statute, Lord Goddard C.J. offered the following comments with respect to the police practice carried out in this case:

There is another point of much greater public importance. The court observes with concern and disapproval the fact that the police authority at Derby thought it right to send a police officer into a public house to commit an offence. It cannot be too strongly emphasised that, unless an Act of Parliament provides for such a course of conduct - and I do not think any Act of Parliament does so provide - it is wholly wrong for a police officer or any other person to be sent to commit an offence in order that an offence by another person may be detected. It is not right that police authorities should instruct, allow, or permit detective officers or plain clothes constables

to commit an offence so that they can prove that another person has committed an offence. It would have been just as much an offence for the police constable in the present case to make the bet in the public house as it would have been for the bookmaker to take the bet if in doing so he had committed an offence. I hope the day is far distant when it will become a common practice in this country for police officers to be told to commit an offence themselves for the purpose of getting evidence against someone; if they do commit offences they ought also to be convicted and punished, for the order of their superior would afford no defence. (174)

What then are the limits of acceptable police practices in England? In R. v. Birtles (175), the English Court of Appeal stated:

Before leaving this case, the Court would like to say a word about the use which, as the cases coming before the Court reveal, is being made of informers. The Court of course recognises that, disagreeable as it may seem to some people, the police must be able in certain cases to make use of informers, and further - and this is really a corollary - that within certain limits such informers should be protected. At the same time, unless the use made of informers is kept within strict limits, grave injustice may result. In the first place, it is important that the Court of trial should not be misled. (176)

And further on the Court drew the line as follows:

Secondly, it is vitally important to ensure so far as possible that the informer does not create an offence, that is to say, incite others to commit an offence which those others would not otherwise have committed. It is one thing for the police to make use of information concerning an offence that is already

laid on. In such a case, the police are clearly entitled, indeed it is their duty, to mitigate the consequences of the proposed offence, for example, to protect the proposed victim, and to that end it may be perfectly proper for them to encourage the informer to take part in the offence or indeed for a police officer himself to do so. But it is quite another thing, and something of which this Court thoroughly disapproves, to use an informer to encourage another to commit an offence or indeed an offence of a more serious character, which he would not otherwise commit, still more so if the police themselves take part in carrying it out. (177)

In Sneddon v. Stevenson (178), the appellant-accused had been convicted of soliciting for the purpose of prostitution, having discussed "business" with the respondent, a plain-clothes officer, when he parked his car near her on the street with a view to obtaining evidence on which to base a prosecution.

Lord Parker, C.J. stated:

No doubt this court does frown on the practice of police officers being employed to commit offences themselves, or indeed to encourage others to commit offences. Here, of course, it cannot be said, as I have already indicated, that the police officers were employed themselves to commit offences. In my judgment, the respondent did not commit an offence; in so far as it can be said that he did act so as to enable others to commit offences by making himself available if an offence was to be committed, it does seem to me that, provided a police officer is acting under the orders of his superior and the superior officer genuinely thinks that the circumstances in the locality necessitates action of this sort, then, in my judgment, there is nothing wrong in that practice being employed. (179)

The approaches taken by these English courts bring to mind the distinction between "the trap for the unwary innocent and the trap for the unwary criminal" (180). Police practices which merely provide opportunities for the commission of an offence which is already "laid on" appear to be justified whereas official instigation of an offence by a person who would not otherwise have committed it has met with the disapproval of English courts. Such a position is consistent with the prevalent subjective approach to the defence of entrapment adhered to in American federal courts and most state courts.

The obvious question then is what mechanisms have the English courts adopted to counter police practices of which they disapprove. In addition to civil suits or criminal prosecutions directed at overzealous police officers, English courts, although not acquitting an accused subjected to certain police methods, have preferred to condemn these methods by mitigating the sentence of an accused who is convicted as a result of their use.

In Browning v. J.W.H. Watson (Rochester) Ltd. (181), the accused, a company, was charged under road traffic legislation with unlawfully permitting a motor coach to be used as an express carriage without a road service licence. The accused had hired out a motor coach, which was not being used under such a licence, to a club to take members of the club to a nearby town to watch league football matches. On one occasion, unknown to the accused, two investigators posed as passengers and travelled

on the coach although they were not members of the club, so that the party conveyed was not a "private party" pursuant to a special proviso of the statute and thereby rendering the conveyance illegal.

The Queen's Bench Division found the accused guilty of an offence holding that the mere fact that the accused did not know that on one occasion there were persons in the coach who were not members of the club did not absolve them from liability since they should have taken precautions to see that only members of the club were on the coach. The involvement of the investigators, although not affecting the question of guilt or innocence, might mitigate sentence. As Lord Goddard, C.J. stated:

No court in England has ever liked action by what are generally called agents provocateurs resulting in imposing criminal liability. We must, therefore, hold that, in the case of the sixth information - i.e. the information relating to November 15, 1952 - there was an offence, but we remind the magistrates that it is possible for them to grant an absolute discharge and it is not necessary for them when they do grant an absolute discharge to order payment of costs. (182)

In R. v. Birtles (183), the accused devised a plan for raiding a post office while serving an earlier term of imprisonment. After his release, he was approached by an informer and later by a police officer who was introduced as "a top criminal from London". In order to assist the accused with his plan, the police officer supplied his car and either

he or the informer supplied an imitation firearm. Subsequently, the accused, together with another man, broke into a post office, the accused carrying an imitation pistol, however, the police were waiting and apprehended them.

The accused was later convicted of burglary and carrying an imitation firearm with intent to commit burglary for which he was sentenced to consecutive terms of three years and two years.

On appeal from sentence, the Court of Appeal pointed out that no one will perhaps ever know the exact truth but it seemed that there was a "real possibility" that the accused was encouraged by the informer and the police officer and further, that there was a "real likelihood" that he was encouraged to commit an offence which otherwise he would not have committed (184). The Court took into consideration this assumed encouragement in reducing the sentences by making the terms concurrent. And, as noted above (185), the Court took the opportunity to condemn police conduct which encourages another to commit an offence which he would not otherwise commit.

Birtles was followed in R. v. McCann (186). Here, an informer had been in touch with the accused, who was employed as a truck driver. The police, being suspicious, decided to lay a trap. The accused, the informer and a police officer met, the latter representing himself as a willing buyer of stolen goods. The accused later took his truck to an appointed place for the

transfer of stolen goods. There, he and another man with him were arrested. The accused was convicted of theft and he appealed his sentence of four years imprisonment.

It was contended on behalf of the accused in the Court of Appeal that while there was clear evidence of conspiracy, it was uncertain whether or not the actual theft was going to be committed had the police not provided the opportunity. The Court held that while the exact truth will never be known, there was "some possibility" that the accused might not have carried through the theft had the opportunity not been provided by the police. As a result, the Court dealt with the matter of sentence as if the accused had been charged with conspiracy and accordingly reduced the sentence to two years imprisonment.

It has been argued that police agents involved in the commission of an offence as instigators or participants should be treated as accomplices and the appropriate warnings with respect to corroboration given to the jury. The effect of this would be to reduce the effectiveness of the evidence of such persons, notwithstanding their purpose in procuring evidence upon which to base a prosecution. Such a contention has not been supported by authority (187).

The matter was raised in two cases dealing with treasonous activities related to Chartist groups. In *R. v. Dowling* (188), it was held that a person who entered into a conspiracy

for the sole purpose of detecting and betraying it, did not require confirmation as an accomplice, although his evidence should be received by the jury with caution. Similarly, in R. v. Mullins (189), it was held that a person employed by the government to mix with conspirators and who instigated offences, no further than pretending to concur with the perpetrators for the purpose of betraying them, did not require corroboration although his evidence was entirely for the jury to judge.

This reasoning was later followed in R. v. Bickley (190) and R. v. Heuser (191) and more recently in Sneddon v. Stevenson (192), referred to above (193), where Lord Parker, C.J. noted that the police officer placed himself and his car in such a position, that if the accused wished to solicit, there was full opportunity to do so. He added that although that did not mean that the officer committed an offence, even if he were a party to the offence, he would not be an accomplice requiring corroboration. After referring to Mullins, Bickley and Heuser, Lord Parker, C.J. stated:

It seems to me that, on a true reading of those cases, it can be stated that, though a police officer acting as a spy may be said in a general sense to be an accomplice in the offence, yet if he is merely partaking in the offence for the purpose of getting evidence, he is not an accomplice who requires to be corroborated. (194)

A more drastic application of evidentiary rules has been through the court's discretion to exclude evidence it considers to operate unfairly against the accused. Since, in entrapment cases, the prosecution usually relies on the evidence of police agents, its exclusion would be tantamount to an acquittal. Although police conduct was strongly criticized in Brannan v. Peek (195) and R. v. Birtles (196), police evidence was admitted whereas other courts have excluded such evidence.

In R. v. Foulder, Foulkes, and Johns (197), the accused were charged with unlawfully having L.S.D. tablets in their possession. An undercover police officer had approached Foulkes and persistently requested the drugs. As a result, the three accused later met the policeman, produced the drugs and were then arrested. It was submitted that the evidence of the police (the sole factual evidence) should be rejected by the court in the exercise of its discretion, since the police had incited the accused, or one of them, to commit the offence. The court excluded the evidence and on the prosecution's offering no evidence before the jury, the three accused were acquitted.

A similar situation arose in R. v. Burnett and Lee (198). Lee was introduced to an informer who told him that she was the agent of a foreign government and was interested in finding the source of forged currency and travellers cheques and obtaining them in large quantities. She also told Lee that in view of her diplomatic status, he would have nothing to worry

about. Lee said he did not think he could help her but would contact her if he came across anything. The informer persistently phoned Lee's home asking whether he had discovered the source.

After these calls, Burnett showed Lee a forged United States dollar bill which Lee then showed to the informer who then arranged to buy as many of the bills as Lee could acquire and to pay Lee a commission. Although Lee was concerned with the dishonesty involved, the informer assured him he had nothing to worry about and would be protected. After the two accused delivered 845 forged bills to the informer, they were arrested and later indicted for conspiracy to utter 845 forged notes. Burnett alone was charged with possession of the notes.

The court ruled the evidence inadmissible since there was a strong suspicion that the conduct of the informer tempted and encouraged the accused to commit crime. The conduct of the informer was regarded as that of an agent provocateur and the case was withdrawn from the jury on the general grounds of unfairness.

One would assume that by withdrawing the case from the jury, the court found there was insufficient admissible evidence to support a prima facie case. This is not clear from the report, however, and if the case was withdrawn from the jury "on the general ground of unfairness", it would amount to the court implicitly adopting entrapment as a substantive criminal defence (199).

Furthermore, in both cases, Foulder and Burnett, the inducements, persistent as they were, were directed to only one of the accused whereas the evidence was ruled inadmissible against the coaccused as well. Such a result would not even occur in the United States where only those persons induced by police agents may raise the defence of entrapment.

Any thoughts that a defence of entrapment existed in England were quickly put to rest in R. v. McEvilly and Lee (200). In this case, a police officer received information from an informer which led him rightly to believe that there was a plan already afoot to obtain a large quantity of intoxicating liquor, the theft of which had already been planned or which it was contemplated would shortly be stolen. The police officer subsequently met McEvilly, and in the light of the aforementioned information, put himself forward as a willing means of disposal of the property in order to secure evidence to prosecute the perpetrators. The accused were later convicted, McEvilly of receiving stolen goods, and Lee of dishonestly assisting in the retention of stolen goods. At trial, the judge admitted the police officer's evidence.

On appeal against the convictions, it was again contended on behalf of the accused that the police officer was an agent provocateur and therefore his evidence was either inadmissible or, if not strictly inadmissible, was of such a prejudicial character to the accused that the trial judge, in the exercise

of his discretion, should have refused to admit it. Although there was a possibility of "an" offence occurring after the police officer's meeting with McEvilly, it was submitted that there was no certainty of "the" offence occurring thereafter and what the officer did and said gave rise certainly to the possibility and perhaps to the probability that what subsequently happened would not or might not have otherwise happened.

The Court of Appeal ruled the evidence admissible. It agreed that evidence of minimal probative value and great prejudicial effect should be excluded by a judge in the exercise of his discretion in the interests of securing a fair trial and avoiding prejudice against an accused. The Court referred to Foulder and Burnett and indicated that the evidence in question in those cases was plainly admissible and ought to have been admitted.

Roskill L.J. stated:

In a case where, as here, the police evidence shows that an offence had been "laid on" and a plan for carrying it out was already clearly contemplated, the mere fact that (as the judge assumed - perhaps too favourably for the appellants) there was a possibility that the offence as it was ultimately committed might not have taken place but for the intervention of the police is not of itself a ground for the trial judge to exercise his discretion to exclude the evidence. (201.)

It was also contended, however, that the trial judge should have directed the jury that the doctrine of entrapment

afforded a defence. The Court of Appeal asserted that such a view had never been accepted in the English courts (202) and the Court was not prepared to do so in this case. However, the Court noted that even if such a defence did exist, the evidence fell far short of supporting it.

This is an accurate statement because it is abundantly clear that prior to the intervention of the police officer, there was a plan afoot to obtain by dishonest means, large quantities of liquor which were going to be delivered to a willing receiver for distribution. Therefore, in accordance with the classic American position, the accused were predisposed to commit the offence and the police only provided the opportunity for its commission. On the facts of this case, a defence of entrapment would not be available under the American objective approach either.

Entrapment was again raised in R. v. Healey and Sheridan (203). In this case, Healey, Sheridan and another person, all of whom had concern for the Irish Republican interest, in concert with an informer, planned a robbery. These persons, in the absence of the informer who said he could not leave his sick child, went through the early motions of the robbery and prior to going to the place of the intended crime, they were arrested by the police with all the impedimenta of armed robbers about them. The accused were convicted of conspiracy to rob and on appeal from their convictions contended that the informer had

acted as an agent provocateur and therefore, they were entitled to be acquitted on the basis of a defence of entrapment.

The Court of Appeal held that there was no evidence that the informer was an agent provocateur in the true sense of enticing another to commit an express breach of the law which he would not otherwise have committed. The Court, however, viewed the informer's duties of passing information to the police and cooperating with them as justifiable.

The Lord Chief Justice stated:

So far as the propriety of using methods of this kind is concerned, we think it right to say that in these days of terrorism the police must be entitled to use the effective weapon of infiltration. In other words, it must be accepted today, indeed if the opposite was ever considered, that this is a perfectly lawful police weapon in appropriate cases, and common sense indicates that if a police officer or anybody else infiltrates a suspect society, he has to show a certain amount of enthusiasm for what the society is doing if he is to maintain his cover for more than five minutes. Accordingly one must expect, if this approach is made by the police, that the intruder who penetrates the suspect organisation does show a certain amount of interest and enthusiasm for the proposals of the organisation even though they are unlawful. But, of course, the intruder, the person who finds himself placed in the organisation, must endeavour to tread the somewhat difficult line between showing the necessary enthusiasm to keep his cover and actually becoming an agent provocateur, meaning thereby someone who actually causes offences to be committed which otherwise would not be committed at all. (204)

With respect to the defence of entrapment, the Court of Appeal held that this doctrine, given "the unlovely name of 'entrapment'" (205) did not find a place in English law:

In fact, if one looks at the authorities, it is in our judgment quite clearly established that the so-called defence of entrapment, which finds some place in the law of the United States of America, finds no place in our law here. It is abundantly clear on the authorities, which are uncontradicted on this point, that if a crime is brought about by the activities of someone who can be described as an agent provocateur, although that may be an important matter in regard to sentence, it does not affect the question of guilty or not guilty. (206)

Although the Court found this determination to end the matter, it did state that it in no way approved of the action of agents provocateurs when their conduct crosses the line by enticing a person to commit offences he would not otherwise have committed.

In a sense, this latter comment by the Court is a restatement of the dominant American approach to the defence of entrapment, but, other than mitigation of sentence, no remedy is provided by the English Court of Appeal.

McEvilly and Mealey were followed by the Court of Appeal in R. v. Willis and others (207). A policeman who received some information about the existence of a drug supplying conspiracy contacted T who volunteered that he was involved with a "connection" and could supply cocaine. The police officer intimated

that he was prepared to buy some and T said it would take some time to obtain. The officer later contacted T on several occasions asking when the cocaine would be available and continued to encourage T to supply him. Eventually, W and others handed over cocaine to the police officer and were arrested and indicted for conspiring together and with persons unknown to supply drugs.

After arraignment, the accused applied unsuccessfully to the judge to rule that the evidence had been obtained unfairly and the case ought not to proceed, that there was a defence of entrapment available to them, and to exercise his discretion to exclude the evidence pursuant to R. v. Birtles (208).

The Court of Appeal doubted the existence of such a discretion, but, assuming it did exist, the Court held that there was no wrong exercise of discretion as the police officer had not encouraged the accused to commit a crime they would not otherwise have committed and had acted on the right side of the line drawn in Birtles.

With respect to entrapment, the Court simply adhered to the position in McEvelly and Mealey that there was no such defence in English law.

Another English case involving an informer is R. v. Ameer and Lucas (209). An informer had approached Ameer, whom he knew to be involved in social smoking of cannabis, with cocaine and asked him to help sell it. Ameer refused but after much

persuasion, agreed to procure cannabis for some enthusiastic purchasers. As a result, Ameer approached Lucas who obtained 50 lbs. of cannabis from a third party. Ameer and Lucas were later arrested in possession of a large amount of cannabis by police officers posing as willing buyers of the drug at a meeting arranged by the informer.

The Central Criminal Court took into consideration several factors and excluded the prosecution evidence because it had been obtained by the activity of an agent provocateur. Again, as in Foulder and Burnett, evidence appears to have been excluded against both accused although the pressing inducements were directed at Ameer only.

It is noteworthy that the discretion to exclude evidence due to police instigation of crime has been exercised in England, in the Foulder, Burnett and Ameer cases, by lower English courts and in factual situations where police conduct was excessive and would likely give rise to a successful defence of entrapment in the United States.

While the unavailability of a defence of entrapment in English law has been settled for some time, the issue of the admissibility of a police agent's evidence was still in dispute until 1979 (210). In that year, the House of Lords, in the landmark case of R. v. Sang (211) ruled that, although courts possess a limited discretion to exclude admissible evidence, this discretion would not operate because the police, an agent

provocateur or an informer, incited the accused to commit the crime alleged.

In Sana, the accused was charged with conspiring with others to utter forged United States banknotes and with possession of the banknotes. On his arraignment, the accused pleaded not guilty. Before the case for the Crown was opened, defence counsel applied to the court to hold a trial within a trial in order that it might consider whether the involvement of the accused in the offences charged arose out of the activities of an agent provocateur.

Defence counsel hoped to establish, by cross-examination of a police officer and by evidence-in-chief from an alleged informer, the following facts on which he proposed to rely. The informer, allegedly acting under police instruction, had approached the accused in prison and told him that he knew of a safe buyer of forged banknotes. After the accused's release from prison, a police officer (unknown to the accused), posing as a keen buyer of forged banknotes, contacted the accused and inquired whether the accused would sell him any. The accused was willing and a meeting was arranged in order to complete the deal. The accused and his associates went to the meeting place with a large number of forged United States dollar banknotes and walked straight into a police trap after which they were arrested. It was contended that the accused had been induced to commit offences which would not have been committed but for the activities of the informer and the police officer.

Counsel then hoped to persuade the trial judge to rule, in the exercise of his discretion, that the Crown should not be allowed to lead any evidence of the commission of the offences thus incited, and to direct that a verdict of not guilty be returned. Without hearing the evidence, the trial judge ruled that he had no discretion to exclude the evidence. The accused then pleaded guilty to the conspiracy charge and was sentenced.

An appeal against the trial judge's ruling was dismissed by the Court of Appeal. That Court certified that the following point of law of general public importance was involved in the decision:

Whether, a trial judge has a discretion to refuse to allow evidence, being evidence other than evidence of admission, to be given in any circumstances in which such evidence is relevant and of more than minimal probative value. (212)

A further appeal by the accused to the House of Lords was dismissed. Firstly, all the members of the House approved the decisions in McEvidly and Mealey and therefore, established beyond any doubt that there is no defence of entrapment in English law.

Their Lordships agreed that in the presence of the constituent elements of the offence, the accused is guilty. The fact that the accused was induced, and, as Lord-Diplock said, "the counsellor and procurer is a policeman or a police informer, although it may be of relevance in mitigation of penalty for the

offence, cannot affect the guilt of the principal offender"(213).

Lord Salmon held that "a man who intends to commit a crime and actually commits it is guilty of the offence whether or not he has been persuaded or induced to commit it, no matter by whom" (214).

Lord Fraser reasoned that a claim of inducement necessarily involves admitting the commission of the crime and although no finding other than guilty would logically be possible, "the degree of guilt may be modified by the inducement and that can appropriately be reflected in the sentence" (215).

Lord Scarman asserted:

It would be wrong in principle to import into our law a defence of entrapment. Incitement is no defence in law for the person incited to crime, even though the inciter is himself guilty of crime and may be far the more culpable. It would confuse the law and create unjust distinctions if incitement by a policeman or an official exculpated him whom they incited to crime whereas incitement by others, perhaps exercising much greater influence, did not. There are other more direct, less anomalous, ways of controlling police and official activity than by introducing so dubious a defence into the law. The true relevance of official entrapment into the commission of crime is on the question of sentence when its mitigating value may be high . . . . (216)

The unavailability of an entrapment defence was not challenged by the defence. Instead, it was contended that if the trial judge was satisfied at a trial within a trial, that

the offence was instigated by an agent provocateur acting on the instructions of the police and but for this, would not have been committed by the accused, the judge had a discretion to refuse to allow the prosecution to prove its case by this evidence.

The Law Lords rejected this argument agreeing that this discretion would not differ from recognizing entrapment as a defence available only at the discretion of the trial judge because if such evidence were excluded, the judge would then have to direct the jury to acquit.

As Lord Diplock queried:

If he exercised the discretion in favour of the accused, he would then have to direct the jury to acquit. How does this differ from recognising entrapment as a defence, but a defence for which the necessary factual foundation is to be found not by the jury but by the judge and even where the factual foundation is so found, the defence is available only at the judge's discretion. (217)

Lord Diplock commented further on this paradoxical contention as follows:

What it really involves is a claim to a judicial discretion to acquit an accused of any offences in connection with which the conduct of the police incurs the disapproval of the judge. The conduct of the police where it has involved the use of an agent provocateur may well be a matter to be taken into consideration in mitigation of sentence; but under the English system of criminal justice it does not give rise to any discretion on the part of the judge himself to acquit the accused

or to direct the jury to do so, notwithstanding that he is guilty of the offence. (218)

Viscount Dilhorne reasoned:

It would indeed be odd if, although proof that he was incited to commit an offence which he would not otherwise have done is no defence to a charge, he could not be convicted of the offence as a result of the exclusion of admissible evidence in the exercise of judicial discretion. (219)

And Lord Salmon, after pointing out that the defence of entrapment does not exist in English law, asserted:

This being the law, it is inconceivable that, in such circumstances, the judge could have a discretion to prevent the Crown from adducing evidence of the accused's guilt, for this would amount to giving the judge the power of changing or disregarding the law. (220)

Their Lordships therefore agreed that whatever the ambit of the judicial discretion to exclude admissible evidence, it did not extend to excluding evidence of a crime because the crime was instigated by an agent provocateur (221). It follows that Foulder, Burnett and Ameer were overruled.

On the more general question certified by the Court of Appeal, their Lordships stressed the overriding duty of the judge to ensure the accused has a fair trial. But fairness at trial, according to traditional common law principles, does not, apart from the confession exclusionary rule, include a concern for the methods of obtaining evidence which is to be used at trial.

Lord Diplock, after referring to the confession exclusionary rule, distinguished the methods of obtaining evidence from its use at trial, in relation to fairness at trial:

Outside this limited field in which for historical reasons the function of the trial judge extended to imposing sanctions for improper conduct on the part of the prosecution before the commencement of the proceedings in inducing the accused by threats, favour or trickery to provide evidence against himself your Lordships should, I think, make it clear that the function of the judge at a criminal trial as respects the admission of evidence is to ensure that the accused has a fair trial according to law. It is no part of a judge's function to exercise disciplinary powers over the police or prosecution as respects the way in which evidence to be used at the trial is obtained by them. If it was obtained illegally there will be a remedy in civil law; if it was obtained legally but in breach of the rules of conduct for the police, this is a matter for the appropriate disciplinary authority to deal with. What the judge at the trial is concerned with is not how the evidence sought to be adduced by the prosecution has been obtained but with how it is used by the prosecution at the trial. (222)

Lord Diplock and Viscount Dilhorne formulated the following two propositions in response to the certified question:

- (1) A trial judge in a criminal trial has always a discretion to refuse to admit evidence if in his opinion its prejudicial effect outweighs its probative value.
- (2) Save with regard to admissions and confessions and generally with regard to evidence obtained from the accused after commission of the offence, he has no discretion to refuse to admit relevant admissible evidence on the ground that it was obtained by improper or unfair means.

The court is not concerned with how it was obtained. It is no ground for the exercise of discretion to exclude that the evidence was obtained as the result of the activities of an agent provocateur: (223)

Although the other members of the House accepted these formulations they would have gone further, suggesting a departure from traditional concepts. Lord Salmon indicated that the category of cases where the judge's discretion may be exercised to ensure that the accused has a fair trial is not and never can be closed. Lord Fraser and Lord Scarman pointed out that the discretion is not limited to excluding evidence which is likely to have prejudicial effects out of proportion to its evidentiary value. Lord Scarman stated that the discretion is now a general one in the sense that it is to be exercised whenever a judge considers it necessary in order to ensure the accused a fair trial.

Lord Scarman added:

Each case must, of course, depend on its circumstances. All I would say is that the principle of fairness, though concerned exclusively with the use of evidence at trial, is not susceptible to categorisation or classification, and is wide enough in some circumstances to embrace the way in which, after the crime, evidence has been obtained from the accused. (224.)

This apparent extension of the court's discretionary power to exclude evidence savouring of self-incrimination is consistent with Lord Diplock's second proposition.

. The House of Lords in Sang has rejected both a defence of entrapment and a court's discretion to exclude admissible evidence due to entrapment practices.

          Although abusive police practices and existing and potential remedies to counter them have not gone unnoticed in England (225), aside from strong judicial disapproval, the only means of redress are civil suits, mitigation of sentence, prosecution of the entrappers and police disciplinary measures, all of which would have no effect on the guilt or innocence of the entrapped person.

Chapter III

Canada

As in other common law jurisdictions, Canadian courts have conceded that the use of stratagems by the police is often a required and appropriate investigatory practice, particularly where such practices provide opportunities for the commission of an offence or in other words, the catalyst for the transaction (226). Uncertainty arises, however, when these police practices cease to be mere investigatory methods but become methods of instigating the commission of criminal offences by persons who would not otherwise have so acted criminally.

Laskin C.J.C. raised the problem as follows:

The problem which has caused judicial concern is the one which arises from the police-instigated crime, where the police have gone beyond mere solicitation or mere decoy work and have actively organized a scheme of ensnarement, of entrapment, in order to prosecute the person so caught. In my opinion, it is only in this situation that it is proper to speak of entrapment and to consider what effect this should have on the prosecution of a person who has thus been drawn into the commission of an offence. (227)

Although entrapment situations have been before the courts in Canada on several occasions, there is no clear authority, statutory or otherwise, nor a rational foundation for a defence of entrapment. In some cases, judges have either

denied the existence of the defence or skirted the issue entirely, disposing of the case before them upon other considerations. In others, there has been a common feeling among judges that a person should not be subjected to such unconscionable practices and consequently, courts have groped for some legal principle or device in order to exonerate the accused.

A. Cases in which Entrapment has been Avoided

In Irwin v. The Queen (228), the accused was charged with supplying a drug knowing that it was intended to be used to procure the miscarriage of a female person. A policeman and policewoman, dressed in civilian clothes, entered the accused's drugstore. The man claimed that the woman with him, his girlfriend, was pregnant and he indicated their desire for a drug which would induce a miscarriage. The drug was provided and the accused was subsequently convicted of an attempt to commit the offence (229).

The accused appealed, contending that since it was never the intention of the policeman or policewoman that she take the drug, the accused could not "know" something which did not exist and accordingly could not be convicted. Appeals to the Alberta Supreme Court, Appellate Division, and the Supreme Court of Canada were dismissed, both Courts holding that it was the belief of the accused, the supplier of the drug, that the recipient

intended to use it to procure a miscarriage, which was material, regardless of the recipient's true intention (230).

In this case, entrapment was not mentioned at all and although the extent of the police persistence and of the accused's predisposition to commit the offence is unclear, it is probable that the accused was predisposed as there appears to have been little hesitation on his part. If this assumption is accurate, the police tactics would only have constituted a trap by providing an opportunity for the accused to do what he would have done anyway.

The facts in R. v. Woods (231) approach more closely an entrapment situation. Two off-duty policemen in plain clothes decided to investigate liquor offences outside their jurisdiction and without the sanction of their superiors. The officers then pretended to be Toronto gangsters in the market for stolen outboard motors purchaseable at a discount and exhorted the accused to steal such an item for them. It was clear that the accused was threatened with some violence if he did not produce a particular outboard motor. As a result of that approach and the threats, the accused broke into a marina and produced the outboard motor specified.

At the accused's trial for breaking, entering and theft, the Magistrate readily believed the evidence of the Crown witnesses and rejected inconsistent defence evidence. The Magistrate, however, referred to his previous knowledge of the credibility

and integrity of one of the two police officers involved, an important Crown witness. The Ontario Court of Appeal allowed an appeal by the accused and quashed his conviction on the ground that the Magistrate erred in assessing the credibility of a significant Crown witness by referring to his previous personal knowledge of the witness (232).

Entrapment was not considered as a defence. The Court was unanimously of the opinion that the conviction would have to be quashed and a new trial directed before another Magistrate. The Court did quash the conviction but, with Crown consent, did not order a new trial, and acquitted the accused in view of "the highly unusual circumstances giving rise to the charge" (233), and the fact that the accused had been in custody for some time. In this way, although not dealing directly with the police practices involved in this case, might it be said that the Court of Appeal implicitly expressed its disapproval of the police instigation of the offence?

#### 1. Accomplice Cases

Until recently in Canada, it was a well-established common law rule that a trial judge must caution the jury that it is dangerous to convict on the uncorroborated evidence of an accomplice (234). As a result, the courts, in several cases, have had to determine the issue of whether or not a police agent should be considered an accomplice. In Canada, as in England,

courts have generally ruled that police agents are not accomplices and their evidence does not require corroboration.

In an oft-cited case, Amsden v. Rogers (235), Amsden, a special constable responsible for detecting and prosecuting infringements of the liquor laws, induced the accused, a brakeman on a train proceeding from Medicine Hat, Alberta to Swift Current, Saskatchewan, to supply him with some liquor stating that he was too sick to go to the buffet car for it himself. The accused obliged and was charged with illegally selling liquor.

The only fact in dispute was whether or not the liquor was sold in Saskatchewan, as the constable claimed, or in Alberta, as the accused claimed. The Police Magistrate dismissed the case on the ground that the special constable was an accomplice and his evidence therefore required corroboration of which there was none.

An appeal to the Supreme Court of Saskatchewan was dismissed because the prosecution had not discharged its onus in establishing the commission of the offence in Saskatchewan.

However, the court ruled that the special constable was not an accomplice and did not require corroboration (236). The court added that if police activity is carried out for the inducement rather than the detection of crime, the weight given to the evidence of the police officers involved may be affected and hence, their evidence should be examined more carefully (237).

Mr. Justice Lamont stated:

I do not say that in their efforts to secure evidence in cases where crimes have been committed the officers of the law are not sometimes entitled to resort to pretence and even false statements. There may be cases where that is necessary in the interests of justice to enable them to secure the evidence, and the fact that an officer has resorted to subterfuge may not cast discredit upon the evidence which he discovers by means thereof. But, in my opinion, it is a different matter where the false statements are made, not for the detection of crime committed but for the purpose of inducing its commission, and inducing its commission in order that the person making these statements may be able to prefer a charge for the offence committed at his solicitation. The evidence of such a witness must, in my opinion, be scrutinized with great care. (238)

And further:

Every case must be determined in the light of its own particular facts, which will not be without bearing on the credit that is to be given to the testimony of the witnesses called. I have, however, no hesitation in saying that where the zeal (or otherwise) of an officer of the law leads him to make false statements to secure the commission of an offence in order that he may be able to prosecute the offender, his evidence must be weighed in the light of the possibility that the same motives might have a tendency to induce him to colour his testimony in order to secure a conviction. (239)

R. v. White (No. 1) (240) involved an alleged offer to sell a motor vehicle, by the accused, a car salesman, to an undercover police officer, in excess of the price fixed by certain war orders.

Laidlaw J.A. commented on the evidence of the police officer, as follows:

That he resorted to false representations or disguise for the purpose of obtaining the evidence does not necessarily discredit him or invalidate his evidence. Indeed, it would be difficult, if not impossible, for officers of the law to prevent or successfully combat crime of certain kinds (including offences charged against the accused), except by employment of measures involving masquerade, deceit and false representation ... A police officer or detective is not in the same class as an accomplice and the rule of practice as to corroboration of evidence given by accomplice is not applicable to such persons ....

Nevertheless, it is proper to scrutinize carefully the testimony against a prisoner given by policemen, constables, and others employed in the suppression and detection of crime. (241)

The rule regarding corroboration of accomplices, therefore, does not apply to police officers or their agents even though they have instigated, provoked or joined in a crime (242). However, although not accomplices, their actions, as is the case with any other witness, may bear on their credibility and a direction to the jury in this regard would be proper. Such reasoning is consistent with the recent decision of the Supreme Court of Canada in Vetrovec and Gaja v. The Queen (243) where Dickson J., on behalf of the Court, held:

I would hold that there is no special category for "accomplices". An accomplice is to be treated like any other witness testifying at a criminal trial and the judge's conduct, if he chooses to give his opinion, is governed by the general rules. (244)

Although, in these "accomplice" cases, the courts have examined the corroboration rule in the presence of police inducements or instigation, no consideration has been given to the effect of such inducements, or instigation on the guilt or innocence of the accused (245). The entrapper, police officer or not, might still be subject to criminal prosecution in virtue of sections 22 and 422 of the Criminal Code. In practice, however, prosecuting authorities would unlikely lay charges in view of the circumstances, notwithstanding the law precluding reliance upon motive as a defence (246).

## 2. Agency Cases

In a perhaps unique "solution" to the problem of entrapment, several courts have, until recently, acquitted accused persons by invoking civil law rules of agency in that the accused acted as an agent for a police officer or undercover agent (247). These cases deal primarily with the sale or traffic of liquor or drugs. Again, however, police inducements or instigation have not, in themselves, been determinative of the guilt or innocence of the accused.

In O'Sullivan v. Michus (248), two police constables went to a restaurant which did not have a liquor licence and ordered meals. Before the meal had been served, they asked the waiter to get them \$1 worth of beer. The waiter thereupon went

to a nearby licenced premises, purchased three bottles of beer for \$1 and delivered them to the constables.

The accused, the owner of the restaurant, was acquitted by a Police Magistrate on a charge of selling liquor through his employee. An appeal to the Saskatchewan District Court was dismissed, the court holding that the waiter acted solely as the agent of the constables, the purchasers (249).

In R. v. Warren (250), the accused, a taxi driver, answered a call for a taxi and was met by two men, one of whom was an undercover R.C.M.P. officer, and two girls. At the instigation of the undercover officer, the accused agreed to purchase some liquor for him. This officer then handed one of the girls \$20 after which the accused proceeded to a premises to which the accused claims he was directed by the girls who accompanied him. There, the accused purchased the wine from one Mackey. Later, the accused and the girls met the officer at a previously arranged location and the accused gave the officer a bottle of wine and change, retaining the cost of the wine and cab fare.

The accused was convicted of unlawfully selling liquor. An appeal from this conviction to the Saskatchewan District Court was allowed and the accused acquitted. The District Court held that there was no "sale" by the accused since there was only one transaction, a sale by Mackey to the undercover officer and the accused was merely the agent of the purchaser, the undercover officer, and did not act for himself.

Geatros D.C.J. stated:

The evidence does not support the contention that the appellant purchased the bottle of wine for himself in the first instance and then resold it to Cameron. Mackey was the seller and Cameron was the buyer and the appellant was the agent of the buyer. (251)

In another case, R. v. Madigan (252), an undercover police officer developed an acquaintance with the accused over a period of time and often asked the accused, although unsuccessfully, to obtain drugs for him. On the date in question, some time after the officer's earlier requests, the accused asked him if he still wanted some drugs. The officer expressed an interest whereupon the accused approached a woman in the restaurant in which they were seated, talked to her briefly and returned to his table indicating to the officer that she had drugs. The officer told the accused that he wanted some of the drugs and the woman then joined them. On the direction of the accused, the officer handed the woman \$2 and she left to obtain change. Upon her return, she gave the accused the change and he, in turn, passed it on to the officer. The woman then passed the drugs to the officer under the table. Although the accused attempted to obtain drugs from two other sources, he was unsuccessful.

The accused was subsequently charged, under the Food and Drugs Act (253), with trafficking in a controlled drug contrary to section 32(1) (254). The trial court acquitted the accused on the ground that his actions did not come within the

definition of "trafficking". A Crown appeal from this acquittal was dismissed by the Ontario Court of Appeal. That Court reasoned that since it was not an offence to purchase controlled drugs, no criminal liability would attach to the acts of the accused if he had been the purchaser. It was held to follow that similarly, no criminal liability attached to such acts if they were on behalf of the purchaser as his agent.

Jessup J.A. stated, in a majority judgement:

In my opinion, on the peculiar facts of this case, it cannot be said they are consistent only with the accused acting as an agent either for the vendor or for both the vendor and the purchaser; they are equally consistent with him acting as an agent for the purchaser alone. Accordingly, there must be a reasonable doubt that what the accused did was "for the purpose of aiding" the vendor in the words of section 21(1)(b), i.e. that his intention was to aid the vendor rather than simply to aid the purchaser. What the section says is "for the purpose of aiding" not "with the effect of aiding". (255)

In determining whether an accused acted for a purchaser or a vendor, courts have considered several factors including the good faith of the accused, the source of illegal liquor or drugs provided to an undercover agent and whether or not the accused earned a profit from the transaction (256).

In Pasquier v. Neale (257), an English case later followed in R. v. Berdino (258), the accused was the keeper of a restaurant without a liquor licence and part owner of a nearby wine shop. A waiter showed a customer, an undercover

excise officer, a wine list and after the officer made a selection and paid for it, the waiter went to the wine shop, purchased the wine and returned to the restaurant with the wine which he then served to the officer.

The Magistrate convicted the accused of selling wine by retail without having a proper licence, holding that there was a sale of wine to the officer by the servant of the accused. An appeal to the Court of King's Bench was dismissed, Lord Alverstone C.J. stating that there was evidence to support the view taken by the Magistrate.

This case is distinguishable from other "agency" cases in that the evidence did support the finding that the accused was an agent of the vendor. The officer was initially given the wine list by an employee of the accused and was subsequently provided with wine from a shop in which the accused had an interest. In other cases referred to above, the officer made the initial request for the illegal liquor or drugs and the accused had no financial ties to the source.

In R. v. Mah Qun Non (259), although an undercover police officer ingratiated himself with the accused and won his confidence, leading to a drug transaction, the British Columbia Court of Appeal held that the accused was the vendor solely or jointly with an undisclosed vendor and was properly convicted of illegally selling opium.

The question of agency was ultimately settled by the Supreme Court of Canada in Poitras v. The Queen (260) in 1973. In this case, Arsenault, an undercover R.C.M.P. agent, assuming the role of a singer with a rock band, expressed his desire for some "hash" (hashish) to one Little. Shortly after, Little introduced Arsenault to the accused who, after a request for the drug, indicated that he was on his way to get some and the price was \$8 a gram. Arsenault paid the accused and returned to his singing job. Little said he would accompany the accused to obtain the drug and then deliver it to Arsenault; which he did. The accused was charged with trafficking in hashish (cannabis resin) contrary to section 4(1) of the Narcotic Control Act (261).

The trial court acquitted the accused, holding that the facts did not establish trafficking beyond a reasonable doubt as the evidence was as consistent with the fact that the accused was acting for Arsenault alone as it was consistent with the fact that he was delivering or selling or trading in drugs or offering to do so. The Manitoba Court of Appeal allowed a Crown appeal, set aside the verdict of acquittal and registered a conviction.

Monnin J.A. stated, in a majority judgement:

The transaction was plain. Arsenault indicated a desire to purchase a narcotic. Through Little he was introduced to the accused who inquired as to the quantity needed, fixed the price, accepted the money in payment thereof and arranged for the delivery to Arsenault by Little. To import into this simple transaction the principles of agency either for the purchaser or agency

for the buyer and to balance the consistencies thereof, as did the learned trial Judge, is simply to confuse an otherwise straight-forward operation of purchase and sale. (262)

In dismissing the subsequent appeal by the accused, the Supreme Court of Canada rejected this notion of "agency" in criminal law. In a majority judgement, Dickson J., with whom Martland, Judson and Ritchie JJ. concurred, referred to the judgement of the trial court and stated:

The fallacy, if I may say so, in this reasoning lies in the fact that even if the appellant can be considered to have been "acting for" Constable Arsenault, it does not follow that he could not also have done one or more of the acts which constitute "trafficking" under the Narcotic Control Act. It was argued on behalf of the appellant that the words "to buy" do not appear in the definition of "trafficking" under the Narcotic Control Act; therefore a mere purchaser does not traffic and an agent for the purchaser comes under the same protective umbrella. I do not agree. One cannot apply the civil law of "agency" in this context. "Agency" does not serve to make non-criminal an act which would otherwise be attended by criminal consequences. Even if the appellant could be said to be the "agent" of Constable Arsenault for the purposes of civil responsibility, his acts may, none the less, amount to trafficking in narcotics or aiding in such trafficking. If, as the trial Judge would seem to have found, the evidence was consistent with the accused delivering or selling or trading in drugs or offering to do so, the fact that he may have been acting as an agent for Arsenault would not exculpate him. (263)

And further:

On the evidence, it was undoubtedly open to the Judge to find that there were present the three essential elements of any sale: the agreement or bargain, the payment of the price and, through the aid of Little, the delivery or conveyance of the property. An alternative view is that the accused aided and abetted an unidentified vendor in selling, and Little in delivering the narcotic to Constable Arsenault. Which ever view one takes, the appellant did unlawfully traffic in a narcotic contrary to the provisions of the Narcotic Control Act. (264)

Laskin J., as he then was, held in a dissenting opinion, that one who buys a narcotic does not by that act engage in trafficking and similarly, one who assists in a purchase is not guilty of trafficking through the effect of section 21 of the Criminal Code. Although he agreed that the accused could have been an agent for Arsenault and still be guilty of trafficking if he had committed one or more of the acts which constitute trafficking such as delivering the hashish to his principal, he held that an agent for a purchaser who does not engage in any of these acts could not be guilty of trafficking.

Laskin J.'s dissent was based on a different view of the facts from the majority of the Court although his reasoning was not necessarily inconsistent with the majority opinion (265). The evidence, he believed, supported no other purpose than that of aiding in a purchase, Little and the unknown seller being the traffickers.

In the situations above, the "agency" defence can, henceforth, only apply where the accused acted for a purchaser

and did none of the acts constituting trafficking or sale pursuant to the applicable legislation. In view of the restricted circumstances which may underlie the "agency" defence and the Supreme Court of Canada decision in Poitras, possible future applications of this defence in entrapment situations appear to be almost non-existent.

3. Cases involving the Absence of a Constituent Element of the Offence

In certain situations which may potentially amount to entrapment, a defence may succeed on the basis that the constituent elements of the offence have not been made out, often a consequence of the intervention of the police or the intended victim.

In R. v. Kotyszyn (266), the accused was charged with conspiring to commit an abortion and with attempting to conspire for the same purpose. A policewoman, posing as a pregnant patient desiring an abortion, went to the accused's house. After the accused examined her, an arrangement was entered into whereby the accused was to perform an abortion on her for a fee. Later, the policewoman returned with her "boyfriend", a policeman, and paid the accused. She then went into the accused's bedroom where the necessary instruments to perform an abortion were laid out. When the accused entered saying she was ready to perform the abortion, the police officers identified themselves.

At trial, the accused was acquitted of both charges. An appeal by the Crown from the dismissal of the charge of attempting to conspire was dismissed by the Quebec Court of King's Bench, Appeal Side. The Court held that there was no common design between two or more persons since the only parties were the accused and the policewoman and the latter had no intention of undergoing the operation, the illegal act (267). Consequently, there was neither a conspiracy nor an attempt to conspire (268).

In Patterson v. The Queen (269), the accused was charged with keeping a common bawdy-house. Detective Leybourne, a morality squad officer, telephoned the accused, using an assumed name, and made an instigative sexual proposition to her. In the result, it was agreed that she should procure another girl who would arrange suitable quarters where both could sexually entertain the officer and friends (also morality squad officers but unknown to the accused). Later, Detective Leybourne, two other policemen, the accused and another girl arrived at a home. Detective Leybourne paid the accused for the expected sexual favours and the use of the premises. Once the policemen were stripped to their undergarments in the presence of the accused and the other girl, they identified themselves as police officers.

At trial, the accused was convicted and an appeal to the Ontario Court of Appeal was dismissed. A further appeal to the Supreme Court of Canada was allowed and the conviction was

quashed. The Supreme Court held that the premises in question were not a common bawdy-house within the meaning of section 168(1) (now section 179(1)) of the Criminal Code, because there was no evidence of any reputation in the community and there was no evidence of the use of the premises for prostitution on any other occasion than the one which was the subject of this prosecution. Moreover, there was no evidence upon which the Magistrate could have properly based an inference that the place had been habitually so used.

In both Kotyszyn and Patterson, a constituent element of the offence was absent and therefore the accused were acquitted. Although the courts declined to comment upon the propriety of the police methods utilized, it does not appear that the accused were "entrapped". One may assume that the police did no more than the ordinary solicitation of a suspected abortionist or prostitute, as in each case their propositions were accepted with no hesitation by the accused (270).

In an effort to detect thieves, police officers and property owners or their agents (e.g. servants or employees) have participated in offences, in some manner, or merely acquiesced in their commission. English courts, in a series of cases, have determined that a distinction must be drawn between those cases in which an owner of property or his agent pretending to concur with an accused in the commission of an offence, physically hands his property to the accused, and those cases where the owner or

his agent put his property, e.g. money, in a certain place so that the intending thief may take it himself (271).

In the former situation, the accused would be acquitted since he did not carry away the goods against the will of the owner (272), whereas in the latter situation the accused would be convicted since, although the owner assented to the facilitation of the commission of the offence, he did not consent to the accused's removal of his property (273).

Similarly, in the case of burglary (breaking and entering), an accused who entered a door of a house opened by a servant, acting under the instructions of the police (his master being out of town) and pretending to concur with him in the commission of the offence, has been acquitted (274). On the other hand, an accused has been convicted where he opened a door to a shop with a key obtained with the assistance of a servant acting on the instructions of his employer (the owner), and the police (275).

In these cases, the criminal intent seems to have originated with the accused, although usually a servant would feign participation at the instructions of his employer or the police in order to apprehend the offender. The facts in Lemieux v. The Queen (276) are of a different twist. One Bard contacted a police officer to inform him that he had information about a gang which had been involved in several break-ins, the members of which the police were anxious to arrest. Bard and two officers drove to a house where a feigned break-in could be staged. The

police obtained the key to this house from the owner who agreed to cooperate in the scheme, and then staked out the premises.

The next day, a car driven by the accused, under the direction of Bard, passed the house. A third man, Guindon, was in the vehicle as well. The car circled the block and was then parked near the house. Guindon and Bard got out while the accused remained behind the wheel. Guindon and Bard then went to a side door where Guindon did the actual breaking with a screwdriver. The police were waiting inside and the three men were subsequently arrested and convicted of breaking and entering a dwelling house. Bard was eventually acquitted by the Ontario Court of Appeal whereas appeals by Guindon and Lemieux were dismissed.

A further appeal by the accused Lemieux, to the Supreme Court of Canada was allowed and he was acquitted. Judson J., who delivered the judgement of the Court, viewed the facts as follows:

It is quite clear that he and Guindon were solicited by Bard, the informer, to undertake this break-in. The police had secured the key from the owner of the house, who was willing to cooperate in this scheme. In the present case Lemieux had no thought of breaking and entering this house until he was approached by Bard, who was acting under police instruction. The police had obtained the consent of the owner to use the premises in the hope that they would be able to arrest certain criminals. (277)

And further:

The police set the whole scheme in motion through Bard. He was to lead a man who at first had no intention of breaking and entering, who went to the scene of the crime at Bard's instigation and who was led into the trap by Bard. (278)

The Court allowed the appeal because:

On the evidence it was open to the jury to find that the owner of the house had placed the police officers in possession of it giving them authority to deal with it as they pleased and that they had not merely consented to Bard breaking into it with the assistance of others, but had urged him to do so. To break into a house in these circumstances is not an offence. (279)

The Court held therefore, that the actus, which was in fact committed, was no crime at all due to the actions of the police who, with the assent of the owner of the house, not only consented to the break-in but instigated it. Thus, police involvement in the commission of an offence resulted in an acquittal but only because of the absence of an essential ingredient of the offence, i.e. the actus reus, due to the consent of the intended victim, the owner, to the breaking and entering. The reasons for the acquittal cannot in this way support a defence of entrapment.

In fact, this case, as opposed to those discussed above, discloses a classic case of entrapment. The accused

had no predisposition to commit such an offence but was induced by an informer acting under police instructions. Notwithstanding these facts, the Supreme Court held:

Had Lemieux in fact committed the offence with which he was charged, the circumstance that he had done the forbidden act at the solicitation of an agent provocateur would have been irrelevant to the question of his guilt or innocence. (280)

Therefore, the Supreme Court of Canada would have upheld the conviction if the police had planned and implemented their scheme without the consent of the intended victim.

One may ask why, if the complete offence was not proved in this case, the Court did not consider convicting the accused of the offence of attempted breaking and entering (281). Or, was the Court implicitly censuring police excesses (282)?

Otherwise, this decision, based as it is on the absence of a constituent element of the offence charged, rather than upon the accused's predisposition or the extent of improprieties in police conduct, suggests that efficient but proper police behaviour will be treated in the same way as an overt departure from the common and accepted standards of fairness. And since, in obiter dicta, the Supreme Court of Canada held that the solicitation of an agent provocateur is irrelevant to the question of guilt or innocence, one would think that police conduct amounting to entrapment has been ruled out as a viable

defence. An examination of cases in which entrapment has been considered by Canadian courts will demonstrate what effect these obiter comments have had.

B. Cases in which Entrapment has been Considered

Several Canadian courts considering a defence of entrapment have held that it was not established by the facts.

In R. v. Timar (283), while entrapment was not expressly mentioned, the court certainly had it in mind. One Lynn, a member of a plumbing and heating association, believed that the accused was involved in illicit dealings in licences, whereby for a fee, he would procure master heating licences from the Licencing Commission by bribing the supervisor of licences. Lynn advised the police and they agreed to lay a trap. Lynn then contacted the accused who, despite being unsuccessful in having Lynn reveal his source as to the accused's name and telephone number, agreed, for a fee, to obtain a licence for him. After Lynn paid the accused on the understanding that he was to pick up his licence the following week, the police arrested the accused.

Although the accused was charged with defrauding Lynn of \$1,000, he was convicted, after trial, of an attempt to commit the offence because Lynn was not deceived by the representations of the accused. Lynn had paid the accused for the sole purpose

of securing evidence against him.

Dupont Co. Ct. J. (Ont.) agreed that Lynn was an agent provocateur and commented as follows:

Our laws have long recognized the necessity to employ "agents provocateurs" for the protection of society. This is primarily due to the existence of types of offences, the detection of which would, without such "police traps" as they have been called, be virtually impossible, and these special methods need to be employed if these crimes are to be controlled.

It falls of course upon the Courts to see that no abuse results in its operation. Each case of course must be dealt with on its own facts. (284)

The judgement does not indicate, however, what control a court may exercise in the event that these police methods become abusive.

His Honour pointed out that "the police had very good reason to suspect that the accused was engaged in illegal activity, and so the trap was laid to detect and stop such conduct" (285). This reasoning brings to mind the American "reasonable suspicion" approach to entrapment (286), although the judgement does not make it clear whether or not reasonable suspicion by the police of the accused's illegal activity is essential to the acceptability of the police trap. In assessing the evidence, however, His Honour applied a subjective test concluding that the police did no more than provide an opportunity for a willing person to commit an offence:

I am satisfied on the evidence that the entire arrangement between the police and Robert Lynn was entered into for the sole purpose of detecting existing designs of the accused and to make them known and stopped for the benefit of society. In this case the accused was a ready and willing party to the transaction and was not lured into conduct that was in any way contrary to his own wishes. He was not lured into acting, but merely given the opportunity to perform and he was quite prepared to do so. Not only does such conduct not offend public policy, but public policy has been held to excuse same. (287)

While a defence of entrapment was not excluded, the facts of this case dispensed with its application. No guidelines were laid out however, for the mode of application of an entrapment defence should it arise of the facts.

In an oft-cited case, R. v. Ormerod (288), the accused was charged with two counts of trafficking in narcotics and one count of trafficking in a controlled drug. The accused claimed he was concerned about the effect of drug use on persons he knew and since he wished to supply information about traffickers, certain Toronto city policemen eventually put him in touch with Sergeant Rozmus of the R.C.M.P.

The accused told Rozmus about "Dennis from the race track", a person who worked at race tracks and solicited the purchase of drugs. An arrangement was made between the accused and Rozmus for the accused to pass on names and descriptions of persons involved in the drug traffic. The accused telephoned Rozmus five or six times to pass on information, which, however,

was of no value, and after learning that "Dennis" was a fellow policeman, Rozmus terminated the agreement. The accused claimed that all communications with Rozmus ceased at the request of the accused's father.

The three transactions resulting in charges against the accused, were carried out by the accused with "Dennis", the undercover officer. In the case of both narcotic transactions, which took place during the approximate six weeks of the accused's arrangement with Rozmus, it was "Dennis" who sought to buy; the accused did not seek to sell.

The accused was convicted of all three charges at trial and appeals from the convictions to the Ontario Court of Appeal were dismissed (289). With respect to the controlled drug charge, contentions on behalf of the accused to the effect that the accused sold out of fear that he would be found out and his previous "undercover" activities exposed if he should refuse to procure the drug for "Dennis", were rejected. With respect to the other charges, arguments on behalf of the accused claiming immunity as a result of public duty (since, it was contended, he was or honestly believed he was an agent of the R.C.M.P.) and further lack of mens rea due to the absence of an illicit purpose were also rejected (290).

A further defence submission in relation to the narcotic trafficking charge was that even if the accused trafficked, he was so induced or entrapped by the police and ought not to

have been convicted.

Laskin J.A., as he then was, in a majority judgement, examined this contention in relation to the power of the courts as follows:

To uphold the defence, which goes not to the issue of whether the crime has been committed but to the issue of whether the methods employed by the police should be tolerated, it would be necessary for the Courts to exercise a dispensing jurisdiction in respect of the administration of the criminal law. There is no statutory warrant for such a jurisdiction, but that does not mean that a Court is powerless to prevent abuses, be they abuses in the lodging of the prosecution itself or in the establishment of the foundation for the prosecution. (291)

Laskin J.A. recognized the existence of an inherent jurisdiction of the court to prevent abuses by staying proceedings. However, he left open until an occasion when squarely raised, the question whether or not this extended to an overriding judicial discretion to stay proceedings because of police complicity in the events which led to it. The Ontario Court of Appeal decision in R. v. Osborn (292) was relied on as an illustration, however that decision was subsequently reversed by the Supreme Court of Canada (293).

In keeping with the authorities, Mr. Justice Laskin held that entrapment does not arise where the police merely provide opportunities to a willing person to commit an offence. And in this case, he found that the conduct of "Dennis", the

undercover agent, did not go beyond this limit.

Without taking a position on the existence of a defence of entrapment, the following comments were offered in a passage which has been quoted in several subsequent judgements:

I do not think it wise, in the present case, to come to any conclusion on the acceptability of entrapment in general as a defence. However its elements may be defined, I do not think it arises merely because an undercover policeman provides the opportunity or gives the occasion for an accused to traffic in narcotics. Moreover, I cannot say that there was here any such calculated inveigling and persistent importuning of the accused by Dennis from the race track as to go beyond ordinary solicitation of a suspected drug seller. This much, at least, the police are entitled to do in seeking to discover peddlers of prohibited narcotics. (294)

This reasoning is not sufficiently precise so as to support either a subjective or objective approach to entrapment. One may ask if, in this case, there had been "such calculated inveigling and persistent importuning ... as to go beyond ordinary solicitation" (295) whether the Court would have applied a defence of entrapment. The Court, one may argue, would not have distinguished entrapment on the facts without anticipating a potential application. Hence, might one deduce the existence of a defence of entrapment from the remarks of Laskin J.A.?

After Ormerod, several courts faced with the issue

of entrapment have ruled that it had no application to the facts before them.

In R. v. Sirois (296), the accused was charged with trafficking in a narcotic after selling narcotics to a policeman - who was working with an informer - despite some initial hesitation. Counsel for the accused contended that this was a case of entrapment citing Sorrells v. United States (297). Greschuk J. of the Alberta Supreme Court, as it was then called, held that neither the informer nor the police officer

implanted in the mind of the accused the disposition to commit the offence in question or to induce its commission in order that they might prosecute, and there was no reasonable doubt whatever in my mind as to this fact and on this point. (298)

In R. v. Pratt (299), an undercover police officer purchased liquor from the accused, a taxi driver, who later delivered it to the officer's motel room. The accused was charged with selling liquor contrary to a liquor ordinance of the Northwest Territories. One of the points raised by the defence was that the officer, by his instigation, entrapped the accused thereby causing an abuse of process of the court. It was contended therefore, that proceedings should be stayed. The Magistrate referred to R. v. Timar (300) and convicted the accused, rejecting this and other defence contentions.

On the issue of entrapment, His Honour Magistrate

de Weerd (N.W.T.), as he then was, held that the police methods did not conflict with the Quimet Committee (301) and did not constitute entrapment as defined in Sorrells v. United States (302) and Sherman v. United States (303). In arriving at this conclusion, he viewed the facts as follows:

The defendant in this case need not have dealt with Constable Ross. Money was offered only after he had indicated his willingness to deal and after he had stated his price. There was no persuasion or duress, nothing to lead him to act contrary to his inclinations. In the circumstances known to the Court the conduct of the defendant was not instigated by the constable in that the defendant had a pre-existing intention to commit the offence when the opportunity arose, and the conduct of the constable, which is alleged to have induced the defendant's conduct, did not go beyond affording the defendant an opportunity to commit the offence charged. (304.)

The case of R. v. Hopkins (305) is somewhat different in that the alleged entrapper, one Hingley, was a 13 year old boy with no connection to the police in his actions. Hingley and two young friends decided to let the accused - a 39 year old man who had harassed him on the telephone - proceed to a stage of sexual impropriety and then report him. The accused took Hingley into the woods, exposed his penis, grabbed the boy and pulled down his (Hingley's) pants. Hingley then fled towards his friends. The police arrived and arrested the accused who was later convicted of indecent assault of a male.

In response to the contention that the accused was entrapped, Cooper J.A., (N.S.), who delivered the judgement of the Court, stated:

Apart from the fact that entrapment has not, generally speaking, been recognized in this country as a defence, in order that there may be an entrapment, it is not sufficient that mere opportunity to commit the crime be afforded. A person alleged to have entrapped another must have initiated action with the object of enticing that other to commit an express breach of the law which he would not otherwise have committed. (306)

Even if the actions of Hingley did constitute entrapment in accordance with this subjective view, he was a lay entrapper and hence, at least pursuant to American jurisprudence, the defence would not be available (307).

In R. v. Haverstock (308), a police officer, after observing the accused and his companion in a deserted parking lot, formed the opinion that they had been drinking and advised them to wait a while and not to drive in that condition. Shortly after, the officer noticed the accused driving a car. Following a chase, the accused was apprehended and he provided breath samples. On appeal by the accused from his conviction for driving with over .08 alcohol in his blood, one of the defence submissions was that the accused was entrapped.

The argument with respect to entrapment was that

the officer encouraged the men to drive while they were not in a condition to do so and then took advantage of the way in which he had misled them in order to implicate the accused in the commission of an offence. O'Hearn Co. Ct. J. (N.S.) came to the same conclusion as the trial judge who found against this contention and he held therefore that the objection based on entrapment could not be supported (309). His Honour also rejected a defence of mistake of fact and dismissed the appeal. It is clear though that on the facts as found by the trial court and concurred in an appeal by the County Court, consideration of entrapment was out of the question.

In R. v. Ridge (310), the British Columbia Court of Appeal had to determine, inter alia, the application of a defence of entrapment, assuming it was available, to persons other than those entrapped.

It was contended that the entrapment of one Williams, an associate of the accused but not tried with him, involved the entrapment of the accused. It was argued that the accused was both vicariously and as an agent and employee of Williams, the subject of the same acts of entrapment. The Court of Appeal held that the defence of entrapment was not available to the accused on the sole ground that it may have been open to Williams:

Here the evidence might support a finding of "calculated inveigling or persistent importuning" in respect of Williams. But it does not support a similar finding in respect of the appellant. It is for this

reason that the appellant seeks to invoke agency to raise this defence. Assuming, without deciding, that Williams might have raised a defence of entrapment, if such a defence is available in law, the appellant cannot do so. On the evidence, even if Williams entered into a conspiracy to traffic and did traffic in MDA or a salt thereof, as a result of "calculated inveigling or persistent importuning" once he was persuaded to do so, he arranged with Ridge to participate in the criminal acts. Ridge, on the evidence, did participate, but not as a result of any "calculated inveigling or persistent importuning". Thus, on the evidence it is not open to him to raise this defence, even if it was available to Williams. (311)

The Court also rejected a defence of abuse of process in the circumstances, expressing doubts as to its existence as a substantive defence, as contended by the defence.

The Court's reasoning in this case is logical and would restrict an entrapment defence, if available, to the person directly induced by the police. By not extending the defence to third persons, the Court avoided opening the proverbial floodgates to any accused who has had contact with an entrapped person. Other than adopt language from R. v. Ormerod (312), however, the Court did not take a position on the existence or foundation of a defence of entrapment or abuse of process.

In R. v. Gauthier (313), the Quebec Court of Sessions of the Peace, without taking a position on an application of the defence of entrapment, saw no need to invoke it as a result of

the accused's readiness to commit the offences.

After the accused and an informer became friendly, the informer began to ~~contact~~ him often, inviting him to parties where narcotics were in abundance. However, the informer soon advised the accused that he needed a large supply of cocaine for some friends from Quebec City and requested his assistance. The accused refused but after numerous telephone calls from the informer pleading with him to find a supplier, the accused acquiesced. The accused found a supplier for the proposed transaction and brought a sample of cocaine to the informer, who introduced the accused to his two friends, actually undercover agents. After the "friends" examined the sample they made arrangements with the accused for a big purchase of cocaine from the accused's supplier. Although the first transaction did not come to fruition, the accused, upon the prodding of the informer, obtained another sample from the same supplier destined to trigger a transaction with the undercover agents. The accused and the supplier were arrested once the transaction was carried out. The accused was convicted of possession of a narcotic, trafficking in a narcotic and conspiracy to traffic in a narcotic (314).

His Honour Sessions Court Judge Ouellette recognized the need for police traps. He classified them into:

1. Ordering traps whereby the police provide opportunities for a criminal to expose himself by the commission of an offence;

2. Probing traps designed to instigate illicit activity by a person from the criminal milieu;
3. Unwarranted traps designed to provide opportunities for the commission of an offence to persons who have done nothing illegal.

His Honour reasoned:

Nous pouvons déceler trois principales sortes de traquenards de police.

Le plus fréquent, qu'on pourrait qualifier de traquenard commun, est celui qui consiste à repérer celui qui se cache et qu'on sait être le criminel recherché. On lui tend alors les pièges qu'il mérite pour la protection de la société. En second lieu, nous avons le traquenard exploratoire qui consiste à susciter des circonstances compromettantes contre un individu dont le comportement et les milieux fréquentés émettent des relents criminogènes. En le faisant tomber, la police ne fait alors que confirmer la sagacité de ses soupçons. La société s'en trouve alors bien servie puisqu'on confond ainsi un de ses membres agissant à son détriment. Mais que dire de l'individu qui n'agissait pas illégalement et qu'on invite, par un informateur de police à agir ainsi? Que dire du traquenard gratuit qui consisterait à tendre un piège à un individu qui n'a encore rien entrepris d'illégal? C'est exactement le cas de l'accusé en cause, rien dans la preuve de la poursuite n'indiquant que les auspices, sous lesquels Dominique a lié amitié avec lui, recelaient un début de compromission donnant des motifs de le suspecter de quelque infraction criminelle que ce fût. (315)

In determining the propriety of the latter category of trap, His Honour would consider the nature of the crime and the difficulty in suppressing it. The vulnerability, fear,

ignorance and naiveté of the accused, he would regard as affecting criminal intent. At first glance, His Honour's reasoning approaches the American "reasonable suspicion" test (316), but a closer analysis reveals that by considering characteristics of the accused, he is actually examining the predisposition of the accused, a significant ingredient of a subjective test of entrapment.

Thus although His Honour found that the accused was subject to a trap of the third variety above, he further found, after quoting from R. v. Kirzner (317), that the accused did not need the inducements of the informer to commit the acts as he carried them out of his own free will:

*Non! vraiment! L'accusé n'avait nul besoin d'un traquenard pour poser les actes libres et autonomes révélés tant par la preuve de la poursuite que par son propre témoignage.* (318)

In so concluding, the court considered the expected profit the accused anticipated as well as his worldliness, experience and absence of fear of the informer.

The courts in all of the above cases in which entrapment, although considered, was distinguished, clearly, with the exceptions perhaps of Ormerod (319) and Ridge (320), adopted a subjective approach to the defence based as it is on the accused's disposition. The evidence in these cases disclosed police traps whereby the police merely provided opportunities

to willing persons to commit an offence (321). In this way, the commission of an offence is facilitated rather than instigated. Such activity is indubitably permissible. While recognizing such a distinction, the courts, in the above cases, have not offered a judicial pronouncement of a comprehensive explanation or basis for a defence of entrapment should it arise on the facts.

Other courts, however, regardless of the factual settings, have ruled out any notion of a defence of entrapment altogether.

In R. v. Chernecki (322), an undercover police officer entered a hotel beer parlour and approached the accused, a waiter. The two had known one another for several years although the accused was unaware that the officer was a policeman. The officer, passing himself off as a drug user, requested drugs and the accused indicated that he would have to go to a certain café as he himself had none. They then went to the café and the officer paid the accused for the drug and gave him a commission. Upon their arrival, the accused approached the café while the officer remained in the car. Upon the accused's return, they drove back to the hotel, the accused indicating that he had the narcotic in his possession but that the officer would have to accompany him to his room and take a "fix" with him. As they

were proceeding to the room, the accused was arrested and searched but no narcotics were found.

At trial it was found that the actions of the accused constituted trafficking as defined in section 2(i) of the Narcotic Control Act (323) and the accused was convicted under section 4(1). An appeal from the conviction was unanimously dismissed by the British Columbia Court of Appeal.

It was argued that the officer entrapped the accused into his illegal actions and further that as a result of such conduct on the part of the officer, the Court should hold that the prosecution of the accused constituted oppression and an abuse of the Court's process and, in the exercise of its inherent jurisdiction, quash the conviction.

Bull J.A., with whom Tysoe J.A. concurred, rejected these submissions holding that the facts did not support entrapment. He referred to language used in R. v. Ormerod (324) and stated:

It is my opinion that there is no substance to the appellant's submissions. The evidence accepted by the learned Judge was quite incapable of establishing any calculated inveigling or persistent importuning or inducing to raise the spectre of "entrapment" or any oppression or abuse of court process. The officer, performing his duty as an undercover policeman on the drug squad, approached the appellant to purchase drugs in the usual way. There were no inducements or pleading involved, and the fact stressed by the appellant that the officer and he were well known to each other does not support

the suggestion of "entrapment" or a foundation for an allegation that a prosecution involved oppression and abuse. (325)

He then added in obiter dicta, that he was of the firm view that entrapment did not constitute a general defence to a charge in Canada. The obiter remarks of Judson J. in Lemieux v. The Queen (326) were cited. Bull J.A. further rejected the existence of a court's power to deal with abuses in view of the Supreme Court of Canada decision in R. v. Osborn (327).

This reasoning is curious because, after holding that the facts did not support entrapment, Bull J.A., contrary to other judgements cited above, took a firm position on the issue and categorically denied the existence of the defence, at that time, in Canada. The obvious question is that if he was certain as to the unavailability of the defence (or of abuse of process), why did he bother to consider whether the evidence was capable of establishing any "calculated inveigling or persistent importuning or inducing to raise the spectre of 'entrapment' or any oppression or abuse of court process" (328)?

In a short concurring judgement, Branca J.A. held that the record was barren of any evidence to prove entrapment and accordingly he expressed no opinion on that ground of appeal.

In R. v. Burke (329), the Prince Edward Island Supreme Court, Appeal Division, dismissed an appeal from a conviction for trafficking in a narcotic. The facts involved

a sale of narcotics by the accused, a physician, to an undercover R.C.M.P. officer in what appeared to be a case of ordinary solicitation of a willing vendor. One of the grounds of appeal was that the trial judge erred in holding that entrapment was not a defence to a criminal charge.

Prior to defence counsel's opening address to the jury, the trial judge ruled that entrapment did not constitute a general defence which would warrant an acquittal or a stay of proceedings although it might go to mitigation in the event of a conviction. The trial judge added that "elements" of entrapment might be introduced as evidence and have the effect of going to the credibility of Crown witnesses or of allowing the jury, should it convict, to recommend mitigation of sentence to the trial judge. He added further, however, that:

... if upon the completion of all of the defence evidence, the trial Judge were of the opinion that the activities of the police went beyond reasonable limits and this would be a matter of discretion for the trial Judge, to the degree that the legal process has been flagrantly abused to the degree that there was in effect, no *actus reus* on the part of the accused, then it would be within the prerogative of the trial Judge to order a stay of proceedings and discharge the Jury. (330)

This latter portion of the trial judge's reasoning merely reiterates the fact that a court cannot convict in the absence of a constituent element of the offence as in Lemieux v. The Queen (331). The trial judge, for some reason however,

would see a stay of proceedings rather than an acquittal (or a conviction for attempt) as the appropriate remedy in such circumstances.

The Appeal Division approved the ruling of the trial judge and dismissed the appeal but added correctly, citing Lemieux, that if, as a result of police conduct, no actus reus is established, the accused should be acquitted. The Lemieux decision appears to have been referred to out of context. It was not at all based on entrapment. Judson J.'s obiter remarks certainly suggest the contrary. The Supreme Court of Canada acquitted Lemieux because all of the ingredients of the offence were not made out. This resulted from the cooperation of the intended victim in the police operation and not from a stand on police practices such as the entrapment of Lemieux, which clearly took place.

Therefore, other than confirm the result in Lemieux which, as mentioned, exists apart from a defence of entrapment, the Burke decision, by restricting the effect of entrapment to the credibility of Crown witnesses and mitigation of sentence, appears to reject entrapment as an independent substantive defence.

Another case in which the defence of entrapment was rejected is R. v. Baxter (332). The accused was charged with two counts of trafficking in cocaine. An undercover R.C.M.P. officer had been acting as a barman and/or doorman in order to

make arrests in the traffic of cocaine. On at least 40 occasions over 4½ months, the officer asked the accused if he knew anyone who was selling cocaine, without saying more. Eventually, the accused acted as a middleman for the officer and introduced him to a vendor.

At trial, the accused tried to bring as a witness, a psychiatrist, to prove that he was an easily influenced person, in order to bolster a possible defence of entrapment. After a review of the pertinent cases and relying upon Judson J.'s obiter remarks in Lemieux, Barrette-Joncas J. of the Quebec Superior Court ruled that there was no defence of entrapment in Canada (333). Even assuming that such a defence did exist, she found that it did not arise on the facts and consequently, ruled the proposed evidence irrelevant.

As steadfast as the courts above have been in their stance against the defence of entrapment, other Canadian courts have accepted the defence although they have not been consistent in adopting a legal basis for it.

In R. v. Shipley (334), an undercover R.C.M.P. officer took up residence at a Y.M.C.A., where he met the accused, also a resident, and over a two month period they became friends. The officer was of the opinion that the accused was naïve and looked up to him (the officer) and the officer had no reason to suspect he was engaged in drug trafficking. The officer testified that

he was not interested in procuring evidence against the accused but, in order to locate drug suppliers, he advised the accused that, because of his financial difficulties, he had no alternative but to push drugs.

The officer then asked the accused to get drugs for him, however the accused refused. The officer admitted that he would not pay back \$10 that he had borrowed from the accused until he got the drugs. The accused acquiesced and was charged with trafficking in a narcotic. The defence applied in the Ontario County Court for an order staying proceedings on the ground that the accused was induced by a police officer to commit the offence.

McAndrew Co. Ct. J. found that without the inducements held out by the officer, the accused would not have indulged in such an offence.

His Honour cited Sherman v. United States (335) and stated:

However, the fact remains that this was a fellow who was naive, the officer had won his friendship and his respect and the lad looked up to him. I think it is fair to say that, without the inducements held out by the officer, the accused would not have indulged in an offence against the Narcotic Control Act, ... and the inducements were that the officer wished, for perfectly proper reasons, to ascertain if Shipley had drug suppliers and, if so, who they were. Among other inducements he was told quite frankly that he would not get his money back until a transaction went through.

There is a well-recognized distinction between an agent provocateur, one who simply provides the opportunity for a person to commit a crime that of (sic) his own volition and intent and without encouragement he intended to commit when opportunity presented itself, and an agent who instils in the mind of a man or a person the idea of committing an offence that he otherwise would not have intended and then persuades and encourages him to carry out that intent. The distinction may be put in another way, in that the agent provocateur provides the occasion or milieu in which to discover the existing or pre-existing designs of the person accused. That is a function in the prevention and detection of crime, but as stated in the United States Supreme Court decision, that function does not include the manufacturing of crime. (336)

While the Sherman reasoning was followed to define entrapment, its basis for the defence was not adopted. His Honour held that the court has an inherent jurisdiction to stay proceedings to prevent an injustice to the accused. He relied upon the Ontario Court of Appeal decision in R. v. Osborn (337) and stated that "it would be unfair to this accused, and oppressive and an abuse of the process of the Court, to permit this prosecution to continue" (338). As a result, rather than acquit the accused, the court stayed proceedings according to the abuse of process doctrine. Although proceedings were stayed as a result of entrapment, the Osborn decision which supported this remedy in the event of an abuse of process, was subsequently reversed by the Supreme Court of Canada (339).

Entrapment was recognized as a defence, apart from the doctrine of abuse of process, by the British Columbia

Provincial Court in R. v. MacDonald (340). In this case, the accused, charged with trafficking in a narcotic, sold narcotics to an informer, a known drug addict, only after the latter implored the accused to sell on the basis that she was ill and in need of drugs right away, and broke into tears when, at first, the accused refused because he only had enough for himself.

Selbie Prov. J. referred to Shipley where entrapment was held to be an abuse of process of the court, but he considered entrapment to be a matter of fact and not of law. Citing R. v. Ormerod (341) and focusing on the accused's lack of predisposition to commit the offence, His Honour stated:

In the present case it is quite obvious that the defendant would not have sold but for the histrionics and persistent oppor-  
tuning of the accused by the third party informer. I think this goes far beyond, as Laskin J.A. says, "ordinary solicitation of a suspected drug seller". When a person shows a reluctance to sell, as the defendant did, and only sold under this type of pressure placed upon him by a known drug addict, then I think the matter goes beyond, as Laskin J.A. says, "ordinary solicitation". (342)

The resulting acquittal is consistent with the view expressed by His Honour that entrapment is a matter of fact. According to this view, in the event of a jury trial, the jury would assess the evidence and, if it found entrapment, acquit the accused. On the other hand, entrapment viewed as an abuse of process of the court, as in Shipley, would be dealt with by the court alone, as a matter of law, and if entrapment constituting

abuse of process were established, proceedings would be stayed by the court.

The Macdonald judgement, although defining entrapment, does not indicate the legal basis underlying the existence of the defence.

Entrapment was directly applied as a defence, again by the British Columbia Provincial Court, in R. v. Haukness (343). The accused, charged with trafficking in a narcotic, although extremely reluctant and despite several refusals, sold marijuana to an undercover police officer only after persistent entreaties over a period of approximately fifty minutes.

Cronin Prov. J., relying upon several American decisions, including Sorrells v. United States (344) and Sherman v. United States (345), defined entrapment as follows:

Now as to what constitutes entrapment. First of all, what is entrapment? The best definition that I can find of entrapment is that entrapment is the act of officers or agents of the government in inducing a person to commit a crime not contemplated by him, that is, by that person, for the purposes of instituting a criminal prosecution against him. (346)

His Honour held that the police conduct in this case constituted entrapment and as a result, he acquitted the accused. The stated definition adheres to the prevailing American subjective approach. However, later in his judgement, after quoting extensively from the minority opinion of Frankfurter J.

in Sherman, His Honour indicated that the test adopted in that opinion - and it is an objective one - is the proper test in both Canada and the United States. This is not only inconsistent with his previous definition of entrapment but is incorrect because, as mentioned, Frankfurter J.'s opinion did not then, nor does it now, represent the view of the majority of the United States Supreme Court (347).

Entrapment was applied as an independent substantive defence in Haukness, however, it is difficult to clearly ascertain the legal basis adopted by the court. After alluding to confusion on this point in Canadian decisions, Cronin Prov. J. noted that Parliament, in passing the Narcotic Control Act (348) did not anticipate that the police would induce non-disposed persons to commit those offences. He referred to the confession exclusionary rule and pointed out the responsibility of a criminal court to oversee and control the enforcement of the criminal law where the conduct of police officers or other persons in authority is such as to bring the criminal law into disrepute as in the case of entrapment. His Honour added that to convict the accused would be contrary to the principles of the administration of justice.

In dealing with the court's responsibility to control the police and by referring to Frankfurter J.'s opinion in Sherman, Cronin Prov. J. approached a reasoning that has been contended to justify a stay of proceedings due to abuse of

process. This remedy with its justification is analogous to the proposed bar to prosecution adopted by proponents of the American objective approach to entrapment. But His Honour stated that the defence of entrapment did not rest on the doctrine of abuse of process, which he said, dealt with certain procedural matters and was not concerned with police abuse or misconduct in the investigation or enforcement of the criminal law (349).

It appears as if due to the acknowledged lack of a legal basis for an entrapment defence in Canada, His Honour raised an imbroglio of developed tests and rationales and attempted to found his judgement upon them notwithstanding the illogicality of such reasoning. Nevertheless, as a result of the court's focus on deliberate police inducements of an accused with no previous criminal design, one may extract from this decision the court's repugnance to entrapment and an application of an independent defence of entrapment which approximates a subjective approach without, however, an intelligible foundation.

In R. v. Sampare (350), a different effect was given to entrapment. The accused was approached by two undercover fisheries officers regarding the sale of fish. The accused stated that such a sale was illegal but offered to give the officers a fish. The officers pressed the accused to sell the fish to which pressure the accused finally acceded. As a result, he was charged with unlawfully selling fish taken in non-tidal waters. At trial, it was contended on behalf of the accused

that the officers' evidence of the induced sale was inadmissible.

Cook Prov. J. (B.C.) acknowledged that a technical defence of entrapment did not exist in Canada although he felt that it was open to trial courts to decide, on the facts of each particular case, whether there has been an abuse in the use of agents provocateurs. Whether or not there has been such abuse he considered to be a question of fact. His Honour noted that there was no evidence that the accused was a suspected offender of fish laws. He referred to the pressure exerted by one of the officers on the accused and found that "an offence was committed which would not have been committed had he not actively instigated it" (351). In His Honour's view, "it is not necessary for the investigation of crimes of this kind to take on those tactics" (352). Consequently, His Honour held that it would be an abuse to accept this officer's evidence and he further held, apparently due to the exclusion of evidence, that there was no evidence of a sale.

The exclusion of the evidence of the officer as a result of his instigation is a novel approach, however, it is unfounded. The Supreme Court of Canada decision in R. v. Wray (353) held that courts have no discretion to exclude relevant and admissible evidence of substantial probative value because it was obtained improperly or illegally. The accused was acquitted in Sampare, not as a result of a defence of entrapment, but because once the undercover officer's evidence was excluded, there

was no evidence of a sale.

In R. v. Rippey (354), the Nova Scotia County Court accepted the defence of entrapment and the accused, charged with trafficking in a narcotic, was acquitted. An undercover police officer accosted the accused and a friend and asked them where he could get narcotics. The two youths replied that they did not know. The officer persuaded the two companions to get into his car and would only let them out after the accused's friend agreed to go look for marijuana at a particular diner. The officer drove to the diner and the accused and his friend went inside. Upon rejoining the officer, the accused sold him some marijuana.

The trial judge found that the accused had no prior intention of committing the offence of trafficking that night and further that the accused was induced to commit the offence by the "calculated inveigling and persistent importuning" of the officer. In arriving at these conclusions, McLellan Co. Ct. J. considered the fact that the accused was an unsophisticated youth, with no prior experience in drug transactions and committed the offence in order to get rid of the officer who had become a "pain" to him.

His Honour reviewed the authorities, in particular R. v. Kirzner (355), in which pursuant to section 7(3) of the Criminal Code, the defence of entrapment was left open by a minority of the Supreme Court of Canada.

His Honour applied a two-fold subjective test. Firstly, he held that a lack of predisposition was a prerequisite in order to benefit from the defence and the accused was not predisposed to commit the crime in this case. Secondly, he considered the effect the police inducements had on the accused. As mentioned, he found that the accused was merely trying to get rid of the officer with a view to relieving himself from what had become an embarrassing situation. McClellan Co. Ct. J. pointed out that had the accused been older, more sophisticated and more knowledgeable in the ways of the drug trade, he would not have reached the same conclusion.

The second aspect to this subjective test appears to be no more than an aid to the trial judge in determining the predisposition of the accused (as in R. v. Gauthier (356)). While the defence was properly applied to a set of facts constituting entrapment and the accused was accordingly acquitted, other than refer to Kirzner, His Honour did not allude to any legal or theoretical basis of the defence. If it was meant to attach to section 7(3) of the Criminal Code, this was not expressed (357).

There are no Canadian appellate court judgements in which entrapment has been accepted and applied as a defence or an aid to the accused in some manner. In two higher court decisions, entrapment has been recognized although found to be

unsupported by the facts before the respective courts.

In R. v. Bonnar (358), the proprietors of Piercey's, a building supplies concern, suspecting thefts by the staff, hired one O'Brien, a private investigator, to conduct an investigation. The store procedure was that all cash sales had to be transacted by the cashier and not by a sales clerk. O'Brien attended at the store, representing himself to be a contractor, and inquired of the accused, an employee, about the price of certain lock sets. O'Brien complained that the price quoted was excessive. The accused then offered to sell some at a "good price" and asked whether cash was to be paid. O'Brien replied he would pay cash if the price was right. The accused then accepted cash from O'Brien for the locks at a great deal less than their value. The accused put the money in his pocket and placed the locks in O'Brien's truck. A few days later, O'Brien returned to the store and a similar transaction was entered into with the accused for some paint.

The accused, charged with two counts of theft under \$200, was acquitted at trial. The trial judge held:

Therefore, it is my opinion there is clear evidence that there was implanted in the mind of the accused by Mike O'Brien's actions and words the inducement to commit the offence in order to provide grounds for the prosecution of the accused. (359)

After reviewing the authorities on a Crown appeal, Macdonald J.A., on behalf of the Nova Scotia Supreme Court Appeal Division, held that abuse of process encompassed entrapment, which he viewed subjectively, the effect of which would be a stay of proceedings or a discharge of the accused. His Lordship stated:

I am of the opinion that proceedings should be stayed or the accused discharged if it is clear that the accused did not have a prior intention or predisposition to commit the offence with which he is charged but committed it only because the conduct of the agent provocateur was (as Laskin, J.A., said in R. v. Ormond (sic) "...): such calculating, (sic) inveigling and persistent importuning, as went beyond ordinary solicitation. In such a situation there is an abuse of the process of the Court and something that is contrary to public policy. Indeed, such conduct by an agent provocateur strikes at the very foundation of the system and administration of criminal justice in a free and democratic society and just cannot be permitted or condoned. (360).

The Court allowed the Crown appeal and convicted the accused being of the view that the accused was not entrapped but was afforded the opportunity to commit the offence. Macdonald J.A. stated:

In the present case I am of the opinion that it cannot be said that Piercey's "instigated" the theft of the lock sets and paint by the accused. It is true that they passively made it possible for him to do so if he were so inclined but they or their agent O'Brien did not actively instigate the commission of the offence by the accused. In other words,

and as I said earlier, the accused was not induced to commit the offence. He was given the opportunity and a reason to steal the articles and seized such opportunity because of his predisposition to do so. It was never suggested to him that he steal the articles. He did so on his own initiative because he had a "ready market" in Mr. O'Brien. (361)

In R. v. Sabloff (362), the accused acted as an intermediary between the vendor and purchaser (an undercover officer) of narcotics. She claimed that she had been a heroin addict for several years, that she had never before trafficked in any narcotic and that she had been illegally entrapped by an informer then known to her as a heroin addict, who, despite several refusals by the accused, repeatedly telephoned her claiming to be physically ill from withdrawal symptoms, desperately begging for help and in great need of heroin or morphine for herself and a friend (the officer) and his girlfriend.

Upon the termination of all of the evidence, defence counsel presented to the presiding Quebec Superior Court in the absence of the jury, a motion for a stay of proceedings on the basis of abuse of process. That motion was dismissed in view of the Supreme Court of Canada decision in Rourke v. The Queen (363).

Greenberg J. examined the law relating to entrapment and not finding himself bound by any decision, he submitted the defence of entrapment to the jury. His Lordship held that the defence of entrapment presupposes a finding of fact by the jury that the offence was committed. He accordingly instructed the

jury that if it found that the Crown had proved beyond a reasonable doubt each and every element of either or both of the offences charged, it was then to consider the defence of entrapment which the accused would have the burden to establish by a preponderance of evidence. In such event the jury had to choose between either:

(a) the present accused was previously disposed and had a pre-existing intention to commit the crime of trafficking in narcotics, and the agent provocateur and the police undercover agent, by ordinary solicitation, simply provided her with the opportunity or occasion to do so (as the Crown would have them believe);

or

(b) she was not previously so disposed and had no pre-existing intention to traffic in narcotics, but was instigated and induced into so doing by the calculated inveigling and persistent importuning effected by the agent provocateur (as the accused would have them believe).

(364)

In finding the accused guilty (365) on both counts of trafficking in a narcotic, the jury obviously disbelieved her and opted for alternative (a) above.

By charging the jury on the issue of entrapment, it is clear that Greenberg J. viewed entrapment as a substantive defence which he held, if established on a preponderance of evidence, would lead to the accused's acquittal. Although His Lordship purported to apply entrapment as defined in R. v. Ormerod (366), the contents of his charge to the jury reveal a

strong adherence to the subjective approach. His examination of entrapment, preceding his decision to submit the issue to the jury, was restricted to a survey of its application in case law without spelling out some legal basis. The court's rejection of abuse of process and reference to R. v. Kirzner (367), as leaving the matter of entrapment open, would seem to indicate a preference to link the defence to section 7(3) of the Criminal Code as a common law defence, although this was not expressed. Nevertheless, Greenberg J. clearly articulates the nature and onus of a subjective entrapment defence and of the ensuing allocation of function between the judge and jury.

While not propounding a uniform, if any, source of authority, for a defence of entrapment, the courts in the aforementioned cases have clung to a subjective test. Some direction from the Supreme Court of Canada was expected to resolve the question of a comprehensive legal basis for the defence. In 1975 and again in 1982 the Supreme Court was confronted with the issue.

Firstly, in R. v. Kirzner (368), the accused, a known heroin addict was employed from time to time by officers of the R.C.M.P. as a paid informer upon whom they relied to obtain information with respect to the distribution of drugs. The accused testified that his activities as an informer involved him in purchasing drugs with money supplied by the R.C.M.P. and in

selling drugs as well. It was the evidence of his R.C.M.P. contact that he did not know the accused was selling drugs. The accused further testified that he had told his contact of an opportunity to make a big "buy" and the contact had agreed to the plan. The accused went ahead on his own and made the purchase when the contact was on vacation. It was this purchase that led to the accused's arrest by the metropolitan Toronto police.

At trial, the defence was withdrawn from the jury and the accused was subsequently convicted of possession of a narcotic and possession of a narcotic for the purpose of trafficking. On appeal, the Ontario Court of Appeal rejected the defence contention that the trial judge wrongfully withdrew the defence of entrapment from the jury and held that the defence was not available to a criminal charge.

In a majority judgement, Pigeon J., with whom Martland, Ritchie, Beetz and Pratte JJ. concurred, declined to squarely address the issue of entrapment holding that the evidence was not open to such a claim. As a result, a further appeal to the Supreme Court of Canada was dismissed. It is arguable that by dealing with the issue in this manner, the Supreme Court of Canada implicitly recognized the availability of a defence of entrapment if supported by the facts.

Laskin C.J.C., with whom Spence, Dickson and Estey JJ. concurred, delivered a concurring minority opinion in which he

expressed the justification for police stratagems and the courts' desire to impose control mechanisms for entrapment or police instigated crime which exceeds mere solicitation. On the facts before the Court, the Chief Justice stated:

I fail to see how this evidence, taking it most favourably to the accused, shows entrapment in respect of the offences committed by the accused. To me it is obvious that he saw his police contacts as a shield for activities which he carried out on his own, activities amounting to trafficking in drugs. He had initiated a transaction which he carried out for his own benefit. (369)

While it was unnecessary to confront the effect or basis of an entrapment defence, Laskin C.J.C. surveyed the authorities in the area and disapproved of judicial rejection of the defence. The Chief Justice preferred to leave open the question whether entrapment, if established, should operate as a defence as well as whether or not the appropriate way to deal with entrapment is by way of a stay of proceedings. He stated:

There are good reasons for leaving the question open. Indeed, if that position is based on a static view of section 7(3) of the Criminal Code, I find it unacceptable. I do not think that s. 7(3) should be regarded as having frozen the power of the Courts to enlarge the content of the common law by way of recognizing new defences, as they may think proper according to circumstances that they consider may call for further control of prosecutorial behaviour or of judicial proceedings. (370)

And further:

Similarly, I leave open the question whether the appropriate way to deal with entrapment is by a stay of proceedings, a matter considered by this Court in another context in R. v. Rourke.... (371)

Laskin C.J.C. appears to have derogated from his apparent view in R. v. Ormerod (372) that abuse of process was the appropriate basis upon which to rest the entrapment defence, the remedy being a stay of proceedings. The views expressed by the minority in Kirzner, leave open the availability of an independent substantive defence of entrapment.

While the defence of entrapment was left open in Kirzner, the matter appears to have been somewhat closed as a result of the more recent decision of the Supreme Court of Canada in Amato v. The Queen (373).

The accused, Amato, was charged with two counts of trafficking in a narcotic. The events were put in motion by a paid police informer who had a drug-related record and was employed by the police to locate sources from which drug traffickers were able to obtain their supply.

The informer was introduced to the accused, a hair-dresser, by the latter's employer. The informer thereafter posed as one in need of drugs and requested the accused to obtain some for him. After refusals by the accused and repeated requests by the informer, the accused obtained one gram from his ex-

girlfriend which he delivered to the informer who had paid him in advance. The accused received no money or cocaine from this transaction and no charge was preferred.

The informer continued to call the accused seeking to purchase a larger amount of cocaine. After several calls, the accused finally succumbed to the pressure exerted over him and obtained half an ounce of cocaine from his ex-girlfriend, in the same manner as previously, on behalf of the informer and an undercover R.C.M.P. officer.

Subsequently, the undercover officer called the accused on several occasions in an attempt to arrange for the sale of three ounces of cocaine, indicating that the drugs were for some friends of his who were coming into town. The officer told the accused that he did not have to be afraid because he always dealt with guns, and according to the accused, the officer told him that the people would be coming to see him (the accused) if he did not get the drugs. The accused accordingly arranged for the sale by his ex-girlfriend of two and one-half ounces of cocaine to the undercover officer. On this occasion, the accused was present while the transaction took place between his ex-girlfriend and the officer but the accused received no money or cocaine for his part of the deal.

It was these last two transactions which were the subject of the charges against the accused. The informer was not called as a witness at trial and as a result, the trial judge

assumed that the findings of fact ought to have been made on the basis of the evidence tendered by the defence. The trial judge concluded as follows in convicting the accused:

I am satisfied that the evidence in this case falls far short of the evidence required at law to establish the defence of entrapment. The evidence amounts no more than to persistent solicitation by the informer and the undercover officer to persuade the accused Amato to engage in trafficking in cocaine. (374)

The British Columbia Court of Appeal was unanimous in dismissing the appeal. Taggart J.A. held that the evidence supported the conclusion reached by the trial judge. Seaton J.A. held that there was no such thing as a defence of entrapment in Canada. He indicated that the Court in considering a criminal case should try the accused, not the police, although factors motivating the accused, including the influence of other persons, could be considered on sentencing. His Lordship viewed the accused's claim of entrapment as follows:

What the appellant is saying is "I did commit the offence, I was importuned by another, and fortunately for me that other had some relationship with the police and as a result I should be found not guilty". I do not accept that. I think that entrapment as such is not a general defence. (375)

A further appeal to the Supreme Court of Canada was dismissed. In a short judgement, Dickson J. with whom Martland, Beetz and Chouinard JJ. concurred, concluded that "on the facts of this case the defence of entrapment, assuming it to be available under Canadian law, does not arise" (376).

Ritchie J., in a separate concurring opinion, pointed out that the evidence did not disclose any wrongdoing by the accused until approached by the informer; that the drug dealings were prompted and solicited by the informer and later by the undercover officer; that the course of events was instigated and carried forward at the direction of the police for the purpose of locating drug sources; that the involvement of the accused was simply an incidental factor necessarily employed by the police in order to achieve their objective. Notwithstanding this factual setting, His Lordship did not find entrapment on the facts. He stated:

... the mere fact that the crime was committed at the "solicitation" of an agent provocateur does not, standing alone, support a defence of entrapment.

In my view, it is only where police tactics are such as to leave no room for the formation of independent criminal intent by the accused that the question of entrapment can enter into the determination of his guilt or innocence. (377)

Ritchie J. interpreted the cases reviewed by the Chief Justice in Kirzner as follows:

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

would be absent and the accused's defence would be established. (378)

Such an interpretation of a subjective test of entrapment approaches, in a sense, the reasoning in Lemieux v. The Queen (379), although here the police instigation is seen as being capable of establishing a defence by eliminating the accused's mens rea. Rather than consider the offence as having been committed but excused, this view would consider the offence as not having been committed at all. This is somewhat inconsistent reasoning as one who decides to commit an offence as a result of entrapment still commits the offence with the requisite mens rea. A substantive defence, for example self-defence, might however justify or excuse such conduct (380).

Estey J. with whom Laskin C.J.C., McIntyre and Lamer JJ. concurred, delivered a lengthy dissenting judgement in which he examined the legal basis, the remedy and the elements of the defence of entrapment. After a review of the authorities he concluded as follows:

Applying the ordinary rule of construction where statutes and common law meet I conclude that s. 7(3) is the authority for the courts of criminal jurisdiction to adopt, if appropriate in the view of the court, defences including the defence of entrapment. (381)

The elements of the defence, which would usually arise in relation to consensual offences, he considered in this way:

The availability of this defence in law and the proper constituent elements of the offence are closely entwined. Assuming the defence to be known to the common law and available in Canadian criminal law, in a proper case what are the component elements, the criteria to be met for its invocation? It is, of course, impossible to cast in futuro a set of guides, principles, rules or yardsticks with satisfactory precision and detail. This defence perhaps more than any other will succeed only in an unusual and delicately balanced set of circumstances. Case-law will have to paint in the variants. The principal elements or characteristics of the defence are that an offence must be instigated, originated or brought about by the police and the accused must be ensnared into the commission of that offence by the police conduct; the purpose of the scheme must be to gain evidence for the prosecution of the accused for the very crime which has been so instigated, and the inducement may be but is not limited to deceit, fraud, trickery or reward, and ordinarily but not necessarily will consist of calculated inveigling and persistent importuning. The character of the initiative taken by the police is unaffected by the fact that the law enforcement agency is represented by a member of a police force or an undercover or other agent, paid or unpaid, but operating under the control of the police. In the result, the scheme so perpetrated must in all the circumstances be so shocking and outrageous as to bring the administration of justice into disrepute.

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

already noted, the concept of entrapment does not arise. (382)

This view adheres clearly to an objective approach similar to that adopted by the minority of the United States Supreme Court (383) and is rooted in the integrity of the criminal justice system.

Estey J. then examined the matter of a remedy for entrapment practices. He acknowledged that entrapment is not in the traditional sense a defence which would support an acquittal. In his view, the successful application of the concept of entrapment leads to a stay of prosecution, the court exercising its inherent powers and withholding its processes from the prosecution on the basis that such would bring the administration of justice into disrepute. His Lordship noted that the effect of R. v. Osborn (384) and Rourke v. The Queen (385) is limited by their respective facts.

His Lordship did indicate, however, that the doctrine of entrapment was rooted in the common law and that section 7(3)C.C. would provide the basis for the entrapment defence. Although his reasoning appears to support two bases for the defence - section 7(3) and abuse of process - the principles of common law which could support a defence of entrapment, would also underlie the doctrine of abuse of process. In view of his preference for a remedy to stay proceedings as opposed to an acquittal, His Lordship noted that:

... it may not be necessary to invoke s.7(3) other than to illustrate by analogy the continuing flexibility of the criminal law within and without the Criminal Code. (386)

Estey J. viewed the facts differently from the majority. His Lordship stated:

The cumulative effect of such a deliberately launched enterprise by the police would in my view "in all the circumstances" be viewed in the community as shocking and outrageous, and such conduct is clearly contrary to the proper principles upon which justice must be done by the courts. (387)

The dissenting judgement, concurred in by four members of the Court, would, therefore, have recognized the defence of entrapment, allowed the appeal, set aside the conviction and directed a stay of prosecution.

Although Ritchie J. and the four dissenting justices differed on the facts, each Justice, therefore a majority, would recognize the defence of entrapment but on different bases (388). The actual majority of the Court, however, has restricted a factual application of the entrapment defence by its rejection of the defence on strong facts in Amato.

Apart from its mitigating effect on sentence (389) therefore, entrapment in Canada has not found a consistent and comprehensive rationale applied uniformly throughout the country. This uncertainty in Canadian criminal law has generated much academic controversy (390). The next Part endeavours to examine the various alternate bases of the defence of entrapment.

PART II

IN SEARCH OF A THEORETICAL BASIS  
FOR THE  
DOCTRINE OF ENTRAPMENT

The cases referred to in Part I attest to the existence of police investigative measures which amount to or approach clear entrapment situations. Canadian courts encountering such measures have, as described, either sidestepped the issue or groped for some rational basis upon which to accept or reject the defence claim. To date the Supreme Court of Canada has not taken a firm position on the existence of a "defence" of entrapment.

It is in the public interest that the law be applied uniformly. The doctrine of entrapment can only receive a uniform application and find a place in Canadian criminal law if it has a theoretical underpinning justifying its existence as an "aid" to an accused.

Since successful entrapment involves the commission, by the accused, of the offence instigated by the police, the whole concept, rather than being characterized as a "defence", may more logically be referred to as a "doctrine" which provides a remedy to an aggrieved accused. The remedy, whether it be a

stay of proceedings, an acquittal or the exclusion of evidence, depends, for its validity, upon a justifiable legal basis. Without a well-founded basis, positive statements made by a court adopting an entrapment "defence" will have little weight and hence be of minimal value.

The purpose of this Part is to examine certain areas of law - the doctrine of abuse of process, the common law defences and the Charter of Rights and Freedoms - and draw from them elements which may provide such a justifiable foundation. Special emphasis is given to the Charter of Rights and Freedoms in view of its potential impact as a constitutional guarantee.

Chapter IThe Doctrine of Abuse of Process.

Abuse of process seen as a discretionary bar to criminal and civil proceedings has been the traditional basis for entrapment in Canada. The whole concept of abuse of process has been the subject of a great deal of commentary and debate (391) and has been discussed admirably in other studies (392), thus it is not intended here to deal with the issue in considerable detail.

Although the concept has a relatively long history in English jurisprudence, its application to criminal proceedings in Canada is more recent (393).

In 1964, a majority of the House of Lords in Connelly v. Director of Public Prosecutions (394) held that a court of criminal jurisdiction possesses an inherent discretionary power to prevent an abuse of its own process. As a result of a murder-robbery, the accused was charged in two separate indictments with murder and robbery respectively. The accused was tried and convicted of the murder charge in the first indictment. However, when he was acquitted on appeal, the Crown, with leave of the Court of Appeal, proceeded with the robbery charge contained in the second indictment. The accused was convicted and appealed unsuccessfully on the ground, inter alia, that the trial judge

had a discretion to stay the second indictment and should have exercised it.

A further appeal by the accused to the House of Lords was dismissed. On the issue of abuse of process, the House of Lords found no oppression in view of a common law procedural rule that no count for another offence is to be included in an indictment for murder. A majority of the House clearly recognized the existence of a judicial discretion to stay an indictment containing charges which are founded on the same facts as the charges in a previous indictment on which the accused has been tried, or which form or are part of a series of offences of the same or a similar character as the offences charged in the previous indictment.

Lord Devlin stated:

... I must observe that nearly the whole of the English criminal law of procedure and evidence has been made by the exercise of the judges of their power to see that what was fair and just was done between prosecutors and accused. The doctrine of *autrefois* was itself doubtless evolved in that way. (395)

And further:

Are the courts to rely on the executive to protect their process from abuse? Have they not themselves an inescapable duty to secure fair treatment for those who come or are brought before them? To questions of this sort there is only one possible answer. The courts cannot contemplate for a moment the transference to the

executive of the responsibility for seeing that the process of law is not abused. (396)

Lord Pearce adopted this view as follows:

The court has, I think, a power to apply, in the exercise of its judicial discretion, the broader principles to cases that do not fit the actual pleas and a duty to stop a prosecution which on the facts offends against those principles and creates abuse and injustice. (397)

Lord Reid concluded that "there must always be a residual discretion to prevent anything which savours of abuse of process" (398).

Lord Morris restricted this discretion, however:

It would, in my judgment, be an unfortunate innovation if it were held that the power of a court to prevent any abuse of its process or to ensure compliance with correct procedure enabled a judge to suppress a prosecution merely because he regretted that it was taking place. There is no abuse of process if, to a charge which is properly brought before the court and which is framed in an indictment to which no objection can in any way be taken there is no plea such as that of *autrefois* acquit or convict which can successfully be made. (399)

Lord Hudson adhered to this narrow view, stating:

I accept that the history of the development of our law justifies the contention that all rules of common law which emanate from the breast of the judges may in a sense be said to be discretionary in origin, but I cannot concede that there ought to be given

to the judge a discretion, which in my opinion he has not hitherto been allowed, to interfere with anything that he personally thinks is unfair. (400)

Connelly was considered recently by a differently constituted House of Lords in Director of Public Prosecutions v. Humphrys (401). The accused who had been acquitted of driving a motorcycle while disqualified, was subsequently charged and convicted of perjury with respect to evidence given by him at the earlier trial consisting of a denial of driving. The Court of Appeal quashed the conviction on the ground that the doctrine of issue estoppel applied to charges of perjury. The House of Lords allowed a Crown appeal on this ground and restored the conviction.

Lord Hailsham acknowledged the inherent jurisdiction of a court to prevent an abuse of its process. Lord Salmon supported such a discretion as follows:

I respectfully agree with my noble and learned friend, Viscount Dilhorne, that a judge has not and should not appear to have any responsibility for the institution of prosecutions; nor has he any power to refuse to allow a prosecution to proceed merely because he considers that, as a matter of policy, it ought not to have been brought. It is only if the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious that the judge has the power to intervene. (402)

Lord Edmund-Davies agreed, stating:

Notwithstanding certain of my observations in delivering the judgment of the Court of Criminal Appeal in Connelly, I am now satisfied that, in the words of Lord Parker CJ in Mills v. Cooper, "every court has undoubtedly a right in its discretion to decline to hear proceedings on the ground that they are oppressive and an abuse of the process of the court". (403)

And further:

While judges should pause long before staying proceedings which on their face are perfectly regular, it would indeed be bad for justice if in such fortunately rare cases as R. v. Riebold, their hands were tied and they were obliged to allow the further trial to proceed. In my judgment, Connelly established that they are vested with the power to do what the justice of the case clearly demands.... (404)

Viscount Dilhorne, while recognizing a general power to control the procedure of a court so as to avoid unfairness, confined its ambit, as follows:

A judge must keep out of the arena. He should not have or appear to have any responsibility for the institution of a prosecution. The functions of prosecutors and of judges must not be blurred. If a judge has power to decline to hear a case because he does not think it should be brought, then it soon may be thought that the cases he allows to proceed are cases brought with his consent or approval.

If there is the power which my noble and learned friends think there is to stop a prosecution on indictment in limine, it is in my view a power that should only be exercised in the most exceptional circumstances.

(405)

The House of Lords therefore, was clearly of the view

in both Connelly and Humphrys that a court has an inherent discretion to stay proceedings which amount to an abuse of process. What continues to be less certain however, is the scope and application of this power.

The application of the doctrine of abuse of process and a court's power to stay proceedings in the context of entrapment was considered in R. v. Sang (406). While abuse of process was not argued, the Court of Appeal alluded to it as follows:

First, a trial judge has not and must not appear to have any responsibility for prosecution. Second, a trial judge has no power to refuse to allow a prosecution to proceed merely because he considers that as a matter of policy that prosecution ought not to have been brought. Authority binding on this court for these two propositions will be found in Connelly v. Director of Public Prosecutions and in Director of Public Prosecutions v. Humphrys. We do not think it necessary to give specific references to the many passages in the various speeches in these two cases where these propositions are stated.

Third, a trial judge may have power to stop a prosecution if it amounts to an abuse of the process of the court and is oppressive and vexatious. We say "may have" because this was the view of Lord Salmon and of Lord Edmund-Davies in Director of Public Prosecutions v. Humphrys. Viscount Dilhorne thought otherwise and there is no binding decision of a majority of their Lordships on this point. It has not been argued before us in the present appeals that if the present prosecution were allowed to proceed, it would amount to an abuse of the process of the court. (407)

In the instant case however, the Court found no oppression.

Roskill L.J., referring to defence counsel's contention that a court has a discretionary power to exclude unfairly obtained evidence, stated:

If, however, there is a residual discretion of the kind contended for, it can, we think, only be where the actions of the prosecution amount to an abuse of the process of the court and are oppressive in that sense. All courts have an inherent jurisdiction to protect their process against abuse from any quarter. But in the instant case and in the cases cited, the evidence led or sought to be led fell very far short of being oppressive in that sense. (408)

In the House of Lords, Lord Scarman stated:

The role of the judge is confined to the forensic process. He controls neither the police nor the prosecuting authority. He neither initiates nor stifles a prosecution. Save in the very rare situation, which is not this case, of an abuse of the process of the court (against which every court is in duty bound to protect itself), the judge is concerned only with the conduct of the trial. The Judges' Rules, for example, are not a judicial control of police interrogation, but notice that, if certain steps are not taken, certain evidence, otherwise admissible, may be excluded at the trial. The judge's control of the criminal process begins and ends with trial, though his influence may extend beyond its beginning and conclusion. It follows that the prosecution has rights, which the judge may not override. The right to prosecute and the right to lead admissible evidence in support of its case are not subject to judicial control. Of course when the prosecutor reaches court he becomes subject to the directions as to the conduct of the trial by the judge, whose duty it then is to see that the accused has a fair trial according to law. (409)

His Lordship generally restricted the court's function to the conduct of the trial with no power over the investigatory stages (410) or the decision to prosecute. In reaching this conclusion, Lord Scarman outlined the limits of judicial power as follows:

The accused is to be tried according to law. The law, not the judge's discretion, determines what is admissible evidence. The law, not the judge, determines what defences are available to the accused. It is the law that, subject to certain recognised exceptions, evidence which is relevant is admissible. It is the law that there is no defence of entrapment. The judge may not use his discretion to prevent a prosecution being brought merely because he disapproves of the way in which legally admissible evidence has been obtained. The judge may not by the exercise of his discretion to exclude admissible evidence secure to the accused the benefit of a defence unknown to the law. Judges are not responsible for the bringing or abandonment of prosecutions; nor have they the right to adjudicate in a way which indirectly usurps the functions of the legislature or jury. For legislation would be needed to introduce a defence of entrapment: and, if it were to be introduced, it would be for the jury to decide whether in the particular case effect should be given to it. (411)

Although the evidence in Sang did not appear to amount to a clear entrapment situation, the above comments reflect a judicial reluctance, in the absence of legislation, to either establish a substantive defence of entrapment or to extend the inherent discretion of the court (by staying proceedings or excluding evidence) to entrapment cases. One might conclude then that the doctrine of abuse of process though firmly established

in England, does not encompass entrapment.

The doctrine of abuse of process has been directly considered by the Supreme Court of Canada on two occasions.

In R. v. Osborn (412), the accused had been previously acquitted of a charge of having in his possession seven cheques and other writings that were adopted and intended to be used to commit forgery. The Crown, after an unsuccessful appeal, charged the accused with conspiring with a person or persons unknown to commit the indictable offence of uttering the same seven forged cheques, the subject matter of the previous charge.

The accused was convicted but the conviction was quashed and a verdict of acquittal entered by the Ontario Court of Appeal. Jessup J.A., who delivered the judgement of the Court, held that every court, regardless of whether it exercises civil or criminal jurisdiction, has inherent discretionary power to prevent an abuse of its own process through oppressive or vexatious proceedings. His Lordship found that the long delay coupled with the Crown's intervening appeal resulted in unjust oppressiveness from the second indictment. In his view, the trial judge would have properly exercised his jurisdiction by staying the proceedings.

On a Crown appeal to the Supreme Court of Canada, Hall J., with whom Ritchie and Spence JJ. concurred, held that there was no evidence of oppression in this case as much of the

delay was attributable to the accused. Accordingly, he stated that the question of whether or not the Court has jurisdiction to intervene to prevent an abuse of its process did not have to be decided. Pigeon J., with whom Martland and Judson JJ. concurred, did not consider it unfair or oppressive where, as a result of an error committed either in a trial or in the laying of a charge, an accused undergoes repeated trials on the same charge.

His Lordship added, however:

I can see no legal basis for holding that criminal remedies are subject to the rule that they are to be refused whenever in its discretion, a Court considers the prosecution oppressive. (413)

Three members of the Court therefore, would rule out a court's power to stay oppressive proceedings in the Canadian criminal process. Fauteux C.J.C., who could have formed a majority on this issue, merely agreed that the appeal should be allowed without any reasons. Thus, while the Court unanimously allowed the appeal and restored the conviction - there being no oppression - no clear guidance on the doctrine of abuse of process emerged.

More recently, the Supreme Court of Canada confronted the issue in Rourke v. The Queen (414). The accused was charged with kidnapping and robbery alleged to have taken place in 1971. However, he was not arrested until approximately 1½ years later

although he had throughout that time lived openly in the community. Evidence was given by affidavit that the resulting delay had prejudiced the accused in obtaining witnesses crucial to his defence.

At the opening of his trial in County Court the accused moved to have the proceedings stayed as an abuse of the court's process. This motion was granted, the court holding that to do otherwise "would be a denial of the right of the accused to a fair hearing in accordance with the principles of fundamental justice" (415). An application by the Crown to the British Columbia Supreme Court for a writ of mandamus was also dismissed.

An appeal by the Crown to the British Columbia Court of Appeal was allowed and a writ of mandamus issued requiring the County Court Judge to proceed to the trial of the indictment. The Court held that trial judges of all courts of competent jurisdiction have an inherent jurisdiction to stay proceedings for an abuse of the court's process. However, it was further held that the trial judge in this case was not justified in staying the proceedings as the alleged oppression was due to matters which arose prior to prosecution, that is, in the investigatory stages, and was not due to the nature of the proceedings or the manner in which they were conducted by the prosecution.

McIntyre J.A., as he then was (416), who delivered the judgement of the Court, stated:

I adopt the view, then, that a trial Judge has an inherent jurisdiction to protect the process of the Court from abuse by oppressive conduct on the part of the prosecution. It is a power which must be used sparingly and only in the clearest case and in my view is not a power limited to superior Courts. The need to protect the process will be as great in Courts of inferior or limited jurisdiction as in superior Courts ... (417)

And further:

It must be remembered that the traditions of the common law have always dictated free access to the Courts by private litigants, those charged with crime, and the Crown. In the exercise of discretionary power of the nature here under discussion the Courts must not be allowed to become in addition to Judges of the cases presented to them, Judges of what cases shall be permitted to come to them. The discretion to stay is one which should be exercised in only the most unusual cases and the case will be a rare one indeed where its use can be justified. (418).

An appeal by the accused to the Supreme Court of Canada was dismissed. In a majority opinion, Pigeon J., with whom Martland, Ritchie, Beetz and de Grandpré JJ. concurred, stated that he could not find "any rule in our criminal law that prosecutions must be instituted promptly and ought not to be permitted to be proceeded with if a delay in instituting them may have caused prejudice to the accused" (419). On the issue of abuse of process, His Lordship commented as follows:

I have to disagree with the view expressed by McIntyre, J.A., that there could be factual situations giving to a trial Judge discretion to stay proceedings for delay.

For the reasons I gave in R. v. Osborn . . . ., I cannot admit of any general discretionary power in Courts of criminal jurisdiction to stay proceedings regularly instituted because the prosecution is considered oppressive. (420)

And further:

In my view, the absence of any provision in the Criminal Code contemplating the staying of an indictment by a trial Judge or an appeal from such decision is a strong indication against the existence of any power to grant such stay. (421)

In a separate concurring judgement, Laskin C.J.C., with whom Judson, Spence and Dickson JJ. concurred, agreed, but for different reasons than the Court of Appeal, that mandamus would lie to compel the County Court ~~to~~ to proceed with the trial. On the issue of abuse of process, the Chief Justice held that a criminal court has the power to stay proceedings on the basis of abuse of process although he concluded that the facts in this case did not support the exercise of the power.

His Lordship stated:

Apart from the generality of support for the proposition that a criminal Court may stay proceedings which are an abuse of process or oppressive and vexatious and that, in the view at least of Lord Edmund-Davies which in (sic) the view I hold, the power may be invoked by every Court having criminal jurisdiction (such Courts being presided over in Canada generally by persons qualified as lawyers), neither Connelly nor Humphrys are (sic) of direct assistance in the present case. They do, however, underline, as I would myself, that

the power to prevent abuse of process is one of special application and its exercise cannot be a random one. (422)

Much of what was said in Osborn and Rourke was obiter as the divisions of the Supreme Court of Canada found no oppression to justify a stay of proceedings, assuming the doctrine of abuse of process existed. These two decisions might appear to abolish the doctrine of abuse of process in all possible situations. On a strict application of the rules of stare decisis however, the reasons for judgement of Pigeon J. in both cases, but particularly Rourke - in view of their potential impact in a majority judgement - should be limited to the dispositions of the precise factual settings before the Court (423). Moreover, Dickson J., in delivering the unanimous judgement of the Supreme Court of Canada, recently in R. v. Krannenburg (424), alluded to the possibility of abuse of process where the Crown lays a second information after jurisdiction has been lost over the first information. As a result of the uncertainty in this area of the law, confusion has been evident in Provincial Courts of Appeal which have grappled with the scope and application of the doctrine (425).

There appears to be a distinction in abuse of process cases between the nature and conduct of the proceedings, and executive action leading to the charge (426). The former relates to situations where there is a defect in the charge or in its proper institution; or to the manner in which the prosecution

has been conducted. In these cases the court's power to stay would properly be exercised, if at all, before arraignment (427). The latter relates to situations involving improper actions by the police at the investigatory stages before any legal proceedings are commenced. If the court's power to stay were to be exercised in these cases, it would have to be after evidence has been heard at trial, since any impropriety would not be readily apparent (428).

Except for Sana (429) and Rourke (430), all of the above decisions deal with the procedural propriety of the institution of charges against an accused. As noted in Part I, the doctrine of abuse of process has also been contended, in Canada, to extend to stages prior to the launching of a prosecution. The courts have considered whether or not police conduct operating unfairly against an accused in the investigatory stages, and ratified by the Crown by the fact of a prosecution, constitutes entrapment, thereby triggering the remedy to stay proceedings.

In R. v. Ormerod (431), Laskin J.A., as he then was, considered abuse of process as a basis for the defence of entrapment, as follows:

To uphold the defence, which goes not to the issue of whether the crime has been committed but to the issue of whether the methods employed by the police should be tolerated; it would be necessary for the Courts to exercise a dispensing jurisdiction in respect of the administration

of the criminal law. There is no statutory warrant for such a jurisdiction, but that does not mean that a Court is powerless to prevent abuses, be they abuses in the lodging of the prosecution itself or in the establishment of the foundation for the prosecution. (432)

As an example of the power to stay an indictment, His Lordship referred to the Ontario Court of Appeal decision in R. v. Osborn (433), although he recognized the factual limits of that case. Since the facts in Ormerod did not support entrapment, consideration of an overriding judicial discretion to stay a prosecution because of police complicity in the events which led to it, was left open until an occasion when squarely raised.

In R. v. Shipley (434), McAndrew Co. Ct. J., (Ont.) while citing Ormerod, relied upon Connelly v. Director of Public Prosecutions (435) and the Ontario Court of Appeal decision in Osborn as support for his ruling that he had an inherent jurisdiction to stay proceedings upon facts giving rise to entrapment. As a result of entrapment, proceedings were ordered stayed, His Honour being of the view that "it would be unfair to this accused, and oppressive and an abuse of the process of the Court, to permit this prosecution to continue" (436). His Honour did not consider, however, the basis for any analogy between the different factual settings in Osborn and Shipley.

In R. v. Chernecki (437), the authority of Ormerod and

consequently, Shipley, as support for abuse of process, was restricted in view of the reversal by the Supreme Court of Canada of the Ontario Court of Appeal decision in Osborn, which was relied upon in both cases. However, as mentioned earlier, Osborn - and Rourke (438) - must be restricted to their own facts which do not cover entrapment situations. Therefore, although not binding, Ormerod and Shipley remain as persuasive authority for encompassing entrapment within the principles of abuse of process.

Shipley was cited in R. v. MacDonald (439), however Selbie Prov. J. (B.C.) differed, holding that entrapment is a matter of fact and not of law. Since entrapment was found to arise on the facts - the court applied the test in Ormerod - the accused was accordingly acquitted.

Although entrapment was found to be unsupported by the facts in R. v. Bonnar (440), the Nova Scotia Supreme Court Appeal Division held, in obiter dicta, that if entrapment were established there would be an abuse of process and the proper course would be to stay proceedings or discharge the accused.

Macdonald J.A., speaking for the Court, stated:

I am of the opinion that proceedings should be stayed or the accused discharged if it is clear that the accused did not have a prior intention or pre-disposition to commit the offence with which he is charged but committed it only because the conduct of the agent provocateur

was (as Laſkin, J.A., said in R. v. Ormond, (sic) ...): such calculating, (sic) inveigling and persistent importuning as went beyond ordinary solicitation. In such a situation there is an abuse of the process of the Court and something that is contrary to public policy. Indeed, such conduct by an agent provocateur strikes at the very foundation of the system and administration of criminal justice in a free and democratic society and just cannot be permitted or condoned. (441).

Two subsequent decisions rejected abuse of process as a legal basis for a defence of entrapment (442).

In R. v. Haukness (443), Cronin Prov. J. (B.C.) held that the defence of entrapment does not rest on the doctrine of abuse of process of the court, the latter being concerned with procedural matters in the course of a criminal proceeding and not directly with "the misuse or an abuse or misconduct on the part of the police in the investigation or the enforcement of the criminal law" (444). His Honour applied a substantive defence of entrapment and acquitted the accused.

In R. v. Sabloff (445), Greenberg J. of the Quebec Superior Court, felt himself bound by the Supreme Court of Canada decision in Rourke v. The Queen (446) and accordingly denied a motion to stay proceedings claiming abuse of process as a result of entrapment. Although His Lordship refused to withdraw the case from the jury and stay proceedings, he submitted the issue of entrapment to the jury as a substantive defence.

A different approach to abuse of process was argued in

*R. v. Ridge* (447), where it was submitted to the British Columbia Court of Appeal that abuse of process can be raised as a substantive defence and left to the jury for its consideration. The Court was not persuaded that abuse of process can be left to the jury as a substantive defence but even assuming it was available, as a matter of law, it was not found to arise on the evidence.

The entrapment cases decided by the Supreme Court of Canada have neither definitively accepted nor rejected a defence of entrapment, and the existence of the doctrine of abuse of process as a legal basis to entrapment has met the same uncertain fate.

In *R. v. Kirzner* (448), Laskin C.J.C., in a minority concurring judgement, left open the question whether the appropriate way to deal with entrapment is by a stay of proceedings. The Chief Justice however, acknowledged that the matter was considered by the Court "in another context" in *Rourke v. The Queen* (449), implying therefore that that decision did not foreclose the issue. The majority judgement did not address the question.

Similarly, in *Amato v. The Queen* (450), the judgements constituting a majority of the Court did not raise abuse of process as a result of entrapment, but simply found that entrapment did not arise on the facts (451). Of particular significance however, is the dissenting judgement of Estey J., concurred in by Laskin C.J.C. (452), McIntyre and Lamer JJ. Estey J. held that the successful application of the doctrine of entrapment results

in the staying of the prosecution, the court, in the exercise of its inherent powers, withholding its processes from the prosecution on the basis that such would bring the administration of justice into disrepute.

His Lordship held that the Supreme Court decisions of R. v. Osborn (453) and Rourke v. The Queen (454) must be taken as standing on their own facts and Jessup J.A.'s observations on abuse of process in the Ontario Court of Appeal decision in Osborn were considered to have remained intact. Estey J. distinguished Amato from other cases such as Rourke as the issue in Amato related to the case where

the executive action leading to the charge and its prosecution is offensive to the principles on which the administration of justice is conducted by the courts. (455)

The dissenting opinion saw the need for a defence where the police have gone beyond mere crime detection and the crime has been designed and committed by the state itself. The issue, it was held,

is not the discipline of the prosecution but the avoidance of the improper invocation by the State of the judicial process and its powers in circumstances where the accused has been ensnared by the police force in order to bring about an offence for which he will be prosecuted. (456)

Estey J. concluded on the facts before the Court as follows:

The cumulative effect of such a deliberately launched enterprise by the police would in my view "in all the circumstances" be viewed in the community as shocking and outrageous, and such conduct is clearly contrary to the proper principles upon which justice must be done by the courts. (457)

Accordingly, he would have directed a stay of prosecution.

Entrapment considered as an abuse of process of the court, closely parallels the American objective approach (458) and shifts the focus of dispute to the conduct of the police rather than the predisposition of the accused, thus the remedy to stay proceedings rather than acquit the accused. Moreover, the issue, on this basis, would more properly be a matter of law for the court alone to decide, hence the factual bases would not be submitted to the jury.

Estey J. remarked, as follows, in his dissenting judgement in Amato:

The realization of an abuse of the judicial branch is a question essentially of law or law and political science and one not by its nature ordinarily assigned to the jury component of the trial courtroom. (459)

The matter of the burden of proof to be placed on the defence is less clear (460).

The doctrine of abuse of process is based on a public policy

rationale (461) with different considerations from a personal defence - concerned with the subjective guilt of the accused - which excuses or justifies the commission of an offence (462). The doctrine aims to preserve the purity and integrity of the criminal justice system by empowering courts to withhold their processes from injustices such as disreputable police conduct. It further aims to deter police misconduct in the investigation and detection of crime.

Accordingly, the propriety of police conduct would be measured by requirements of justice and fairness and by its probable effect upon a hypothetical person. As a result, the courts would not consummate a wrong and police practices would be expected to adhere to developed standards of propriety and be applied consistently to all persons, the criminally-inclined and the innocent-minded alike. In this manner, the doctrine of abuse of process is hoped to uphold public respect for, and confidence in, the administration of criminal justice.

Courts across Canada will probably continue to view inconsistently, abuse of process in the form of entrapment (463). Hence, there will be no uniformity of application of the doctrine until its existence, scope and application are definitively settled by our highest Court (464).

Chapter II

The Common Law Defences

Section 7(3) of the Criminal Code gives an accused the benefit of common law defences that are not expressed in the Criminal Code.

Section 7(3) reads:

Every rule and principle of the common law that renders any circumstance a justification or excuse for an act or a defence to a charge continues in force and applies in respect of proceedings for an offence under this Act or any other Act of the Parliament of Canada, except in so far as they are altered by or are inconsistent with this Act or any other Act of the Parliament of Canada.

The Supreme Court of Canada, in interpreting this provision, has adverted to common law defences of due diligence (465), duress (466), necessity (467) and res judicata (468). As well, the Court has extended the plea of autrefois acquit to summary conviction proceedings (469), and ruled that there could be no conspiracy between husband and wife (470).

In the case of entrapment, as in the case of due diligence, duress or necessity, the offence is, in fact, committed, but, pursuant to section 7(3), the accused is absolved as a result of circumstances which justify or excuse his conduct (471).

In 1913, Russel J., of the Nova Scotia Supreme Court, Appeal Division, referring to s.16 (now 7(3)) of the Criminal Code, stated:

I seriously doubt whether this provision was intended to affect in any way the construction of the terms used in the definition of the crime. I think it was rather intended to give a defendant the benefit of some common law excuse or defence when all the conditions constituting the crime as defined in the statute were present. (472)

The question arises whether despite proof of the actus reus and mens rea, an entrapped accused should nevertheless be exonerated in this manner. Or, should he be held accountable for an offence designed and committed by law enforcement authorities?

By virtue of section 7(3), common law rules may be invoked by the defence if they are neither altered by, nor inconsistent with, federal legislation. It cannot escape notice though that the common law is derived from England and there, the defence of entrapment has been categorically rejected by the House of Lords. However, English decisions, although persuasive - especially those rendered by the House of Lords - do not bind Canadian courts.

In addition to preserving existing common law defences, application of section 7(3) leaves room for a creative role for the courts. The courts must apply the criminal law to modern societal conditions. In order to accomplish this,

section 7(3) must be regarded as evolving with changing conditions in the community (473). Police crime detection methods aimed at protection of the public vary with changing conditions in the community. The courts therefore, must keep abreast of these changes by recognizing the need for these methods, but also by ensuring that individual rights are safeguarded and by adapting the criminal law as a result. In this manner, the balance to be struck between competing interests is properly adjusted.

Support for this view of section 7(3) can be found in the Report of the Royal Commissioners on the Draft Code of 1879, s. 19 (474) in which the commissioners explained the inclusion of section 19 (now 7(3)) as follows:

But whilst we exclude from the category of indictable offences any culpable act or omission not provided for by this or some other Act of Parliament, there is another branch of the unwritten law which introduces different considerations; namely, the principles which declare what circumstances amount to a justification or excuse for doing that which would be otherwise a crime, or at least would alter the quality of the crime. In the cases of ordinary occurrence, the decisions of the Courts and the opinions of great lawyers enable us to say how the principles of the law are to be applied. And so far the unwritten law may be digested without extreme difficulty and with practical advantage, and so far also it may be settled and rendered certain.

In our opinion the principles of the common law on such subjects, when rightly understood, are founded on sense and justice. There are a few points on which we venture.

to suggest alterations, which we shall afterwards state in detail. At present we desire to state that in our opinion it is, if not absolutely impossible, at least not practicable, to foresee all the various combinations of circumstances which may happen, but which are of so unfrequent occurrence that they have not hitherto been the subject of judicial consideration, although they might constitute a justification or excuse, and to use language at once so precise and clear and comprehensive as to include all cases that ought to be included, and not to include any case that ought to be excluded.

We have already expressed our opinion that it is on the whole expedient that no crimes not specified in the Draft Code should be punished, though in consequence some guilty persons may thus escape punishment. But we do not think it desirable that, if a particular combination of circumstances arises of so unusual a character that the law has never been decided with reference to it, there should be any risk of a Code being so framed as to deprive an accused person of a defence to which the common law entitles him, and that it might become the duty of the judge to direct the jury that they must find him guilty, although the facts proved did show that he had a defence on the merits, and would have an undoubted claim to be pardoned by the Crown. While, therefore, digesting and declaring the law as applicable to the ordinary cases; we think that the common law so far as it affords a defence should be preserved in all cases not expressly provided for. This we have endeavoured to do by Section 19 of the Draft Code. (475)

In the context of a defence of entrapment, section 7(3) has been interpreted by members of the Supreme Court of Canada.

In a minority concurring opinion in R. v. Kirzner (476), Laskin C.J.C. did not find entrapment on the facts, however, with respect to a potential defence of entrapment,

he stated:

There are good reasons for leaving the question open. Indeed, if that position is based on a static view of s. 7(3) of the Criminal Code I find it unacceptable. I do not think that s. 7(3) should be regarded as having frozen the power of the Courts to enlarge the content of the common law by way of recognizing new defences, as they may think proper according to circumstances that they consider may call for further control of prosecutorial behaviour or of judicial proceedings. (477.)

Although Estey J., in his dissenting judgement in Amato v. The Queen (478), based the defence of entrapment on the doctrine of abuse of process, he held that "the roots of the doctrine of entrapment are to be found in the common law" (479).

His Lordship stated:

If there be a defence of entrapment available to the accused in the circumstances of this appeal it cannot be of statutory origin for it is not to be found in the Criminal Code. If a defence arises in the common law it can only find its way into the courts through s. 7(3) of the Code .... This provision in turn only supports the application of such a defence if s-s. (3) has a continuing prospective character when properly construed .... The conventional view has been that the common law is always speaking. Some theories hold that it is a process of discovery, others of evolution. Whatever it might be properly classified to be in jurisprudence it would take the clearest and most precise language in a statute which purports to incorporate the principles of common law to so construe it as to crystallize the common law at the date of enactment of the statute. If so, the importation of common law principles would be limited to those which

had crystallized and developed prior to the effective date of the statute. Section 7(3) does not employ such words. It is at most ambiguous, susceptible either to the static view or to the view that it makes reference to the common law as an evolving, developing system of rules and principles. Where a statute might be read as displacing the common law the appropriate canon of interpretation is a preference for that construction which preserves the rule of common law where it can be done consistently with the statute. By analogy the common law would be allowed to develop defences not inconsistent with the provisions of the Code if the construction adopted was prospective....

Applying the ordinary rule of construction where statutes and common law meet I conclude that s. 7(3) is the authority for the courts of criminal jurisdiction to adopt, if appropriate in the view of the court, defences including the defence of entrapment. The components of such a defence and the criteria for its application raise other issues. (480)

A substantive defence of entrapment based on section 7(3) would be raised after a plea of not guilty and the remedy, of course, would be an acquittal. Such a defence would, by its nature, be subjective, focusing on the guilt or innocence of the accused rather than on any overriding concern for the effect of unsavoury police conduct on the integrity of the criminal processes. Application of this defence would presuppose the commission of the offence by the accused.

The significant determination of fact to be made, much like the American subjective approach (481), would be whether the accused was predisposed to commit crimes of the nature charged prior to instigation by the police. It is unclear whether the

accused would shoulder a legal or evidentiary burden of proof (482). In the former case, the onus would be by a preponderance of evidence (483), whereas in the latter case, the defence would merely have to put the defence in issue, upon evidence (484). If there is evidence of entrapment, the trier of fact would then be called upon to make findings of fact and apply them to the defence after proper instructions on the law.

Chief Justice Laskin stated in R. v. Kirzner (485):

The jury would not be excluded on the subjective test since, if there was evidence of entrapment, it would be for the jury to determine if there was entrapment in fact and if there was predisposition in the accused. This is consistent with Canadian practice in respect of factual issues in a trial with a jury, which is to limit the Judge to a determination of whether there is evidence to go to the jury and to leave it to the jury to act on its view of the evidence once the issue is left to them. (486)

In a recent case, R. v. Sabloff (487), Greenberg J. of the Quebec Superior Court, submitted a substantive defence of entrapment to the jury in a manner consistent with the subjective test discussed above. His Lordship directed the jury that only if they concluded that the Crown had proved the essential elements of the offences charged were they to consider the defence of entrapment. With respect to the defence of entrapment, His Lordship asked the jury to decide whether:

(a) the present accused was previously disposed and had a pre-existing intention to commit the crime of trafficking in narcotics, and the agent provocateur and the police undercover agent, by ordinary solicitation, simply provided her with the opportunity or occasion to do so (as the Crown would have them believe);

or

(b) she was not previously so disposed and had no pre-existing intention to traffic in narcotics, but was instigated and induced into so doing by the calculated inveigling and persistent importuning effected by the agent provocateur (as the accused would have them believe).

(488)

As in Sabloff, a substantive defence of entrapment, although not expressed, to be based on section 7(3), has been applied by Canadian trial courts in R. v. MacDonald (489), R. v. Haukness (490) and R. v. Rippey (491). In each case, the elements of the defence were considered, a subjective test applied and the accused acquitted. It is submitted that section 7(3) must be recognized as the only authority for the course of action taken by these courts.

A majority of members of the Supreme Court of Canada favours flexibility of the common law defences pursuant to section 7(3) of the Criminal Code (492). It only remains for the Court to deal with a factual setting constituting entrapment in the view of the majority, thereby providing an opportunity for an application of, and a definitive ruling on, a substantive defence of entrapment based on common law principles.

Chapter III

The Canadian Charter of Rights and Freedoms

Since April 17, 1982, no study of any aspect of Canadian criminal law is complete without considering the Canadian Charter of Rights and Freedoms (hereinafter referred to as the Charter).

The Charter is contained in Part I, Schedule B of the Constitution Act 1982 which is itself a schedule to a United Kingdom statute entitled the Canada Act 1982 (493).

Section 2 of the Canada Act 1982 terminates the power of the United Kingdom to legislate for Canada, including future amendments to the Constitution of Canada.

Section 52(2) of the Constitution Act 1982 stipulates, inter alia, that the Constitution of Canada includes the Canada Act 1982. Therefore, the Charter forms part of the Constitution of Canada.

Part V of the Constitution Act 1982 provides detailed Canadian procedures for amending the Constitution of Canada. These amending procedures are far more intricate and complex than procedures for amending ordinary legislation.

In this manner, the Constitution of Canada, including the Charter, has become an entrenched Canadian constitutional

document and has a status entirely distinct from ordinary legislation. The Charter has tremendous potential for application in various circumstances in the administration of criminal justice and may accommodate the "defence" of entrapment. It is intended here to examine the Charter as a possible basis to challenge police entrapment and provide a remedy to an aggrieved person.

#### A. Scope of the Charter

##### 1. Application

The Charter, pursuant to section 32, applies to all matters within the authority of the Parliament and government of Canada (including all matters relating to the Yukon Territory and Northwest Territories) and the legislature and government of each province. The Charter does not cover relations among persons, natural or corporate, in their private or personal capacities (494), but is directed at limiting governmental abuse of power and laws that interfere with personal rights and freedoms.

Section 32 specifically includes the legislative branch of government. The term "government" would appear to include the executive branch, i.e. the entire body of functionaries by which the state operates, e.g. police, civil servants, licensing boards, etc. Of course, the enforcement provisions

would then apply to these legislative and executive bodies.

It is unclear however, whether the term "government" includes courts or persons who exercise judicial responsibilities. Sections 11 and 14 prescribe certain rights and corresponding judicial duties that the judiciary is obliged to discharge. The difficulty arises in seeking remedies pursuant to section 24 if one of those rights were infringed by a court. From a practical view, it is unlikely that a remedy would be imposed against an individual judge, e.g. damages, however, a remedy could be obtained, e.g. quashing a conviction (495).

Considering its application, the entrenched constitutional Charter restrains the theory of legislative supremacy and puts certain rights and freedoms enumerated in the Charter beyond the ordinary reach of federal and provincial legislatures and governments while at the same time providing channels for the enforcement of guaranteed rights and freedoms.

In this way, the bodies to which the Charter applies are now subordinate to it and any inconsistencies between them and the Charter will be determined by the courts. As a result, the courts acquire a much expanded jurisdiction to review legislative and administrative actions in order to ensure that such actions comply with the Constitution of which the Charter is an integral part.

2. Guaranteed Rights and Freedoms

The Charter provides for the following rights and freedoms (496):

- (1) the fundamental freedoms set out in section 2;
- (2) the democratic rights set out in sections 3 through to 5;
- (3) the mobility rights set out in section 6;
- (4) the legal rights set out in sections 7 through to 14;
- (5) the equality rights set out in section 15; (497)
- (6) the language rights set out in sections 16 through to 22;
- (7) minority language educational rights set out in section 23.

Section 26 of the Charter states:

The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada.

This section retains for everyone in Canada those rights and freedoms that existed in Canada prior to the proclamation of the Charter although they are not specifically set out in the Charter. Such unincorporated rights and freedoms continue to exist in the same form and with the same remedies as prior to the enactment of the Charter (498) however, since

these "other" or "residual" rights and freedoms seem to have no constitutional guarantee, the enforcement provisions of the Charter are not available to them (499). If a right or freedom in the Charter has status in other legislation as well, then the aggrieved party may seek a remedy under the Charter in addition to remedies that lie outside the Charter.

Since a residual right or freedom does not appear to have the same constitutional protection as do the rights and freedoms set out in the Charter, it is important to determine whether a particular right or freedom is of a residual nature pursuant to section 26, or whether it fits under a particular section of the Charter.

Rights and freedoms set out in the Charter can only be modified or repealed by constitutional amendment unless a legislature opts out as per section 33. Residual rights and freedoms existing in other statutes or common law may be modified or repealed at any time by the legislature or by whatever power gave rise to them. New non-Charter rights and freedoms could be created in the same manner.

Most of the rights and freedoms guaranteed by the Charter existed prior to its enactment in other statutes such as the Criminal Code (500) of Canada and the Canadian Bill of Rights (501) as well as in common law.

The preamble to the Canada Act 1982 (502) states, in part:

AND WHEREAS it is also desirable to provide in the Constitution of Canada for the recognition of certain fundamental rights and freedoms and to make other amendments to that Constitution;

The preamble to the Charter states:

Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law;

With respect to the rule of law, Professor Dicey wrote:

The "rule of law", lastly, may be used as a formula for expressing the fact, that with us the law of the constitution, the rules which in foreign countries naturally form part of a constitutional code, are not the source but the consequence of the rights of individuals, as defined and enforced by the Courts; that, in short, the principles of private law have with us been by the action of the Courts and Parliament so extended as to determine the position of the Crown and of its servants; thus the constitution is the result of the ordinary law of the land. (503)

This reasoning supports a view that most Charter rights and freedoms are not created by the Charter but result from rights and freedoms existing in Canada prior to the enactment of the entrenched Charter. Although worded differently than the Charter, the Canadian Bill of Rights has been subject to such an interpretation.

In R. v. Burnshine (504), Martland J. stated:

The Bill did not purport to define new rights and freedoms. What it did was to declare their existence in a statute, and, further by section 2, to protect them from infringement by any federal statute. (505)

And further, after noting that the Canadian Bill of Rights "by its express wording ... declared and continued existing rights and freedoms" (506), he added:

It was those existing rights and freedoms which were not to be infringed by any federal statute. Section 2 did not create new rights. Its purpose was to prevent infringement of existing rights. (507)

This "frozen concepts" theory has been criticized (508) and moreover, it has been contradicted by the Supreme Court of Canada which, pursuant to the Canadian Bill of Rights, has rendered legislation null and void (509). It would appear that differences in terminology in the Canadian Bill of Rights and the Charter will limit the scope of this theory.

Courts however, will, at times, continue to view rights and freedoms guaranteed by the Charter in a manner not inconsistent with their pre-existing equivalents and will construe Charter rights and freedoms in reference to existing case law (510).

Where Charter rights and freedoms did not exist in other forms, the courts will be looked to for a determination of the scope and application of "new" rights and freedoms (511). As in the past, however, and even more in the future, in view of the

constitutional nature of the Charter, it is expected that the courts will interpret rights and freedoms and their reasonable justifiable limitations in keeping with changing social conditions.

In a recent Charter case, however, Re Potma and the Queen (512), Mr. Justice Eberle offered the following cautionary words:

I have said earlier that the Charter was not passed in a vacuum. This country has a well-developed and long-established system of laws, including many presumptions in favour of an accused person. We have a whole body of legal principles and concepts, substantive and adjectival, together with a system of tribunals to apply that whole complex of laws to the cases that arise from day to day. It cannot be thought that the intent of the provisions of the Charter that are in issue in this case, is to undermine and bring to the ground the whole framework of laws and the legal system of the country at the stroke of a pen, even if it be a Royal pen. (513)

### 3: Reasonable Limits

Prescribed rights and freedoms in the Charter, although guaranteed, are not absolute. They do not exist in bald form and are guaranteed only to the extent they are not limited.

Section 1 of the Charter states:

The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Canada has always been a free and democratic society. The courts therefore, will examine the pre-Charter state of the law in determining "reasonable limits as can be demonstrably justified in a free and democratic society".

In the context of the Canadian Bill of Rights - which does not have a provision similar to section 1 - Mr. Justice Ritchie commented as follows in Robertson and Rosetanni v. The Queen (514):

It is to be remembered that the human rights and fundamental freedoms recognized by the Courts of Canada before the enactment of the Bill of Rights and guaranteed by that statute were the rights and freedoms of men living together in an organized society subject to a rational, developed and civilized system of law which imposed limitations on the absolute liberty of the individual. (515)

The limitations imposed by section 1 on rights and freedoms guaranteed by the Charter must find a foundation in law. "Prescribed by law", (516) meaning laid down by law or supported by law, appears to include statute law, regulations, common law and perhaps International Covenants to which Canada has acceded.

Since the legislature, the executive and the judiciary

form integral parts of government in a free and democratic society which recognizes the rule of law, they may be expected to prescribe reasonable limits on guaranteed rights and freedoms pursuant to section 1 (517).

In view of the words "can be" in section 1, it seems that an assessment of justifiable limits must be regarded objectively (518). The courts will make the final determinations on what government enactments or actions "can be demonstrably justified" (519). The issue is not whether the court would have chosen an alternative route but whether certain governmental actions "can" be justified (520).

The courts must balance personal rights and freedoms against rights and freedoms of a nation or society as a whole. Criminal law is designed to protect society, not shield the criminal. On the other hand, in a free and democratic society, an entrenched constitution, enshrining rights and freedoms, is designed to prevent state interference with, and abuse of, the rights and freedoms set out in it. In attempting to strike such a balance between the rights of the individual and the rights of society, the courts will look to the state of the law before the enactment of the Charter.

A determination will have to be made in a given situation whether or not Parliament, the legislatures and the courts are to be considered to have been acting unreasonably in the past (521). The courts are not directly responsible

to the public and if courts are unreasonable or unjust, the decisions of the courts can be changed by legislation (522). On the other hand, if a legislature is unreasonable or unjust, it can be changed by an election.

Although they now have an expanded power to do so, the courts may be somewhat reluctant, at least at the outset, to render laws invalid and thereby frustrate the will of the people through their duly elected representatives, unless Charter violations are clearly unreasonable (523).

In view of the entrenchment of the Charter in the Constitution and in the absence of constitutional amendments or resort to section 33, the Supreme Court of Canada will have the final word on the scope and application of rights and freedoms guaranteed in the Charter and the extent of the reasonable limits prescribed by law. The result will be a clear break from our British system of Parliamentary supremacy and a move towards the American system of judicial supremacy (524).

However, such a shift is not an absolute one and legislative and political processes will continue to play a dominant role (525). Although section 31 states that legislative powers are not extended, the following must be considered:

(i) The limits referred to in section 1 recognize the role of legislatures and give them a wider range to restrict Charter rights and freedoms than if section 1 was in-existent;

(2) Pursuant to section 33, fundamental rights, legal rights and equality rights are subject to an opting out clause by which Parliament or the legislatures avoid their provisions according to a legislative declaration; (526)

(3) Sections 37 and 59 retain a prominent role for legislatures;

(4) Pursuant to section 6(3) and (4) and section 15(2), certain rights are subject to laws of general application and to affirmative action programs;

(5) Pursuant to sections 38 through to 49, the Constitution may be amended by a complex procedure.

Furthermore, section 24, which provides a means for an aggrieved person to seek a remedy for Charter violations, is subject to certain conditions before the court may exercise its jurisdiction.

#### 4. Section 7

The Charter is not merely an illusory protection for its guaranteed rights and freedoms, however, their enforcement is dependant upon certain conditions being met. It follows that before considering remedies for police entrapment under the Charter, an aggrieved person must demonstrate to the court that such police measures infringed or denied his rights or freedoms guaranteed by the Charter. The question that arises then is whether there is a constitutional right not to be entrapped, and if so, what is the remedy.

It should be noted that Canadian jurisprudence has neither recognized entrapment as a breach of an individual's rights or freedoms under the Canadian Bill of Rights, nor under the so-called implied bill of rights allegedly contained in the preamble to The British North America Act, 1867 (527).

It is respectfully submitted that section 7 would be the most appropriate of the Charter provisions upon which a defence invoking entrapment might rely. Arguments may be foreseeable under other sections. Equality rights under section 15 may be raised to restrict entrapment practices upon individuals arbitrarily selected to be entrapped (528). The right to be secure against unreasonable search and seizure under section 8 may be argued to extend to police officers or their agents, who, in "searching" for crime and armed only with a suspicion, induce an individual to commit an offence (529). Any discussion of entrapment under the Charter however, will be restricted to section 7, although references will be made to jurisprudence interpreting analogous provisions of the Canadian Bill of Rights.

Section 7 reads:

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

The term "right" includes a claim or an advantage possessed by a person or persons which is conferred or protected by law and

which implies a corresponding duty or obligation on the part of another (530).

Four rights are provided in section 7:

1. the right to life;
2. the right to liberty;
3. the right to security of the person;
4. the right not to be deprived of the preceding three rights except in accordance with the principles of fundamental justice.

The right to life would appear to include the right of the individual to the completeness of his body and the use and enjoyment of all his faculties (531). In essence, the right to liberty means freedom from all restraints except such as are justly imposed by law (532). The right to security of the person has been defined as a person's legal and uninterrupted enjoyment of his life, limbs, body, health and reputation (533).

These rights overlap in certain areas, however it appears clear that under section 7, a person's choice to go about his life as he pleases, without interference, is guaranteed, except in those areas in which the public good requires some direction and restraint (534). These rights therefore, are not absolute and, under the Charter restraints are proper, pursuant to section 1, where prescribed by law but only if they meet the

test of reasonableness and are justifiable in a free and democratic society. Moreover, the fourth right in section 7 provides for the deprivation of life, liberty and security of the person as long as this is done in accordance with the principles of fundamental justice. What then are the principles of fundamental justice?

A literal interpretation of "the principles of fundamental justice" would appear to include general and essential accepted basic truths, doctrines or rules respecting what is just.

This phrase is used in section 2(e) of the Canadian Bill of Rights with respect to a fair hearing and has been interpreted by the courts. This section provides that:

.... no law of Canada shall be construed or applied so as to ....

e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations;

In Duke v. The Queen (535), the accused was charged under section 224 (now 236) of the Criminal Code with driving a motor vehicle with over .08 alcohol in his blood. The police were unable to comply with a subsequent request by the accused for a sample of his breath, none having been retained by them. In a unanimous judgement, the Supreme Court of Canada held that the accused was not deprived of a fair trial contrary to section 2(e) and (f) of the Canadian Bill of Rights as a result of the

failure of the Crown to provide him with the requested evidence prior to trial as nothing required the Crown to do so.

Fauteux C.J.C., in delivering the judgement of the Court, considered the meaning of a fair hearing in accordance with the principles of fundamental justice:

Under s. 2(e) of the Bill of Rights no law of Canada shall be construed or applied so as to deprive him of "a fair hearing in accordance with the principles of fundamental justice". Without attempting to formulate any final definition of those words, I would take them to mean, generally, that the tribunal which adjudicates upon his rights must act fairly, in good faith, without bias and in a judicial temper, and must give to him the opportunity adequately to state his case. (536).

It must be noted that in the Canadian Bill of Rights, the phrase "principles of fundamental justice" relates specifically to a fair hearing; thus it is logical for the Supreme Court of Canada to have given the phrase a procedural meaning resembling the definition of natural justice (537). The position of the phrase in the Charter is not so expressly qualified.

The phrase has been interpreted in its procedural sense by the Ontario Court of Appeal in R. v. Institutional Head of Beaver Creek Correctional Camp, Ex Parte MacCaud (538) as follows:

In holding that in a matter in which he is required to act judicially the institutional head shall observe the basic principles of fundamental justice, it is our opinion that this requires that the inmate affected be fully informed of the

disciplinary offence he is alleged to have committed, that he be given a fair opportunity to present his case and the evidence relevant to the matters he is called upon to face, and that the decision of the institutional head be arrived at judicially, upon the material properly before him and not capriciously or in reliance upon some consideration not relevant to the charge. (539)

Rights to life, liberty and security of the person are recognized in section 1(a) of the Canadian Bill of Rights but in the following words:

.... the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law;

The American Constitution provides similar guarantees in its Fifth Amendment with respect to federal matters:

No person shall ... be deprived of life, liberty, or property, without due process of law.....

and in its Fourteenth Amendment with respect to state matters:

.... nor shall any State deprive any person of life, liberty, or property, without due process of law.....

In both Amendments these rights and the due process clause are not contained in a separate provision like section 7 of the Charter but exist alongside other guarantees.

In addition to the absence of the right to enjoyment of property in section 7 of the Charter and of particular importance, is the replacement of the phrase "due process of law" by "the principles of fundamental justice". This is significant in view of the potential application of constitutional due process in the face of intolerable and outrageous police conduct in the United States (540). A brief look at the meaning of due process of law may shed some light on the content and scope of "the principles of fundamental justice".

Due process of law does not lend itself to a precise definition. In a literal sense it would denote just or proper action or conduct. In its strict legal sense, due process of law refers to law in the regular course of administration through the courts of justice according to those specific procedural requirements based on standards of fundamental fairness which have been established for the protection of all persons (541). Among the procedural safeguards which are essential in order to constitute due process in the criminal justice system are the right of an accused to notice, the right to a hearing before an impartial tribunal, the right to counsel and the right to confront one's accusers and present a defence (542).

In the United States, due process has been given a broad meaning. It has been viewed as a repository for certain fundamental rights not appearing elsewhere in the Bill of Rights. Moreover, it has been used, although less nowadays, as a standard

by which the propriety of legislation is measured. In this way and by invalidating legislation, the courts may control the content of legislation as well as the manner by which it is implemented and given effect. This has become known as substantive due process whereas the more restricted view is called procedural due process (543).

The following passage is of assistance in distinguishing substantive and procedural law:

It is vitally important to keep in mind the essential distinction between substantive and procedural law. Substantive law creates rights and obligations and is concerned with the ends which the administration of justice seeks to attain, whereas procedural law is the vehicle providing the means and instruments by which those ends are attained. It regulates the conduct of Courts and litigants in respect of the litigation itself whereas substantive law determines their conduct and relations in respect of the matters litigated. (544)

Due process in the American Constitution predates its equivalent in the Canadian Bill of Rights although the concept is a direct descendent of "per legem terre" of the famous 39th chapter of the original Magna Carta (545).

The terms "law of the land" and "due process of law" have generally been regarded as synonymous (546) and notwithstanding much controversy and litigation, the meaning of due process is still not clear. In 1954, it was said that:

Probably more cases, more articles and more books have been written concerning due process than any other single statutory phrase in American Law. There are about 2000 cases in this century, and over 2000 articles and case notes since 1926. There are four substantial treatises confined to the narrow title "due process" and many more of lesser importance, while general treatises on Constitutional Law in which the subject is studied and discussed are as numberless as the sands of the sea.

One would expect that after so much litigation and discussion for 50 years the meaning of due process would be crystal clear. Unfortunately that is not true. (547)

English experience with due process of law has been limited, and if any content can be given there to it at all, it would include no more than fair procedure and the rule of law (548). In Canada, due process of law as contained in section 1(a) of the Canadian Bill of Rights has been judicially considered, and interpretations of the clause have generally restricted its scope to procedural safeguards (549).

In examining section 7 and the term "principles of fundamental justice", regard must be had for the intention of Parliament. It must not be forgotten that prior to the enactment of the Charter, the same words, "principles of fundamental justice", which, as mentioned, were given a procedural meaning, were deliberately inserted in section 7 in place of the words, "due process of law", as found in section 1(a), section 7's equivalent in the Canadian Bill of Rights. Professor Hogg has stated, with this in mind, that "it is unlikely that s. 7's

phrase 'the principles of fundamental justice' can be pushed beyond procedural safeguards" (550).

The question of judicial review of legislation would not come into play, with respect to entrapment, unless a statute approved it, but even then, entrapment, being a police practice, is a procedural matter, therefore notions of judicial review of substantive legislation would not arise. The police represent for most accused the initial point of contact with the criminal justice system. The obvious question arising is when the process begins in the context of judicial review of procedure. Rather than restricting control of the process to the courtroom scene, the Supreme Court of Canada appears to be moving towards an overall regard for the criminal justice system of which police and their practices are an integral part (551).

In reviewing police practices under the Charter, the courts must decide whether these practices have caused a deprivation of the accused's right to life, liberty and security of the person, and if so, whether they have been carried out according to the principles of fundamental justice. The next step brings into play section 1. Whether or not the deprivation of the accused's right to life, liberty and security of the person was in accordance with the principles of fundamental justice, is it a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society? Of course, it is unlikely that if such procedural police practices respect the

principles of fundamental justice, they could lead to an unreasonable limit on section 7 rights because it is doubtful that a right would be infringed in this way. On the other hand, if the principles of fundamental justice have not been respected in the deprivation of rights under section 7, section 1 would be utilized to assess whether the deprivation is a reasonable and demonstrably justifiable limit.

Traps designed to apprehend individuals who have already chosen to engage in criminal conduct would unlikely be considered undue interference with section 7 rights. Instigation of crime by state agents and their persistent inducements, made to persons who would not otherwise have engaged in criminal conduct, may in certain cases be deemed undue interference with the manner in which such persons have chosen to conduct their lives.

The factual situations in Sorrells (552), Silva (553) and Sherman (554), to name but a few, disclose efforts by the state to go to great lengths to persuade innocent-minded persons to commit crimes for which the instigators are later parties to the prosecution. It is conceded that such an accused person had a choice whether or not to ultimately commit the crime, however, that may be easier said than done in the presence of determined "entrappers". Where entrapment constitutes an invasion of personal integrity and privacy by pressure tactics designed to induce an otherwise-innocent person to commit a crime.

conceived by agents of the authorities and for which he will later be prosecuted, it cannot be said that one's right to life, liberty and security of the person has not been infringed. And, the means utilized to achieve the purpose envisaged are clearly far removed from any notion of fair play inherent in the principles of fundamental justice especially if the officials acted without reasonable grounds in the first place (555).

In his dissenting judgement in Amato v. The Queen (556), Estey J., who held that the facts constituted entrapment, considered the police activities to be "shocking and outrageous" (557) and "clearly contrary to the proper principles upon which justice must be done by the courts" (558).

In R. v. Bonnar (559), Macdonald J.A. (N.S.) held that entrapment "strikes at the very foundation of the system and administration of criminal justice in a free and democratic society and just cannot be permitted or condoned" (560).

Similarly, in R. v. Haukness (561), an entrapment case, Cronin Prov. J. (B.C.) stated that notwithstanding the commission of the offence by the accused, "it would be contrary to the principles of the administration of justice in this country to convict him of that" (562).

In the United States, there is a body of opinion that would apply constitutional due process, apart from the traditional defence of entrapment, to monitor outrageous police

conduct in appropriate circumstances (563).

Assuming then that entrapment breaches the principles of fundamental justice, the obvious question is whether or not it is a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society. Police detection measures are seldom prescribed by statute but they are the subject of much judicial comment and judicial precedents do appear to be included in the general term "law" or its French equivalent "règle de droit" in section 1 of the Charter.

Police measures amounting to traps which provide opportunities for the criminal-minded to commit offences, are, as previously noted, an acceptable practice. Although the Supreme Court of Canada has not yet seen fit to provide a defence of entrapment, police entrapment has certainly not been approved. It may be argued though, that if entrapment practices can lead to a conviction then they are implicitly approved by the courts and are reasonable limits "prescribed by law" on any right infringed in the process. On the other hand, entrapment has not been a recognized limit imposed by the courts neither prior to nor since the enactment of the Charter. Furthermore, the Supreme Court of Canada has not categorically rejected entrapment as a defence but has simply found that if such a defence exists it has not been factually supported by the evidence in the cases before the Court (564).

Although the solicitation of predisposed persons may be a reasonable limit on guaranteed rights, one would have to be hard-pressed to argue that "the conception and planning of an offense by an officer, and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion, or fraud of the officer", (565) falls within the section 1 proviso. In a clear case of entrapment, not only would the police measures be unreasonable but, in a free and democratic society, unjustifiable. One could certainly not rely upon the difficulties of enforcement of crimes without victims as a justification for the near creation of crimes by those responsible for law enforcement.

Assuming then, that there is a constitutional right not to be entrapped in Canada, the next question that arises is how to enforce such a right.

#### B. Redress in the Event of Charter Violations

The rights and freedoms guaranteed in the Charter are complemented by express enforcement provisions. Some constitutions, such as that of the United States, do not contain an express enforcement provision although in that country, the courts have applied remedies in the event of violations of constitutional rights.

The Canadian Bill of Rights, although containing a rule of statutory construction which may, in rare situations, render a statutory provision inoperative (566), does not contain an enforcement section according to the courts jurisdiction to grant remedies for violations of the enumerated rights and freedoms.

Section 24 (567), the entrenched enforcement provision in the Charter, on the one hand allows the courts greater freedom of action in dealing with infringements or denials of guaranteed rights and freedoms, yet, on the other hand imposes its own restrictions thereby preventing judicial review from straying beyond control.

Section 24 stipulates:

(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

Section 24 does not create rights or freedoms but is merely a means of enforcing them. Nor does section 24 operate

in a vacuum but, on the contrary, is limited by its very wording. It only applies to rights and freedoms guaranteed by the Charter. Therefore, it does not apply to other rights and freedoms not benefitting from constitutional guarantees. Moreover, there is a further restriction in that rights and freedoms guaranteed by the Charter are subject to reasonable limits prescribed by section 1. As well, it must be remembered that any remedy pursuant to section 24 may only be directed at the bodies governed by the Charter in virtue of section 32(1).

1. Section 24(1)

In order to bring section 24(1) into play, there must be an application. The application may be made by "anyone" and, in contrast to the word "individual" in section 15, this would appear to include natural and corporate persons (568).

Section 24(1) does not create a special court to entertain Charter violations. The court of competent jurisdiction to which the application must be made seems to signify a court (civil or criminal), which, independently of the Charter and in accordance with existing law under the distribution of powers, has jurisdiction to grant a particular remedy. (569). It is obvious that the civil or criminal nature of a remedy is determined by the civil or criminal nature of the court to which the application is made.

Appropriate and just remedies which a court might grant, at the very least, are those forms of relief which have always been available to the court having regard to its competence. Therefore, in criminal matters, the types of remedies which courts will likely grant pursuant to section 24(1) may include adjournments, costs in certain circumstances, quashing of charges and stays of proceedings (570). With respect to entrapment, the most likely remedy would be a stay of proceedings. Exclusion of evidence is dealt with separately under section 24(2).

## 2. Section 24(2) and Illegally Obtained Evidence

Section 24(2) provides a specific mechanism for one remedy, that of excluding evidence. Sections 24(1) and (2) must be read together as section 24(2) does not exist alone but is a particular type of section 24(1) application (571). Therefore, the same conditions governing a section 24(1) application, apply, *inter alia*, to an application to exclude evidence, i.e. an application to a court of competent jurisdiction by a person whose rights or freedoms have been infringed or denied.

The references in section 24(2) to "proceedings under subsection 1" and further "the proceedings", envisage the situation where a court that is authorized to have evidence presented before it, in a specific case, is confronted with certain evidence and an application is made to that court pursuant to section 24(1) to exclude it. This would then trigger the application of

section 24(2) (572). The intent is for such applications to take place during an existing proceeding before the court that is seized with the matter and before which the disputed evidence is tendered (573). Contingent interlocutory applications or motions to suppress would be premature as they would be in anticipation of evidence not tendered at that point in time by the Crown (574).

In order to succeed in excluding evidence under section 24(2), the disputed evidence must have been obtained "in a manner that infringed or denied any rights or freedoms guaranteed by this Charter". It is not every situation where evidence has been obtained illegally that will render section 24(2) applicable (575).

Implied in the wording of section 24(2) is the necessity of a causal relationship between the infringement or denial and the obtaining of evidence (576). The more remote the infringement or denial from the obtaining of the attacked evidence, the more likely an argument in favour of admission of the evidence would be successful (577).

Once the court concludes that evidence was obtained in a manner that infringed or denied Charter rights or freedoms, there is a further matter for the court's determination; that is, whether it has been established that, "having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute" (578).

With respect to illegally obtained evidence and whether or not its admission would bring the administration of justice into disrepute, an analysis of the state of law in Canada prior to the Charter and, of course, in its present form outside the scope of the Charter, is essential for a full understanding of the impact and significance of the constitutional remedy of excluding evidence.

In R. v. Wray (579); the accused Wray was charged with non-capital murder. The accused had signed a statement in which he told the police that he threw the gun (the murder weapon) in the swamp. Subsequently, the accused directed the police to the locality where, as a result of what he told them, they found the rifle the following day.

The trial judge ruled the statement inadmissible as it was not voluntary (this was not challenged) and further refused to allow the Crown to adduce evidence as to the participation by the accused in finding the murder weapon. The accused was acquitted and on appeal by the Crown, the Court of Appeal unanimously affirmed the acquittal. Mr. Justice Aylesworth, in delivering the judgement of the Court, used words which have found their way into subsequent judgements and of course, the Charter. He stated:

In our view, a trial Judge has a discretion to reject evidence, even of substantial weight, if he considers that its admission would be unjust or unfair to the accused or

calculated to bring the administration of justice into disrepute, the exercise of such discretion, of course, to depend upon the particular facts before him. Cases where to admit certain evidence would be calculated to bring the administration of justice into disrepute will be rare, but we think the discretion of a trial Judge extends to such cases. (580)

A further Crown appeal to the Supreme Court of Canada was allowed (by a 6-3 majority) and a new trial ordered.

The Supreme Court held that a judicial discretion to exclude relevant evidence of substantial probative value was not warranted by the authorities and therefore evidence of the facts leading up to the finding of the murder weapon and parts of the confession as were confirmed as true by the discovery of such facts were admissible.

Martland J., who rendered the majority judgement, held that such evidence may have operated unfortunately for the accused but not unfairly. He further held that:

It is only the allowance of evidence gravely prejudicial to the accused, the admissibility of which is tenuous, and whose probative force in relation to the main issue before the Court is trifling, which can be said to operate unfairly. (581)

It is only evidence of this nature that might be excluded.

In a concurring opinion, Judson J. virtually ruled out any discretion whatsoever, stating:



There is no judicial discretion permitting the exclusion of relevant evidence, in this case highly relevant evidence, on the ground of unfairness to the accused. . . . The task of a Judge in the conduct of a trial is to apply the law and to admit all evidence that is logically probative unless it is ruled out by some exclusionary rule. If this course is followed, an accused person has had a fair trial. The exclusionary rule applied in this case is one that should not be accepted. (582)

The decision in Wray concentrates on fairness at trial and is authority for the evidentiary rule that apart from the narrow exercise of discretion asserted by Martland J. and apart from the requirement of voluntariness in the realm of confessions, courts do not possess any discretion to exclude evidence because of the manner in which it was obtained, whether or not this be illegal or improper.

Although the dissenting Justices found the evidence the Crown sought to introduce at trial was legally admissible (apart from the involuntary confession), they held that in view of police improprieties in obtaining such evidence,

it was open to the learned trial Judge to hold that the admission of evidence of that fact would be so unjust and unfair to the accused and so calculated to bring the administration of justice into disrepute as to warrant his rejecting the evidence in the exercise of his discretion; (583)

The enactment of the Charter and, in particular, section 24(2), provides an exclusionary rule of the sort Judson J. may have envisaged. The Canadian Bill of Rights has never

contained an exclusionary rule. Although the Supreme Court of Canada rendered federal legislation inoperative due to a breach of the Canadian Bill of Rights, in R. v. Drybones (584), and further construed section 223(2) (now 235(2)) of the Criminal Code in a manner consistent with section 2(c)(ii) of the Canadian Bill of Rights, in Brownridge v. The Queen (585), it was not until Hogan v. The Queen (586) that the Supreme Court of Canada had to resolve the effect a breach of a provision of the Canadian Bill of Rights had upon the admissibility of evidence.

In that case the accused Hogan was taken to the police station for a breathalyzer test. Prior to taking the test, the accused requested to see his counsel who was present at the police station. The police officer refused to allow this and advised the accused that if he refused the test he would be charged with refusing to provide a breath sample. The accused then complied and was subsequently convicted of an offence under section 236 of the Criminal Code. The Nova Scotia Supreme Court Appeal Division affirmed the conviction and a further appeal by the accused to the Supreme Court of Canada was dismissed (by a 7-2 majority).

Ritchie J., in delivering the majority judgement, distinguished Brownridge, as in that case the accused was charged under s. 223(2) (now 235(2)) and the denial of right to counsel to the accused who was under arrest, provided him with a reasonable excuse to refuse to provide a breath sample. Under section 236 there is no provision for reasonable excuse and in Hogan,

evidence had been obtained as the accused submitted to the breathalyzer test which he apparently had a reasonable excuse to refuse. In finding the technician's certificate relevant, cogent and clearly admissible at common law, Ritchie J. referred to Wray and further held that even if the result of the breathalyzer test had been improperly or illegally obtained, there were no grounds for excluding it at common law.

In his dissenting judgement, Laskin J., as he then was, acknowledged the common law rule of admissibility of illegally or improperly obtained evidence if relevant to issues, without regard to the means by which it was procured (except for confessions) and the very narrow discretion accorded to courts in Wray.

As a result of this rule, he offered comments on policy choice as follows:

The choice of policy here is to favour the social interest in the repression of crime despite the unlawful invasion of individual interests and despite the fact that the invasion is by public officers charged with law enforcement. Short of legislative direction, it might have been expected that the common law would seek to balance the competing interests by weighing the social interest in the particular case against the gravity or character of the invasion, leaving it to the discretion of the trial Judge whether the balance should be struck in favour of reception or exclusion of particular evidence. I have already indicated that the discretion has been narrowed, and, I would add, to an extent that underlines a wide preference for admissibility. (587)

Laskin J. referred to the contrary approach in the United States and their rule of exclusion of evidence obtained in breach of their Constitution. In ruling upon the breach of the Canadian Bill of Rights before him, Laskin J. stated:

The Canadian Bill of Rights is a half-way house between a purely common law regime and a constitutional one; it may aptly be described as a quasi-constitutional instrument. It does not embody any sanctions for the enforcement of its terms, but it must be the function of the Courts to provide them in the light of the judicial view of the impact of that enactment. The Drybones case has established what the impact is, and I have no reason to depart from the position there taken. In the light of that position, it is to me entirely consistent, and appropriate, that the prosecution in the present case should not be permitted to invoke the special evidentiary provisions of s. 237 of the Criminal Code when they have been resorted to after denial of access to counsel in violation of s. 2(c)(ii) of the Canadian Bill of Rights. There being no doubt as to such denial and violation, the Courts must apply a sanction. We would not be justified in simply ignoring the breach of a declared fundamental right or in letting it go merely with words of reprobation. Moreover, so far as denial of access to counsel is concerned, I see no practical alternative to a rule of exclusion if any serious view at all is to be taken, as I think it should be, of this breach of the Canadian Bill of Rights. (588)

With respect to the rule of exclusion of evidence formulated by Laskin J. under the Canadian Bill of Rights, Ritchie J. said:

The case of R. v. Drybones . . . . is authority for the proposition that any

law of Canada which abrogates, abridges or infringes any of the rights guaranteed by the Canadian Bill of Rights should be declared inoperative and to this extent it accorded a degree of paramountcy to the provisions of that statute, but whatever view may be taken of the constitutional impact of the Canadian Bill of Rights, and with all respect for those who may have a different opinion, I cannot agree that, whenever there has been a breach of one of the provisions of that Bill, it justifies the adoption of the rule of "absolute exclusion" on the American model which is in derogation of the common law rule long accepted in this country. (589)

Pigeon J., in a concurring majority judgment, added:

I agree with Ritchie, J., that this appeal should be dismissed on the basis that, even if the Canadian Bill of Rights is given the same effect as a constitutional instrument, this does not mean that a rule of absolute exclusion, which is in derogation of the common law rule, should govern the admissibility of evidence obtained wherever there has been a breach of one of the provisions contained in that Bill. (590)

These decisions display a marked tendency of the Supreme Court of Canada to return to common law principles in the absence of an express statutory provision authorizing the taking of a wider course. The relevance and probative value of evidence have been regarded as pre-eminent in the search for the truth in criminal trials overriding other factors such as methods of obtaining evidence and improper police conduct. Therefore, the courts' attention has been diverted from a regard for the integrity of the entire criminal justice system and as a result, police misconduct may be encouraged.

It is not surprising then that the rule in Wray has been subject to a great deal of controversy (591) but, notwithstanding criticism, several studies and recommendations (592) to change the rule, it remained.

In 1977, section 178.16 of the Criminal Code was amended (593) to provide for a discretionary exclusion of evidence obtained directly or indirectly as a result of information acquired by interception of inadmissible private conversations where the court is of the opinion that its admission would bring the administration of justice into disrepute. Prior to the amendment, such evidence, if relevant, was not to be excluded if the exclusion may have resulted in justice not being done. Such a change reflects a shifting of the balance referred to by Laskin J. in R. v. Hoan (594).

The Charter is a constitutional instrument and further shifts the balance referred to above (although section 24(2) is mandatory and not discretionary). In Charter cases dealing with the exclusion of evidence, the dissent in Wray will be influential, although no attempt was made there to define what was meant by the term "would bring the administration of justice into disrepute", a term which has been incorporated into section 24(2) as one pre-condition to the exclusion of evidence obtained in breach of Charter rights (595).

Those words were considered recently by the Supreme Court of Canada in the realm of confessions. In Rothman v.

The Queen (596), the Supreme Court had to rule upon a statement made by an accused charged with possession of narcotics for the purpose of trafficking.

After he was arrested and cautioned, the accused refused to provide a statement and was then lodged in a cell at the police station. Shortly thereafter, a police officer, acting in an undercover capacity, was placed in the cell and although the accused at first suspected the police officer was a "nark", the officer told him he was a truck driver and had been fishing. In response to the accused's query, the officer said he was in jail because of a traffic ticket. When the police officer asked the accused why he was in jail, the accused told him it was for possession of hashish and then continued to make an inculpatory statement relating to the charge.

The trial judge held that the police officer was a person in authority and ruled the statement inadmissible in view of the method in which it was obtained by the officer. As a result, the accused was acquitted but on Crown appeal the Ontario Court of Appeal ordered a new trial. An appeal by the accused to the Supreme Court of Canada was dismissed (by a 7-2 majority).

Martland J. delivered the majority judgement and held, applying the subjective test, that the police officer was not a person in authority because he was not regarded as such by the accused. He further expressed an opinion as to whether the

accused's confession was properly admissible even on the assumption that the police officer was a person in authority. Martland J. adhered to the traditional test of voluntariness without regard for the methods by which the statement was obtained or the effects of such methods on the criminal justice system. He stated:

It was not, in my opinion, a sufficient basis for the refusal of the trial Judge to receive the confession in evidence solely because he disapproved of the method by which it was obtained. The issue in the case was as to whether the confession was voluntary. (597)

In this case, although the accused was mistaken as to the identity of the person with whom he was talking, his statement was freely and voluntarily made, i.e. "the utterance of an operating mind" (598).

Estey J., in a dissenting judgement concurred in by Laskin C.J.C., would have excluded the statement. In his view confessions are not admissible where to admit them would bring the administration of justice into disrepute or, as he said in another way, would prejudice the public interest in the integrity of the judicial process.

Estey J. considered the accused's statement to have been involuntarily made because the accused did not know he was giving it to a person in authority and further because it was "the product of a trick and lies by persons in authority, calculated

to subvert the appellant's expressed decision to stand mute" (599). Such a determined subversion by the police, he held, brought the administration of justice into disrepute and rendered the statement inadmissible. His Lordship would view as potentially bringing the administration of justice into disrepute, police actions that cause the public to lose support and respect for the integrity of the criminal justice system.

Lamer J., in a separate judgement not concurred in, although agreeing with the result of the majority, reviewed the bases for the confession exclusionary rule and expressed a general concern for the criminal justice system. He formulated the following two rules:

1. "A statement made by the accused to a person in authority is inadmissible if tendered by the prosecution in a criminal proceeding unless the Judge is satisfied beyond a reasonable doubt that nothing said or done by any person in authority could have induced the accused to make a statement which was or might be untrue;

2. A statement made by the accused to a person in authority and tendered by the prosecution in a criminal proceeding against him, though elicited under circumstances which would not render it inadmissible, shall nevertheless be excluded if its use in the proceedings would, as a result of what was said or done by any person in authority in eliciting the statement, bring the administration of justice into disrepute. (600)

With respect to the second rule and what would bring the administration of justice into disrepute - a matter not dealt with by Martland J. - Mr. Justice Lamer stated, in what

may become an oft-quoted passage:

I would emphasize that under the above-mentioned second rule the Judge is not exercising a pure discretion to exclude, as is the case under s. 178.16(2) of the Criminal Code, and that his finding is to be dealt with in appeal as any other finding, subject to the differences and limits of the Appeal Court's jurisdiction as defined by s. 603 ... and s. 605 ... of the Criminal Code.

I hasten to say also that, if the second portion of the rule is not a true discretion, it is even less a blanket discretion given Judges to repudiate through an exclusionary rule any conduct on the part of the authorities a given Judge might consider somewhat unfortunate, distasteful, or inappropriate. There first must be a clear connection between the obtaining of the statement and the conduct; furthermore that conduct must be so shocking as to justify the judicial branch of the criminal justice system in feeling that, short of disassociating itself from such conduct through rejection of the statement, its reputation and, as a result, that of the whole criminal justice system, would be brought into disrepute.

The Judge, in determining whether under the circumstances the use of the statement in the proceedings would bring the administration of justice into disrepute, should consider all of the circumstances of the proceedings, the manner in which the statement was obtained, the degree to which there was a breach of social values, the seriousness of the charge, the effect the exclusion would have on the result of the proceedings. It must also be borne in mind that the investigation of crime and the detection of criminals is not a game to be governed by the Marquess of Queensbury rules. The authorities, in dealing with shrewd and often sophisticated criminals, must sometimes of necessity resort to tricks or other forms of deceit and should not through the rule be hampered in their work. What

should be repressed vigorously is conduct on their part that shocks the community. That a police officer pretend to be a lock-up chaplain and hear a suspect's confession is conduct that shocks the community; so is pretending to be the duty legal aid lawyer eliciting in that way incriminating statements from suspects or accused; injecting pentothal into a diabetic suspect pretending it is his daily shot of insulin and using his statement in evidence would also shock the community; but generally speaking, pretending to be a hard drug addict to break a drug ring would not shock the community; nor would, as in this case, pretending to be a truck driver to secure the conviction of a trafficker; in fact, what would shock the community would be preventing the police from resorting to such a trick. (601).

In balancing the interests of society and the individual, Lamer J. would repudiate - in this case through a rule excluding confessions - conduct on the part of the authorities that "shocks the community".

On the other hand, he recognized the need of police officers to resort to stratagems in dealing with criminals and implicitly appears to have felt that the courts have a correlative duty to protect the public by recognizing such means of law enforcement. On the facts before him, His Lordship was of the view that it would shock the community if the police were prevented from resorting to such a trick.

These reasons may serve to assist courts in Charter cases to decide what evidence would bring the administration of justice into disrepute and as a result be excluded from the trier of fact (602). In arriving at such a decision, section 24(2)

directs the court to have regard to all the circumstances.

In "having regard to all the circumstances", the court must weigh the interests of individuals to be protected from state invasion of constitutionally protected rights and the interests of society to be protected from crime with the assurance that evidence bearing on the commission of crime will be secured and tendered in criminal courts.

In striking a balance and setting priorities in a particular case, the court may consider a variety of factors (603) such as:

- 1) Wilfulness, i.e. whether the breach was deliberate and malicious or whether it was done in good faith and inadvertently;
- 2) Urgency of the situation, e.g. to prevent the loss of evidence;
- 3) Unfair prejudice to the accused;
- 4) Seriousness of the Charter violation;
- 5) Gravity of the offence charged;
- 6) Reliability of the evidence under attack;
- 7) Conduct of the police;
- 8) Infliction of harm on the accused or others;
- 9) Extent to which human dignity and social values were breached in obtaining the evidence.

Once the court is satisfied under section 24(2) that the admission of the disputed evidence would bring the administration of justice into disrepute and if the applicant has complied with the other conditions, then the court cannot exercise its discretion in excluding or admitting this evidence since the subsection is mandatory in stipulating that the evidence "shall" be excluded (604). Of course, however, there remains a certain amount of discretion a court may exercise - at least in the absence of binding authority that makes reference to a particular situation (as in Lamer J.'s judgement in Rothman (605)) - in determining whether or not the admission of certain evidence would bring the administration of justice into disrepute.

One starts off then with the rule that relevant evidence of ~~substantial~~ probative value is admissible notwithstanding illegal or improper methods in obtaining it. Touchstones of admissibility therefore, have been relevance, probative value and, with respect to confessions, voluntariness, since a desire for truth and reliability of evidence has been the ultimate goal sought by the courts.

To demonstrate recent trends one only has to turn to the realm of confessions which constitutes a large part of the law of evidence involving direct contact between police officers and accused. The exclusionary rule governing confession evidence is not based upon any objective standards of propriety of police

conduct. It relates to the interplay between the conduct of persons in authority and its effect on the accused, leading to a determination of the voluntariness of a resulting statement.

Prior to R. v. Wray (606) courts were more apt to condemn police tactics per se than after the decision was rendered. What Wray did was significantly reduce the range of discretion a trial judge could exercise with respect to relevant evidence of probative value. Attention was to be focused on the quality of the evidence itself at trial without regard for the measures utilized to obtain it or the effect of such measures on the administration of justice (607).

What would happen then in the realm of confessions is that, in view of the existence of an exclusionary rule, findings of fact could be tailored to conform to the rule and under the guise of voluntariness, a trial judge outraged by police conduct might rule a statement inadmissible (608).

Other forms of evidence have not, in the past, benefitted from such an exclusionary rule even since the advent of the Canadian Bill of Rights and therefore, the strict rule in Wray has generally been adhered to.

The traditional British view, which has been the predominant one in Canada, is concerned with fairness at trial and this includes an assessment of evidence at trial without any concern for how it got there (except for the rule of

voluntariness for confessions) and what took place before the trial (609). Therefore, a discretion to exclude evidence obtained by undesirable means could generally not be exercised by the courts in order to express disapproval of police conduct (610).

The American view and the position to which our law is leaning, considers fairness in the whole process including the pre-trial investigative stage, therefore methods of obtaining evidence are significant as they have a tremendous impact on the admissibility of evidence at trial.

The Rothman (611) case is an important one because two Justices of the Supreme Court of Canada, Lamer and Estey JJ., although not concurring in the reasons of the majority (Lamer J. did concur in the result whereas Estey J., with whom Laskin C.J.C. concurred, dissented), have provided what may be influential reasons for judgement in their analyses of the basis for the confession exclusionary rule, by extending it and breaking with the traditional approach followed by Martland J. (612).

The extension of the rule reflects the manner in which evidence is obtained and its effect on the administration of justice although Lamer and Estey JJ. viewed the facts differently in the case before them. The judicial rules expressed by these two learned Justices further reflects judicial policy-making and a desire to preserve judicial integrity and consequently, the fairness of the whole process by which criminal justice is administered.

That this reasoning was developed without any statutory provision not only marks a break with tradition but suggests a vast potential for development under the Charter which contains a constitutionally entrenched exclusionary rule formulated in broad words similar to those used by Lamer and Estey JJ. The Charter reflects this concern for the criminal justice system as a whole, rather than only a portion of it. It is expected that remedies under the Charter such as the exclusion of evidence will have an effect on the gatherers of evidence in a variety of situations so that their methods will respect guaranteed rights and freedoms and thereby prevent the processes of criminal justice from becoming a party to practices which attack them and which are unfair to individuals by the overriding of constitutional rights.

These developments will certainly carry great weight in the sphere of law enforcement and go beyond mere evidentiary rules. This shift by the courts towards scrutiny of the manner in which evidence is obtained will lead the courts to focus on police investigative measures such as entrapment, in Charter and non-Charter matters and, in their desire to control the process, be more receptive to defence tools to challenge such measures.

### 3. Analogy with the American Bill of Rights.

The Charter contains similar guarantees as can be found in the American Bill of Rights, although expressed differently. In order to measure the impact of American decisions interpreting and applying the American Bill of Rights, it is essential to take into account the respective backgrounds of the Bill and the Charter.

Prior to the United States Declaration of Independence, American colonists suffering injustices at the hands of the mother country developed an independent spirit with a hostility to government. The United States is a nation founded upon a revolution from Great Britain, a country from which she struggled for rights and liberties later declared in a Constitution limiting governmental power (613).

The Bill of Rights was enacted in the form of Amendments to the Constitution. The first ten amendments became effective in 1791, whereas the Fourteenth Amendment was adopted in 1865. In considering the purpose and scope of the American Bill, attention must be given to the intention of Congress in providing for rights in frontier times.

Canada, on the other hand, has slowly evolved from a colony to an independent nation and Parliament's intention in passing the Charter is not at all comparable to the intention of Congress in 1791 and 1865.

Rights and freedoms guaranteed by the Charter apply to the federal and provincial governments whereas the constitutional guarantees contained in the American Bill of Rights, i.e. those included in Amendments 1 through 10, were originally restricted to the U.S. federal government alone but, since the enactment of the Fourteenth Amendment, have gradually been incorporated into the due process clause and applied to the states (614).

The American Bill of Rights does not contain a provision that resembles section 1 of the Charter, which subjects guaranteed rights and freedoms to reasonable limits. This is a significant distinction and therefore, in Canada, judicial interpretation must be guided by the intention of Parliament in enacting section 1.

The Charter further provides a means of enforcing constitutional violations, a provision which is lacking in the United States Constitution although there, the Supreme Court has ensured that constitutional guarantees are not reduced to a "form of words" (615) by developing, as a matter of case law, a method of suppressing tainted evidence.

In the United States, this rule of excluding evidence, obtained as a result of the infringement of constitutional rights, evolved into an absolute exclusionary rule (616) which, subject to various exceptions, was extended to derivative evidence or "fruits of the poisonous tree" (617). Consequently, "the

pettiest peace officer would have it in his power, through overzeal or indiscretion, to confer immunity upon an offender for crimes the most flagitious" (618) or in other words, "the criminal is to go free because the constable has blundered" (619). In favouring other priorities, the "application of the rule thus deflects the truthfinding process and often frees the guilty" (620).

The traditional common law view emphasizes the search for the truth above all else. It has been stated, "it matters not how you get it; if you steal it even, it would be admissible in evidence" (621).

Charter remedies will likely occupy a middle ground between the two extremes having regard to restrictions imposed by sections 1 and 24. In this way, exclusion of evidence is not automatic in the event of a constitutional violation, but hinges on all the circumstances and a regard for the administration of justice as a whole.

The American exclusionary rule has been modified by requirements of standing (622), by the doctrine of harmless constitutional error (623) and by the good faith exception (624).

The good faith exception reflects a balance of interests in a manner not unlike section 24(2) of the Charter. Although not expressly adopted by the United States Supreme Court, it has been applied by the Fifth Circuit Court of Appeals in United States v. Williams (625) where the Court laid out the exceptional rule as follows:

Sitting en banc, we now hold that evidence is not to be suppressed under the exclusionary rule where it is discovered by officers in the course of actions that are taken in good faith and in the reasonable, though mistaken, belief that they are authorized. We do so because the exclusionary rule exists to deter willful or flagrant actions by police, not reasonable, good-faith ones. Where the reason for the rule ceases, its application must cease also. The costs to society of applying the rule beyond the purposes it exists to serve are simply too high - in this instance the release on the public of a recidivist drug smuggler - with few or no offsetting benefits. We are persuaded that both reason and authority support this conclusion. (626)

In the United States, there is a reliance upon the intervention of the judiciary to monitor relations between government agents and individuals and it is within this process that the exclusionary rule finds its rationale.

It is said that the rule deters police actions that breach constitutional protections by removing incentives to disregard them (627) and, in turn, encouraging increased knowledge of constitutional requirements (628). The rule is further justified by the "imperative of judicial integrity" (629) in preventing the judicial process from being stained as a party to official conduct that demonstrates a manifest disregard for constitutional protections because in admitting into evidence the fruits of such lawlessness, the illegal measures used to obtain it are ratified (630).

This concern for the administration of justice is reminiscent of the judgements of Lamer and Estey JJ. in Rothman v. The Queen (631) and of the exclusionary rule expressed in the Canadian Charter.

The Supreme Court of Canada has, in the past, exercised judicial restraint in applying the Canadian Bill of Rights and has expressed a reluctance to be swayed by American jurisprudence (632) or to abolish common law rules of evidence where they can be reconciled with a statute. The Charter, unlike its predecessor, is a constitutional document; however, interpretation by the courts of its guarantees is subject to its inherent restrictions. It appears doubtful that the Supreme Court of Canada, in applying the Charter, will partake in the extreme activism engaged in by the United States Supreme Court and therefore, drastic results that were not intended by Parliament will be avoided. Changes are inevitable however, and it may be expected that Canadian courts will take a more flexible approach which will reflect compromises between the interests of society and the individual on the one hand, and the search for truth at trial, regard for the integrity of the criminal justice system and respect for constitutional guarantees, on the other hand.

#### 4. Remedies in the Event of Entrapment

The most appropriate remedies under the Charter for a violation of section 7 rights caused by police entrapment,

appear to be a stay of proceedings or the exclusion of evidence, pursuant to section 24(1) or (2) respectively.

Once a court is satisfied that an infringement of a Charter right took place as a result of police entrapment, the court may, in determining the appropriate and just remedy, demonstrate a concern for the integrity of the criminal justice system by importing notions of abuse of process and grant a stay of proceedings, although the jurisdiction of the courts to do so is still in dispute (633). A stay of proceedings under section 24(1), if held to be a valid remedy, would best be applied for at the time the evidence infringing Charter rights is tendered or after the Crown's case is closed. In both situations, the granting of the remedy would be a matter for the court alone to decide and, in the former case, evidence would likely be heard on a voir dire. Since a stay of proceedings has greater consequences in a criminal trial than the exclusion of evidence, the stringent conditions in section 24(2) would likely apply (634). The availability of section 24(1) as a basis for a substantive "defence" of entrapment is not likely, however a stay of proceedings or the exclusion of evidence would, in most cases, have the same result as a successful defence.

In most entrapment cases, the exclusion of evidence of entrapment, although a procedural device and not a substantive defence, would be tantamount to an acquittal because the evidence obtained by entrapment would likely constitute the only evidence

relied upon by the prosecution for conviction. Objection would best be made at the time the evidence is tendered and a decision - a matter for the court alone - would be rendered after hearing evidence on a *voir dire*.

An examination of police entrapment, having regard to all the circumstances, as per section 24(2), would generally disclose its wilfulness, lack of urgency, unfair prejudice to the accused, the seriousness of the Charter violation and the potential unreliability of evidence, particularly when informers are involved (635). An examination of this conduct would further disclose, in many cases, that the offence instigated was not that serious, harmful to others or immediate, that it called for drastic action interfering with human dignity and rights and resulting in exposing the judicial process and the public to ignoble behaviour by an arm of the criminal justice system.

In accordance with current views expressed by members of the Supreme Court of Canada (636), it seems unlikely that courts will permit the criminal justice system to be tainted by the admission of evidence obtained by police entrapment in breach of constitutional rights. Therefore, police entrapment could certainly be included among those "shocking" practices described by Lamer J., in Rothman v. The Queen (637), that would bring the administration of justice into disrepute.

Many rights and freedoms existed in Canada in other forms prior to the enactment of the Charter and, although their meaning does not appear to have been altered, the effect of these rights and freedoms is enhanced by their entrenchment in the Constitution. A constitution is a vital and dynamic document and must be capable of growth. The courts must respond by keeping a constitution alive to new developments in society (638).

The right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice are not precisely defined rights granted by Parliament in one operation. As the courts adapt to changing conditions in the community, the exercise of these rights in new or untested circumstances increases their potential but renders any clear definition unpredictable. The accommodation of a doctrine of entrapment under the Canadian Charter of Rights and Freedoms would reflect the adjustment of the courts to a living constitution as well as to the never-ending compromise between the interests of society and the interests of the individual.

CONCLUSION

It has been seen that certain crimes, particularly crimes without victims, are difficult to enforce by ordinary methods of investigation and detection. Police stratagems and undercover operations amounting to traps which provide opportunities for willing persons to commit offences, are recognized as permissible methods designed to combat such crimes. However, police conduct constituting entrapment by inducing otherwise-innocent persons into criminal activity is excessive and brings into play the continuing conflict between the competing interests of the public and the interests of the individual.

Entrapment puts into question the blameworthiness of the entrapped person and is offensive to common notions of decency and fair play. As a result, it undermines respect for the administration of justice of which the police, the prosecution and the judiciary are integral parts. It is not suggested that Canadian police forces are not generally honest or efficient or that they engage in entrapment as a routine practice. Nevertheless, in the event it does arise, a balance must be struck between the protection of the public from criminal activity and the protection of the individual from overzealous police activity.

In order to strike such a balance, control measures must be implemented to ensure that police conduct, although

striving for the protection of the community and the maintenance of order, remains within acceptable bounds of propriety. Such control mechanisms, it is believed, should transcend, but not altogether replace, traditional avenues such as mitigation of sentence of the entrapped accused (639), civil and criminal liability of the offending police officer and the accountability of the offending officer before administrative disciplinary review boards. Control techniques should block the intended aim of police entrapment - the conviction of the entrapped accused.

Measures of control which may come to the aid of an entrapped accused may include the exclusion of evidence obtained by entrapment, a stay of proceedings based on an abuse of process of the court and an acquittal pursuant to a substantive defence of entrapment.

In England, courts have expressed a reluctance to depart from the traditional common law focus on the trial forum and have refused to scrutinize police investigative methods such as entrapment and the resulting evidence, in the absence of precedent or legislation.

American courts do reach into the investigatory stages. In the United States, exclusionary rules of evidence which are founded on constitutional precepts, do not encompass entrapment. However, the Supreme Court has firmly established a defence of entrapment based on statutory construction which

relates, subjectively, to the predisposition of the accused in the case before the court.

The exclusion of relevant and probative evidence, although obtained by improper and/or illegal means, has not been recognized in Canada as a result of R. v. Wray (640). The adoption of the recent Charter of Rights and Freedoms however, may lead one to expect the development of exclusionary rules of evidence. The extension of these rules to evidence obtained by police entrapment - certain conduct which contributes to the commission of crime as opposed to police conduct after the crime has been committed - hinges on whether or not the courts will construe such police conduct to be an unreasonable and unjustifiable limit on the rights contained in section 7 of the Charter and if so, whether or not the admissibility of such evidence would bring the administration of justice into disrepute.

The shift in perspective in Canadian criminal law towards an overview of the administration of justice - as evinced by the Charter and by members of the Supreme Court of Canada in Rothman v. The Queen (641) and Amato v. The Queen (642) - will certainly affect the conduct of the police, the presentation of evidence by the Crown, the development of legal defences and in turn, public regard for the criminal justice system. Although the Supreme Court of Canada and the various courts throughout the country have, in the past, grappled with the doctrine of entrapment, this shift in perspective combined with the potential

impact of the Charter may yet find a place for entrapment in Canadian criminal law.

Such a concern for the entirety of the criminal justice system may gather support for abuse of process - within or outside the scope of the Charter - as a basis for an entrapment "defence" much in the form articulated by Mr. Justice Estey in his dissenting judgement in Amato v. The Queen (643):

The focus at trial according to this view and analogous to the American objective approach, is on the conduct of the police irrespective of the culpability or predisposition of the accused. The propriety of police conduct is determined by its effect on public regard for the administration of criminal justice. Since egregious police initiatives would taint the administration of criminal justice, the courts withhold their processes from the prosecution of an entrapped accused.

Potential benefits of this approach include the protection of the purity and integrity of the criminal justice system and the deterrence of police misconduct. However, such an objective view also has its defects.

By focusing on police conduct instead of the culpability or predisposition of the accused, it creates a risk of acquitting chronic dangerous offenders. More importantly, by accepting certain less shocking police initiatives without considering the accused's predisposition, there is a risk of

convicting nondisposed persons who ought to be acquitted, where a particular accused is tempted in a situation in which a hypothetical person or a wary criminal would have resisted. The purity and integrity of the criminal justice system do not desire results of this kind.

A substantive defence of entrapment based on section 7(3) of the Criminal Code focuses on the primary issue before the court, the guilt or innocence of the accused rather than police conduct, and adheres to a subjective test. It is, therefore, more concerned with the culpability and predisposition of the accused than with the integrity of the criminal justice system. This approach aims to distinguish between those who are blameworthy and those who are not - as a result of an outside force operating on the accused - and to excuse the latter by acquitting them. In this way, the courts would "manufacture" a defence through the development of the common law to deal with "manufactured" crime.

This subjective defence is not without its detriments. Police appear to be given a licence to engage in entrapment with respect to the criminally-inclined and the concern at trial seems to relate more to the accused's background and proclivities than to his guilt or innocence on the facts giving rise to the charge.

Yet it is understandable that police might resort to greater inducements when dealing with a wary criminal than with

an otherwise-innocent person. Moreover, once the issue of entrapment is raised by the defence and is supported by some evidence, this concern could be alleviated by requiring the prosecution to disprove - usually by rebuttal evidence - the lack of predisposition of the accused. As well, evidence with respect to the accused's background and inclinations would have to comply with strict evidentiary rules, e.g. similar fact evidence, cross-examination of the accused as to previous convictions, etc.

Consequently, an accused could tender evidence demonstrating his lack of predisposition and/or argue, as the case may be, that the prosecution has not tendered predisposition evidence thereby increasing the likelihood of success of the defence. Frequently, though, evidence of predisposition would be determined by the degree of pressure applied by the police as well as the accused's conduct and statements in his dealings with undercover police entrappers prior to his arrest.

Opponents of the subjective approach may argue that it creates an artificial distinction by restricting the defence to entrapment by police or their agents and excluding its application to lay entrappers, since culpability is not diminished according to the status of the entrapper. One response is that to include lay entrappers would increase the danger of collusion and false allegations and this would neither reflect a true search for guilt or innocence nor would it be a desired aim of the criminal justice system.

Where the police go beyond crime detection by planning offences and instigating their commission by persons who would not otherwise have been implicated in such activity, the state has, in fact, artificially propagated crime. In such a situation, it is urged that an entrapped accused must have a legal defence. The availability of such a defence should not cause alarm in the community since, as American studies have shown (644), it would only succeed in the very few cases where entrapment has actually occurred and been proved.

In Canada, there is still no comprehensive and authoritative legal basis for a defence of entrapment. Judicial expressions, in particular the dissent in Amato v. The Queen (645), have, of late, reflected the concerns of courts for police-instigated crime. It is believed that a defence of entrapment must take into account the predisposition of the accused and accordingly, findings of guilt or innocence would have to be made by the trier of fact. Although a general substantive defence is proposed, it is suggested that in cases exposing the most outrageous and shocking police behaviour, section 7 of the Charter, in particular the principles of fundamental justice, could be utilized to prevent the state from profiting from its misdeeds. Only then would the courts consider a stay of proceedings to be an "appropriate and just" remedy pursuant to section 24(1), regardless of the predisposition of the accused.

It would be incumbent upon the courts to articulate guidelines permitting them to derogate from the general defence of entrapment and apply the constitutional remedy. As a result of this approach - which is not unlike recent developments in the United States - entrapment would become a multifaceted "defence" benefitting from the advantages of the subjective and objective views while avoiding the pitfalls of each. It may be that a court would find that neither an acquittal nor a stay of proceedings would be available in a particular case but would, in the circumstances, exclude evidence pursuant to section 24(2) of the Charter. What is clear is that defence counsel would have several options which could be utilized, according to the circumstances.

Entrapment remains, however, an elusive concept in Canadian criminal law. Legislation is silent on the issue. The Supreme Court has left open the possibility for application of a substantive defence and abuse of process as avenues available to an entrapped accused.

This gap in our law was recognized in 1969 by the Quimet Committee. The Committee recognized the use of stratagems by police to catch criminals. However, "the use of persuasion or unfair means to induce the commission of an offence by a person who had no pre-existing intention to commit it, and who would not have committed the offence but for the instigation of law enforcement officers or an agent provocateur"

employed by them" (646) was found to be wholly indefensible.

As a result, the Committee recommended the enactment of legislation to provide:

1. That a person is not guilty of an offence if his conduct is instigated by a law enforcement officer or agent of a law enforcement officer, for the purpose of obtaining evidence for the prosecution of such person, if such person did not have a pre-existing intention to commit the offence.

2. Conduct amounting to an offence shall be deemed not to have been instigated where the defendant had a pre-existing intention to commit the offence when the opportunity arose and the conduct which is alleged to have induced the defendant to commit the offence did not go beyond affording him an opportunity to commit it.

3. The defence that the offence has been instigated by a law enforcement officer or his agent should not apply to the commission of those offences which involve the infliction of bodily harm or which endanger life. (647).

These recommendations adhere to a statutory defence of entrapment modeled after the American subjective approach. The third recommendation - much like section 17 of the Criminal Code - properly excludes the application of the defence, regardless of the entrapment, to crimes of a very serious nature.

In 1981, the McDonald Commission found it unacceptable that the police should be "tacitly encouraged by the law to tolerate instigation by its members of crime by others when that instigation goes well beyond mere solicitation" (648). As a

result, the Commission recommended a defence of entrapment to register clear disapproval of such conduct in appropriate cases.

The Commission opted for a combination of the objective and subjective tests so that the police conduct and the accused's pre-existing intention would both be factors in determining whether a defence should apply. It was stated:

It is the combination of the two factors that make it unjust to convict in any particular case. Society should allow the police very little scope for entrapping the person who lacks a pre-existing intent, but substantially more scope in the case of the person who has a pre-existing intent. The test should reflect that the propriety of police conduct will vary from case to case depending on the crime charged and the accused's prior intent to engage in the activity. (649)

The Commission therefore recommended that the Criminal Code be amended to include a defence of entrapment embodying the following principle:

The accused should be acquitted if it is established that the conduct of a member or agent of a police force in instigating the crime has gone substantially beyond what is justifiable having regard to all the circumstances, including the nature of the crime, whether the accused had a pre-existing intent, and the nature and extent of the involvement of the police. (650)

In this way, the accused would benefit from a defence of entrapment and the police would be warned that unlawful police-instigation of crime will not be condoned. Furthermore, the Commission

recommended the following guidelines for the R.C.M.P.:

WE RECOMMEND THAT the administrative guidelines concerning the use of undercover operatives in criminal investigations which we recommended earlier be established by the R.C.M.P., include a direction that no member of the R.C.M.P. and no agent of the R.C.M.P. counsel, incite or procure an unlawful act. (651)

Neither the McDonald Commission nor the Quimet Committee defined "pre-existing intention" or indicated what evidence could support it, presumably regarding this duty as a judicial one.

Parliament has not as yet implemented the proposals of the McDonald Commission or the Quimet Committee. In the absence of legislation, one must look to the Supreme Court to adopt a legal basis for the defence of entrapment and to settle such issues as its essential ingredients, the burden of proof and whether it is to be dealt with by the judge or jury. As a result, consistency would be engendered in this area of the law and the defence of entrapment would find application in appropriate cases.

\* \* \*

FOOTNOTES

1. (1932) 287 U.S. 435 (U.S.S.G.) rev. (1932) 57 F. (2d) 973 (4th Circ. C.A.)
2. Id., p. 454
3. Alan E. BENT, Ralph A. ROSSUM, Police, Criminal Justice, and the Community, New York, Harper and Row, 1976, p. 51.
4. Robert G. CALDWELL, Criminology, 2nd ed., New York, The Ronald Press Company, 1965, p. 283.
5. See Stanley A. COHEN, Due Process of Law: The Canadian System of Criminal Justice, Toronto, The Carswell Company Limited, 1977, pp. 50-7; Brian A. GROSMAN, Police Command, Toronto, Macmillan of Canada, 1975, pp. 1-7, 77-94; Joseph GOLDSTEIN, Police Discretion Not to Invoke the Criminal Process: Low Visibility Decisions in the Administration of Justice, (1959-60), 69 Yale L.J. 543; James Q. WILSON, Police Discretion, in Leon RADZINOWICZ, Marvin E. WOLFGANG (ed.), Crime and Justice: Volume II: The Criminal in the Arms of the Law, New York, Basic Books, Inc., 1971, p. 253; B. M. BARKER, Police Discretion and the Principle of Legality, (1965-66), 8 Cr.L.Q. 400, pp. 401-2; Glanville WILLIAMS, Discretion in Prosecuting, (1956) Crim. E.R. 222; Nial OSBOROUGH, Police Prosecutorial Discretion and the Police Image: Reflections on the Problem in England, (1966) 5 W.Ont.L.R. 62; Report of the Canadian Committee on Corrections: Towards Unity: Criminal Justice and Corrections, (Quimet Committee), Ottawa, The Queen's Printer, 1969, pp. 44-6; R. v. Commissioner of Police of the Metropolis, Ex Parte Blackburn, (1968) 2 W.L.R. 893 (Enc. C.A.); Gowan v. Smith (1909) 122 N.W. 286 (Mich. S.C.). See generally Wayne R. LAFAVE, Arrest: The Decision to Take a Suspect into Custody, Frank J. Remington (ed.), Boston, Little, Brown & Co., 1965.
6. Brian A. GROSMAN, op.cit., n. 5, p. 77.
7. Jerome H. SKOLNICK, Justice Without Trial: Law Enforcement in Democratic Society, New York, John Wiley & Sons Inc., 1966, p. 228; Alan E. BENT, Ralph A. ROSSUM, op.cit., n. 3, p. 5.

8. Jerome H. SKOLNICK, op.cit., n. 7, p. 219.
9. Id., pp. 5-6
10. Herbert L. PACKER, The Limits of the Criminal Sanction, Stanford, California, Stanford University Press, 1968, pp. 152-8.
11. Id., pp. 158-63.
12. Id., p. 163
13. Id., pp. 163-4.
14. Id., p. 167.
15. Jerome H. SKOLNICK, op.cit., n. 7, p. 6.
16. Id., p. 7; An example of the conflicting community demands for law and order occurred in Montreal in October, 1970, during the F.L.Q. kidnappings when numerous arrests were made under the Public Order (Temporary Measures) Act, 1970, (1970-71-72) S.C., c.2.
17. See Alan E. BENT, Ralph A. ROSSUM, op.cit., n. 3, p. 69.
18. Herbert L. PACKER, op.cit., n. 10, p. 151.
19. Edwin M. SCHUR, Crimes Without Victims, Englewood Cliffs, N.J., Prentice Hall, Inc., 1965, p. v.
20. Ibid.
21. It may be suggested that, in certain cases, for example narcotics, society is the victim due to the prevalence and influence of drugs and the ultimate burden imposed on society by addicts unable to care for themselves. Furthermore, societal interests are certainly affected when, as a result of participation in crimes without victims, offenders become involved in other criminal activities; e.g. drug users, in order to obtain drugs or money for drugs and gamblers, in order to pay off gambling losses. Society is also victimized by the spread of venereal disease by prostitutes, who themselves are often victims of pimps. See William KELLY, Nora KELLY, Policing in Canada, Toronto, Macmillan of Canada, 1976, pp. 531-43. Edwin M. SCHUR, op.cit., n. 19, pp. 6, 138-45. Whether or not there is a victim in abortion cases depends upon whether or not one considers the foetus to be a person.

22. L.P. TIFFANY, D.M. McINTYRE, JR. ; D.L. ROTENBERG, Detection of Crime, Frank J. REMINGTON, (ed.), Boston, Little, Brown and Company, 1967, pp. 273, 208.
23. See Edwin M. SCHUR, op.cit., n. 19, pp. 171, 38-40, 79-82, 134-8.
24. L.P. TIFFANY, D.M. McINTYRE, JR. ; D.L. ROTENBERG, op.cit., n. 22, p. 12. See also William KELLY, Nora KELLY, op.cit. n.21, pp. 541-2; Brian GROSMAN, op.cit., n. 5, pp. 95-109; Edwin M. SCHUR, op.cit., n. 19, pp. 5-10, 75-9; Edward M. DAVIS, Victimless Crimes - The Case for Continued Enforcement, (1973) 1 J. Police Sci. & Admin. 11; G. Thomas GITCHOFF, Joseph ELLENBOGEN, Elsie ELLENBOGEN, Victimless Crimes: The Case Against Continued Enforcement, (1973) 1 J. Police Sci. & Admin. 401; Sanford H. KADISH, Overcriminalization, in Leon RADZINOWICZ, Marvin E. WOLFGANG, (ed.), Crime and Justice: Volume 1: The Criminal in Society, New York, Basic Books, Inc., 1971, p. 56; Louis B. SCHWARTZ, Morals Offenses and the Model Penal Code, (1963) 63 Columbia L.R. 669; August VOLLMER, The Police and Modern Society, Montclair, N.J. Patterson Smith, 1971, pp. 81-118.
25. L.P. TIFFANY, D.M. McINTYRE, JR. , D.L. ROTENBERG, op.cit., n. 22, p. 12.
26. Per Martin J.A. in R. v. Berdino, (1924) 42 C.C.C. 309; (B.C.C.A.), p. 312.
27. Rothman v. The Queen, (1981) 59 C.C.C. (2d) 30 (S.C.C.), p.74; aff. (1979) 42 C.C.C. (2d) 377 (Ont. C.A.).
28. Ibid.
29. See Richard C. DONNELLY, Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs, (1951) 60 Yale L.J. 1091; See also Notes and Comments, Judicial Control of Secret Agents, (1966-67) 76 Yale L.J. 994; William KELLY, Nora KELLY, op.cit., n. 21, pp. 322-41; Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, (McDonald Commission) Second Report, Freedom and Security Under the Law, Ottawa, Canadian Government Publishing Centre, 1981, Vol. 1, pp. 295-328, 536-551, Vol. 2, pp. 1030-1033.
30. In order to obtain a pardon, a person indicted and arraigned of treason or felony could have become an "approver", in the court's discretion, by confessing.

his guilt and accusing his accomplices or "appellees", before plea. The granting of a pardon was subject to the conviction (or defeat in the event of a "trial by battle") of the appellee. If the appellee be acquitted (or conqueror), the approver would have been executed as a result of his confession. See William BLACKSTONE, Commentaries on the Laws of England, Volume IV, 1st ed., Oxford, The Clarendon Press, 1769, pp. 129, 324-5. William HAWKINS, A Treatise of the Pleas of the Crown, Volume II, 3rd ed., London, printed by E. and R. Nutt, and R. Gosling, 1739, pp. 204-9. Edward COKE, The Third Part of the Institutes of the Laws of England, 4th ed., London, printed for A. Crooke and others, 1669, pp. 91, 129-30. BRACON on the Laws and Customs of England, Volume II, George E. Woodbine (ed.), Cambridge, Mass., Harvard University Press, 1968, pp. 429-35. Matthew HALE, The History of the Pleas of the Crown, Volume II, 1st ed., London, printed by E. and R. Nutt, and R. Gosling, 1736, pp. 67-8, 425-35. Abuses in this practice of approvement prompted Hale to write, "... the truth is, that more mischief hath come to good men by these kind of approvements by false accusations of desperate villains, than benefit to the public by the discovery and convicting of real offenders; gaolers for their own profits often constraining prisoners to appeal honest men..." p. 226. It was noted in R. v. Rudd (1775) 1 Leach 115 (Eng. K.B.) that the practice of approvement, by long discontinuance, had grown into disuse.

See also Leon RADZINOWICZ, A History of English Criminal Law and its Administration from 1750: Volume 2: The Clash Between Private Initiative and Public Interest in the Enforcement of the Law, London, Stevens & Sons Limited, 1956, pp. 33-167, for an analysis of various rewards and benefits, in addition to approvement, offered by the state and private bodies to private individuals for the discovery and conviction of offenders. The abuse inherent in such practices was demonstrated in R. v. Macdaniel, (1754) 1 Leach 44 (Eng. K.B.) where the accused and others were prosecuted, after it was discovered that, in order to collect a statutory reward for conviction of highway robbers, they had fabricated a story, falsely accusing one Kidden with the crime of highway robbery and causing him to be tried, convicted and executed.

31. See the remarks of Laskin C.J.C. in R. v. Kirzner, (1978) 38 C.C.C. (2d) 131 (S.C.C.) pp. 135-6, aff. (1977) 32 C.C.C. (2d) 76 (Ont. C.A.).

32. Ibid., See R. v. Birtles, (1969) 53 Cr.App.R. 469 (Eng. C.A.), p. 473, infra, pp. 65-9. See also Amsden v. Rogers (1916) 26 C.C.C. 389 (Sask. S.C.) p. 390-1, infra, pp. 93-4.
33. See K.M. DEVLIN, Informers, Spies and Agents Provocateurs, (1971) 19 Chitty's L.J. 65; See also Irénée LAGARDE, Indicateur, Agent Provocateur et Complice, (1964) 10 McGill L.J. 38; Eugene OSCAPELLA, A Study of Informers in England, (1980) Grim. L.R. 136
34. David BERNHEIM, Defense of Narcotics Cases, New York, Matthew Bender & Co. Inc., 1982, Vol: 1, par. 2.02 (4), pp. 2(7-8). See also Herbert A. BLOCH, Gilbert GEIS, Man, Crime, and Society: The Forms of Criminal Behaviour, New York, Random House Inc., 1967, p. 460; William KELLY, Nora KELLY, op.cit., n. 21, pp. 323-30. Warren PERLEY, Should Police Pay Witnesses for Testimony? The Gazette, Montréal, November 20, 1982, p. B-4; See also Palmer v. The Queen (1980) 50 C.C.C. (2d) 193 (S.C.C.), pp. 208-9 where McIntyre J. comments upon the propriety in certain cases, of using public funds to protect Crown witnesses. In R. v. Ridge, (1980) 51 C.C.C. (2d) 261 (B.C.C.A.), a known drug trafficker acting as an agent of the R.C.M.P. was permitted to retain the bulk of the drugs he acquired and, to the knowledge of the R.C.M.P., trafficked in these drugs for his own benefit thereby maintaining the supply of this drug to the market so as not to raise the suspicions of others in the trade.
35. See David BERNHEIM, op.cit., n. 34, Vol. 1, par. 2.02 (4), pp. 2(7-8). The author, in his text, is referring to American practice, however it is submitted that the same pattern exists in Canada particularly in large metropolitan centres. See also Joseph GOLDSTEIN, loc.cit., n. 5, pp. 565-7; Eugene OSCAPELLA, loc.cit., n. 33, pp. 143-5.
36. See United States v. Silva (1959) 180 F. Supp. 557 (U.S. Distr. Ct; So. Distr. N.Y.). Defences based on contingent - fee arrangements have generally been unsupported by American courts. See Roger PARK, The Entrapment Controversy, (1975-76) 60 Minnesota L.R. 163; pp. 195-6.
37. Edwin M. SCHUR, op.cit., n: 19, p. 135. In this book, the author refers to the relationship between the U.S. Bureau of Narcotics and informers.

38. David BERNHEIM, op.cit., n. 34, Vol. 1, par. 2.02(9), pp. 2-21.
39. See Sherman v. United States (1958) 356 U.S. 369 (U.S.S.C.) rev. (1957) 240 F. (2d) 949 (2nd Circ. C.A.). See infra pp. 33-6.
40. See United States v. Silva; supra, n. 36.
41. See Sherman v. United States, supra, n. 39; Sorrells v. United States, supra n. 1.
42. Beaver v. The Queen, (1957) 115 C.C.C. 129 (S.C.C.).
43. L. P. TIFFANY, D. M. MCINTYRE, JR. ; D.L. ROTENBERG, op.cit., n. 22, p. 272.
44. See Stanley A. COHEN, op.cit., n. 5, pp. 120-122; Wayne R. LAFAVE, op.cit., n. 5, pp. 411-35; Glanville WILLIAMS, Evidence Obtained by Illegal Means, (1955) Crim. L.R. 339, p. 346; Alan BOROVOY, The Powers of the Police and the Freedoms of the Citizen, in R. St. J. MACDONALD, John P. HUMPHREY (ed.), The Practice of Freedom: Canadian Essays on Human Rights and Fundamental Freedoms, Toronto, Butterworths, 1979, p. 425 at p. 429. Paul C. WEILER, The Control of Police Arrest Practices: Reflections of a Tort Lawyer in Allen M. LINDEN, (ed), Studies in Canadian Tort Law, Toronto, Butterworths, 1968, p. 416. See Chaput v. Romain, (1955) S.C.R. 834, where damages were awarded in favour of a Jehovah's Witnesses minister against three police officers who illegally broke up an orderly religious meeting conducted at his home. See also Chartier v. Attorney General of Quebec, (1979) 9 C.R. (3d)(S.C.C.). In Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, (1971) 403 U.S. 388 (U.S.S.C.), the United States Supreme Court held that a complaint alleging that agents of Federal Bureau of Narcotics, acting under colour of federal authority, made warrantless entry of petitioner's apartment, searched the apartment and arrested him on narcotics charges, all without probable cause, stated a federal cause of action under the 4th Amendment for damages recoverable upon proof of injuries resulting from agents' violation of that Amendment.
45. See William C. MATHES, Robert T. JONES, Toward a "Scope of Official Duty" Immunity for Police Officers in Damage Actions, (1964-65) 53 Georgetown L.J. 889.

46. See Allen M. LINDEN, Canadian Tort Law, 3rd ed., Toronto, Butterworths, 1982, pp. 51-5; G.H.L. FRIDMAN, Punitive Damages in Tort, (1970) 48 Can. Bar. Rev. 373; Paul C. WEILER, loc.cit., n. 44, pp. 424-457. Jean-Louis BAUDOIN, La Responsabilité Civile Delictuelle, Montréal, Les Presses de l'Université de Montréal, 1973, Par. 113, 176, pp. 88-9, 130-1.
47. See Stanley A. COHEN, op.cit., n. 5, pp. 114-19 and 122-30; Paul C. WEILER, loc.cit., n. 44, pp. 443-4. A complainant may attempt to lay a "private" information but see Evans v. Pesce and Attorney-General for Alberta (1969-70) 8 C.R.N.S. 201 (Alta. S.C.) where the court refused to grant an application by way of certiorari and mandamus to compel the magistrate to issue a summons or warrant for the attendance of a police officer who instigated a drug transaction with the applicant. See also R. v. Petheran (1936) 65 C.C.C. 151 (Alta. S.C.A.D.) where a "private" information was laid against a police sergeant.
48. See Alan BOROVOY, loc.cit., n. 44, p. 429. Alan GRANT, The Police: Organization, Personnel and Problems in R. ST. J. MacDONALD, John P. HUMPHREY, op.cit., n. 44 p. 405 at p. 417.
49. See Glanville WILLIAMS, loc.cit., n. 44, p. 346.
50. See Roncarelli v. Duplessis (1959) S.C.R. 121; Attorney-General of Québec and Keable v. Attorney General of Canada, (1979) 43 C.C.C. (2d) 49 (S.C.C.), p. 58 per Pigeon J. and p. 81 per Estey J.; R. v. Commissioner of Police of the Metropolis, Ex Parte Blackburn, supra, n. 5.
51. See sections 25, 28, 30-33 and 450 of the Criminal Code. In Priestman v. Colangelo, (1959) S.C.R. 615, sec. 25(4) of the Criminal Code was of assistance in exonerating a police officer who fired a shot at a rear tire of a closely pursued stolen vehicle, thereby contributing to an accident in which two pedestrians were killed. See also sec. 14(1) of The Police Act, (1970) R.S.A. c. 278 rep. by (1980) R.S.A. c. P-12, which, when it was in force, exonerated police officers in Alberta who committed offences contrary to Alberta liquor legislation pursuant to instructions for the purpose of obtaining evidence. See also section 3(4) of the Police Act (1977) S.N.B. c. P-9.2, which reads:

A member of the Royal Canadian Mounted Police or a member of a police force

shall not be convicted of a violation of any Provincial statute if it is made to appear to the judge before whom the complaint is heard that the person charged with the offence committed the offence for the purpose of obtaining evidence or in carrying out his lawful duties.

Similarly, see section 3(1)(g) of the Narcotic Control Regulations, (1978) S.O.R. c. 1041, which provides:

A person is authorized to have a narcotic in his possession where that person has obtained the narcotic pursuant to these Regulations and ... (g) is employed as an inspector, a member of the Royal Canadian Mounted Police, a police constable, peace officer or member of the technical or scientific staff of any department of the Government of Canada or of a province or university and such possession is for the purposes of and in connection with such employment;

And section J.01.002(c) of the Food and Drug Regulations, (1978) S.O.R. c. 870, which stipulates:

The following persons may have a restricted drug in their possession ... (c) an analyst, inspector, member of the Royal Canadian Mounted Police, constable, peace officer, member of the staff of the Department of National Health and Welfare or officer of a court, if such person has possession for the purpose and in connection with his employment;

The McDonald Commission, Second Report, *op.cit.* n. 29, Vol. 1, pp. 301-28, 513-98; Vol. 2, pp. 1017-33, recently made recommendations to authorize certain illegal police activities in particular situations.

52. For a recent review of these and other defences see McDonald Commission, Second Report, *op.cit.*, n. 29 Vol. 1, pp. 363-95. With respect to police liability generally, see M.L. FRIEDLAND, Controlling Entrapment, (1982) U. of Toronto L.J. 1, pp. 25-29. Robert K. PATERSON, Towards a Defence of Entrapment, (1979) 17 Osgoode Hall L.J. 261, pp. 271-3; J.D. HEYDON,

The Problems of Entrapment, (1973) Cambridge L.J. 268, pp. 273-6; Joel SHAFER, William J. SHERIDAN, The Defence of Entrapment, (1970) 8 Osgoode Hall L.J. 277, pp. 294-8.

53. (1969) 4 C.C.C. 3 (Ont. C.A.); See infra pp. 113-16; Graham PARKER, Comments, R. v. Ormerod (1970) 48 Can. Bar. Rev. 178. See also Brannan v. Peek (1947) 2 All E.R. 572 (K.B.), pp. 573-4. See infra pp. 64-5. See also State v. Trophy (1899) 78 Mo. App. 206 (Kansas City C.A.); Daniel L. ROTENBERG, The Police Practice of Encouragement, (1963) 49 Virginia L.R. 871, pp. 885-9.

54. R. v. Ormerod, supra n. 53, p. 17. Note the following remarks of Laskin C.J.C. in Kirzner v. The Queen, supra n. 31, p. 134:

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.

55. See McDonald Commission, Second Report, op.cit. n. 29, Vol. 1, pp. 363-95; Brannan v. Peek, supra, n. 53, p. 574.

56. (1949) 210 P (2d) 991 (Cal. S.C.)

57. See Glanville WILLIAMS, Criminal Law: The General Part, 2nd ed., London, Stevens & Sons Limited, 1961 par. 263, p. 798. See also Wilson v. People, (1939) 87 P (2d) 5 (Col. S.C.)

58. Supra, n. 47.

59. See Glanville WILLIAMS, op.cit. n. 57, par. 263, pp. 797-8; Irénée LAGARDE, loc.cit., n. 33, pp. 44-6. See also McDonald Commission, Second Report, op.cit. n. 29, Vol. 1, pp. 379-93, where Crown and other invoked immunities are examined.

60. See Glanville WILLIAMS, op.cit., n. 57, par. 263, pp. 798-9. In Lilly v. State of West Virginia (1928) 29 F (2d) 61 (4th Circ. C.A.), it was held that public officials engaged in the performance of a public duty, here a prohibition agent chasing an automobile which he believed was engaged in transporting illegal liquor, were exempt from traffic ordinances provided they acted in good faith and with reasonable care. Consequently, a conviction for manslaughter, as a

result of the agent's automobile striking and killing a pedestrian, was reversed, and a new trial ordered. See also City of Norfolk v. McFarland, (1956) 145 F. Supp. 258 (U.S. Distr. Ct.; E.D. Va.; Norfolk Div.); Johnson v. Phillips, (1975) 3 All. E.R. 682 (Q.B.); R. v. Redshaw, (1975) 31 C.R.N.S. 255 (Ont. Co. Ct.). But see R. v. Walker, (1980) 48 C.C.C. (2d) 126 (Ont. Co. Ct.); Glover v. Mackay, (1961) 131 C.C.C. 183 (Ont. Co. Ct.); Gavnor v. Allen, (1959) 2 All. E.R. 644 (Q.B.). See McDonald Commission, Second Report, *op.cit.*, n. 29, Vol. 1, pp. 370-4 in relation to necessity and duress and pp. 377-9 in relation to section 25 of the Criminal Code.

61. See Alan BOROVOY, *loc.cit.*, n. 44, p. 429.
62. See *infra*, Part II, Chapter III, Section B-2. See also Glanville WILLIAMS, *loc.cit.*, n. 44, pp. 345-9.
63. Quimet Committee, *op.cit.*, n. 5, p. 41.
64. Patrick DEVLIN, The Criminal Prosecution in England, London, Oxford University Press, 1966, p. 21.
65. See Curt T. GRIFFITHS, John F. KLEIN, Simon N. VERDUN-JONES, Criminal Justice in Canada: An Introductory Text, Toronto, Butterworths, 1980, p. 52; Wayne R. LAFAVE, *op.cit.*, n. 5, p. 514.
66. See Brian A. GROSMAN, The Prosecutor: An Inquiry into the Exercise of Discretion, Toronto, University of Toronto Press, 1969, pp. 83-4; Law Reform Commission of Canada, Control of the Process, Criminal Procedure, Working Paper 15, Ottawa, Information Canada, 1976, pp. 22-3.
67. See Law Reform Commission of Canada, *op.cit.*, n. 66, pp. 25-6; Brian A. GROSMAN, *op.cit.*, n. 66, pp. 84-6; Henry H. BULL, The Career Prosecutor of Canada, (1962) 53 J. Crim. L.C. & P.S. 89, pp. 95-6; Christmas HUMPHREYS, The Duties and Responsibilities of Prosecuting Counsel, (1955) Crim. L.R. 739.
68. (1955) 20 C.R. 1 (S.C.C.).
69. *Id.*, p. 8. See also Lémay v. The Queen, (1954) 14 C.R. 89 (S.C.C.).
70. See Brian A. GROSMAN, *op.cit.*, n. 66, pp. 10-12, 14. The Director of Public Prosecutions and his staff act as solicitors of the Crown in certain circumstances and with respect to specific offences and are therefore more closely tied to the police, however, barristers

- appointed by the Attorney-General conduct the prosecutions in the courts. See Patrick DEVLIN, op.cit., n. 64; pp. 16-20.
71. See Brian A. GROSMAN, op.cit., n. 66, pp. 13-14. See also Newman F. BAKER, The Prosecutor - Initiation of Prosecution, (1932-33) 23 J. Crim. L.C. & P.S. 770; Newman F. BAKER, Earl H. DE LONG, The Prosecuting Attorney: Powers and Duties in Criminal Prosecution, (1933-34) 24 J. Crim. L.C. & P.S. 1025; Note, Prosecutor's Discretion, (1954-55) 103 U. of Pennsylvania L.R. 1057.
72. See William J. McCARROLL, The Prosecutor's Duty of Fairness, in Sandra OXNER (ed.), Criminal Justice, Toronto, The Carswell Company Limited, 1982, p. 101; Law Reform Commission of Canada, op.cit. n. 66, pp. 9-17; Brian A. GROSMAN, op.cit. n. 66, pp. 20-8; Henry H. BULL, loc.cit. n. 67, pp. 94-5
73. See Stanley A. COHEN, op.cit., n. 5, pp. 131-96; Brian A. GROSMAN, op.cit., n. 66, pp. 28-43; Law Reform Commission of Canada, op.cit., n. 66, pp. 12-17.
74. See infra, Part II, Chapter I.
75. See R. v. Smythe (1971) 3 C.C.C. (2d) 366 (S.C.C.), aff. (Ont. C.A.) p. 97, aff. (Ont. H.C.) p. 98; Law Reform Commission of Canada, op.cit., n. 66, pp. 18-20.
76. See Law Reform Commission of Canada, op.cit., n. 66, pp. 24-5; Keith TURNER, The Role of Crown Counsel in Canadian Prosecutions (1962) 40 Can. Bar. Rev. 438. Bus-see Kenneth L. CHASSE, The Role of the Prosecutor, in Sandra OXNER, (ed.), Criminal Justice, Toronto, The Carswell Company Limited, 1982; p. 79.
77. See Wayne R. LAFAVE, op.cit., n. 5, p. 516.
78. See Law Reform Commission of Canada, op.cit., n. 66 pp. 27, 35.
79. Id., p. 27.
80. Id., p. 36.
81. See Brian A. GROSMAN, op.cit., n. 5, p. 2.

82. Stanley A. COHEN, op.cit., n. 5, pp. 281-342.
83. Elkins v. United States, (1960) 364 U.S. 206 (U.S.S.C.), p. 223.
84. See the judgements of Estey and Lamer JJ. in Rothman v. The Queen, supra, n. 27.
85. Olmstead v. United States, (1928) 277 U.S. 438 (U.S.S.C.), p. 485, (dissenting opinion).
86. The defence is clearly authoritative in federal courts. With respect to its acceptability in state courts, see Roger PARK, loc.cit., n. 36, pp. 164-5, who, in 1976, indicated that all states except Tennessee had adopted the defence, although in that state legislation was pending that would establish it.
87. Genesis 3:13
88. (1864) 29 How. Pr. 33 (N.Y.S.C.).
89. Id., p. 42.
90. (1915) 223 F. 412 (9th Circ. C.A.).
91. Id., p. 415.
92. Supra, n. 1.
93. Id., p. 441.
94. Id., p. 442.
95. Id., p. 448. See O'Brien v. United States, (1931) 51 F (2d) 674 (7th Circ. C.A.) where, prior to the decision in Sorrells, the 7th Circuit Court of Appeals, although adhering to a subjective view of entrapment, approached it through the application of the doctrine of estoppel. See Glanville WILLIAMS, op.cit. n. 57, par. 256, p. 785; John David WATT, The Defence of Entrapment, (1971) 13 Cr. L.Q. 313, p. 333, where the application of estoppel is disputed.
96. Supra, n. 1, p. 449.
97. Id., p. 451.
98. Id., p. 452.

99. Ibid.
100. Supra, n. 39.
101. Id., p. 372.
102. Ibid.
103. Id., p. 376.
104. (1973) 411 U.S. 423 (U.S.S.C.) rev. (1972) 459 F (2d) 671 (9th Circ. C.A.).
105. See infra, pp. 55-63, regarding the furnishing - contraband defence and constitutional due process. See also Hampton v. United States (1976) 425 U.S. 484 (U.S.S.C.) aff. (1974) 507 F (2d) 832 (8th Circ. C.A.), where even more recently, the United States Supreme Court again adhered to the traditional subjective approach.
106. Supra, n. 104, p. 435.
107. Ibid.
108. Id., p. 436.
109. Supra, n. 1, p. 450.
110. See also Lewis v. United States, (1966) 385 U.S. 206 (U.S.S.C.), pp. 208-9; Osborn v. United States, (1966) 385 U.S. 323 (U.S.S.C.) pp. 331-2; Lopez v. United States, (1963) 373 U.S. 427 (U.S.S.C.), pp. 434-5; Casey v. United States, (1928) 276 U.S. 413 (U.S.S.C.), p. 419; Grimm v. United States, (1895) 156 U.S. 604 (U.S.S.C.), pp. 609-11.
111. The defence of entrapment does not necessarily require defence evidence but may be established through the evidence of prosecution witnesses. See Sherman v. United States, supra n. 39, p. 373. See also F. Lee BAILEY, Henry B. ROTHBLATT, Handling Narcotic and Drug Cases, Rochester, N.Y. The Lawyers Co-operative Publishing Company, 1972, par. 262, pp. 211-12.
112. Supra, n. 1, p. 451.
113. United States v. Sherman, (1952) 200 F (2d) 880 (2nd Circ. C.A.).

114. Id., p. 882. See Roger PARK, loc.cit. n.35, pp. 216-24, where Professor Park indicated that the accused, as well, may corroborate his defence with reliable evidence supporting his law-abiding lifestyle and lack of predisposition. More importantly, the accused may point to the absence of evidence of prior crimes and argue that the prosecution has failed to prove predisposition beyond a reasonable doubt because it failed to corroborate the testimony of its informer despite its opportunity to do so.
115. See United States v. Russell, supra, n. 104, pp. 433-4, per Rehnquist J. See also United States v. Garcia, (1977) 546 F (2d) 613 (5th Circ. C.A.); cert. denied (1977) 430 U.S. 958 (U.S.S.C.); United States v. Mayo, (1974) 498 F (2d) 713 (D.C. Circ. C.A.), p. 716; United States v. Conversano, (1969) 412 F (2d) 1143 (3rd Circ. C.A.), p. 1148; cert. denied (1969) 396 U.S. 905 (U.S.S.C.); Polski v. United States, (1929) 33 F (2d) 686 (8th Circ. C.A.), p. 687; cert. denied (1929) 280 U.S. 591 (U.S.S.C.). See also United States v. Twigg, (1978) 588 F (2d) 373 (3rd Circ. C.A.), pp. 376, 381-2, where this principle was affirmed although the 3rd Circuit Court of Appeals was reluctant to establish a per se rule barring use of the "fundamental fairness defence", see infra, pp. 55-63, to anyone who not directly induced by a government agent.
116. Supra, n. 1, p. 451. Section 2.13(3) of The American Law Institute's Model Penal Code, (Proposed Official Draft, 1962) stipulates that the defence of entrapment is unavailable when causing or threatening bodily injury, is an element of the offence charged and the victim is a person other than the entrapper. See infra, p. 50.
117. See Hand J.'s opinion in the first appeal in United States v. Sherman, supra; n. 113, pp. 882-3. See also United States v. Burkley, (1978) 591 F (2d) 903 (D.C. Circ. C.A.); cert. denied (1979) 440 U.S. 966 (U.S.S.C.); Roger PARK, loc.cit., n.36, pp. 262-7; Ben A. HARDY, The Traps of Entrapment, (1974-75) 3 Am. J. Crim. Law 165, pp. 178-83; Kenneth M. MURCHISON, The Entrapment Defense in Federal Courts: Modern Developments, (1976) 47 Mississippi L.J. 573, pp. 604-6, 617.
118. In Sherman, aside from recalling the government informer, a prosecution witness, the defence called no witnesses. In Masciale v. United States, (1958) 356 U.S. 386 (U.S.S.C.), the United States Supreme Court held that in a prosecution for two illegal sales of narcotics

and conspiracy to make a sale, the accused's own testimony, though undisputed, concerning informer's campaign to persuade him to sell narcotics, could not alone establish entrapment as a matter of law and the issue was properly submitted to the jury.

119. For a discussion of the allocation of function between the judge and jury, see Roger PARK, loc.cit. n. 36, pp. 268-70. See also United States v. Burkley, supra, n. 117.
120. See People v. Murn, (1922) 190 N.W. 666 (Mich. S.C.); Kenneth M. MURCHISON, loc.cit., n. 117, pp. 609-12, 618-19; Ben A. HARDY, loc.cit., n. 117, pp. 174-8; Roger D. GROOT, The Serpent Bequiled Me and I (Without Scientist) Did Eat - Denial of Crime and The Entrapment Defense, (1973) U. of Illinois Law Forum 254; Peter S. BERMAN, Norman GOLDENBERG, Entrapment - A Call for the Elimination of the Ninth Circuit Prohibition Against Pleading Inconsistent Defenses, (1972) 4 Southwestern U.L.R. 121; See also the following comments: Comment, The Assertion of Inconsistent Defenses in Entrapment Cases, (1970-71) 56 Iowa L.R. 686; Note Entrapment, (1959-60) 73 Harvard L.R. 1333, p. 1343; R.P. DAVIS, Annotation: Availability of Defense of Entrapment where Accused Denies Participating at All in Offense, (1958) 61 A.L.R. (2d) 677.
121. Gregoroff v. State, (1982) 285 S.E. (2d) 537 (Ga. S.C.); State v. Knight, (1976) 230 S.E. (2d) 732 (W.Va. S. Ct. of Appeals); Sears v. United States, (1965) 343 F (2d) 139 (5th Circ. C.A.).
122. See Roger PARK, loc.cit. n. 36, pp. 166-9, where reference is made to states which have, either by judicial decision or statute adopted the objective approach.
123. Supra, n. 1.
124. McReynolds J. dissented, affirming the judgement below, but without providing reasons.
125. Supra, p. 1, pp. 453-4.
126. Id., pp. 454-5.
127. Id., p. 455.
128. Id., p. 457.
129. Id., p. 459.

130. This explains why the majority reversed the judgement below and remanded the case for further proceedings in conformity with its opinion, whereas the minority held that the judgement should be reversed and remanded to the District Court with instructions to quash the indictment and discharge the accused.
131. Supra, n. 39.
132. Id., p. 379.
133. Id., p. 380.
134. Id., p. 382.
135. Ibid.
136. Id., p. 384.
137. Id., p. 383.
138. Supra, n. 104. Douglas J., with whom Brennan J. concurred, in a separate dissenting opinion, adopted the furnishing - contraband defence. See infra, pp. 55-6.
139. Id., p. 442.
140. Supra, n. 39, p. 380.
141. Supra, n. 104, p. 445. See also Hampton v. United States, supra, n. 105, where Brennan J., with whom Stewart and Marshall JJ. concurred, in a dissenting opinion, again adopted the objective approach. See infra, p. 61.
142. See Roger PARK, loc.cit., n. 36, pp. 262-7.
143. Id., pp. 268-70.
- 143a. The American Law Institute, Model Penal Code, (Proposed Official Draft), Philadelphia, 1962, pp. 43-4.
- 143b. Final Report of the National Commission on Reform of Federal Criminal Laws, A Proposed New Federal Criminal Code, Washington, D.C., U.S. Government Printing Office, 1971, p. 58.
144. Proponents of the objective approach include: Kenneth M. MURCHISON, loc.cit., n. 117, pp. 612-19; L.P. TIFFANY, D.M. McINTYRE, JR., D.L. ROTENBERG, op.cit., n. 22, pp. 265-72; John S. GOODNOW, Entrapment: An Analysis of Dis-agreement, (1965) 45 Boston U.L.R. 542, pp. 551, 557, 571; David P. BANCROFT, Administratrix of the Affirmative Trap and the Doctrine of Entrapment: Deceit and Defense, (1963-64) 31 U. of Chicago L.R., 137, pp. 170-79; Paul W. WILLIAMS, The Defense of Entrapment and Related Problems in Criminal

- Prosecution, (1959-60) 28 Fordham L.R. 399, pp. 415-18; Notes and Comments, Criminal Law - Entrapment by Federal Officers, (1958) 33 N.Y.U.L.R. 1033, pp. 1038-41; Richard C. DONNELLY, loc.cit., n. 29, pp. 1107-1115. Proponents of the subjective approach include: Ralph A. ROSSUM, The Entrapment Defense and the Teaching of Political Responsibility: The Supreme Court as Republican Schoolmaster, (1978) 6 Am. J. Crim. Law 287; Roger PARK, loc.cit., n. 36; Michael A. DE FEO, Entrapment as a Defense to Criminal Responsibility: Its History, Theory and Application, (1967) 1 U. of San Francisco L.R. 243.
145. See Kenneth M. MURCHISON, loc.cit., n. 117, pp. 606-8, 617; Ben A. HARDY, loc.cit., n. 117, pp. 183-8; Daniel L. ROTENBERG, loc.cit., n. 53, pp. 897-9; Richard A. COWEN, The Entrapment Doctrine in the Federal Courts and Some State Court Comparisons, (1958-59) 49 J. Crim. L.C. & P.S. 447, pp. 450-53; Richard C. DONNELLY, loc.cit., n. 29, p. 1108. See also Roger PARK, loc.cit., n. 36, pp. 200-16, 247-62, for a detailed analysis by Professor Park of the admissibility of certain types of evidence about predisposition under the subjective approach and - for its bearing on the decency of police conduct or to show a causal relationship between government misconduct and the offence - under the objective approach.
146. See the remarks of Frankfurter J. in Sherman v. United States, supra, n. 39, p. 380 and Stewart J. in United States v. Russell, supra, n. 104, p. 442, both referred to supra, p. 47. See also Paul H. ROBINSON, Criminal Law Defenses: A Systematic Analysis, (1982) 82 Columbia L.R. 199, pp. 237-8; Roger PARK, loc.cit., n. 36, pp. 170-1, 240-3; John S. GOODNOW, loc.cit., n. 144, pp. 560-5; Notes and Comments, The Serpent-Bequiled Me and I Did Eat: The Constitutional Status of the Entrapment Defense, (1964-65) 74 Yale L.J. 942, p. 946; Daniel L. ROTENBERG, loc.cit., n. 53, pp. 898-900; Note, Entrapment, loc.cit., n. 120, pp. 1340-3; Richard C. DONNELLY, loc.cit., n. 29 pp. 1108-9; W.H. HITCHLER, Entrapment as a Defense in Criminal Cases, (1937-38) 42 Dickinson L.R. 195, pp. 201-2. But see Ralph A. ROSSUM, loc.cit., n. 144, pp. 303-4. Professor Rossum indicates that if the subjective defence were to provide for the acquittal of accused persons who had been entrapped by private persons, it would encourage collusion and increase the danger of contrived defences. See also Roger PARK, loc.cit., n. 36, pp. 241-2, 271-2.
147. See Roger PARK, loc.cit., n. 36, pp. 216-17.
148. Id., pp. 217-21.
149. Daniel L. ROTENBERG, loc.cit., n. 53, pp. 899-900.

150. See Roger PARK, loc.cit., n. 36, pp. 196-8.
151. Ibid. See also Daniel L. ROTENBERG, loc.cit., n. 29, pp. 894-5.
152. See Roger PARK, loc.cit., n. 36, pp. 196-8; George E. DIX, Undercover Investigations and Police Rulemaking, (1974-75) 53 Texas L.R. 203, pp. 249-54; L.P. TIFFANY, D.M. McINTYRE, JR; D.L. ROTENBERG, op.cit., n.22, pp. 265-76; John S. GOODNOW, loc.cit., n. 144, pp. 554-6; Daniel L. ROTENBERG, loc.cit., n. 53, pp. 894-5, 901; Richard C. DONNELLY, loc.cit., n. 29, pp. 1106-7; Notes, Entrapment by Government Officials, (1928) 28 Columbia L.R. 1067, pp. 1070-2.

It has been held that there is no constitutionally imposed requirement of reasonable suspicion before an undercover operation such as Abscam can be commenced. See United States v. Janotti, (1982) 673 F (2d) 578 (3rd Circ. C.A.), pp. 608-9, cert. denied (1982) 102 S. Ct. 2906; United States v. Myers, (1980) 635 F (2d) 932 (2nd Circ. C.A.), pp. 940-1, cert. denied (1980) 449 U.S. 956 (U.S.S.C.). But see United States v. Kelly, (1982) 539 F. Supp. 363 (D.C. Distr. Ct.), pp. 371, 373, 376.

153. W.H. HITCHLER, loc.cit., n. 146, pp. 200-1.
154. See Roger PARK, loc.cit., n. 36, pp. 190-5.
155. Supra, n. 104.
156. Supra, n. 104, p. 674 (9th Circ. C.A.).
157. Supra, n. 104, p. 439. Stewart J., with whom Brennan and Marshall JJ. joined, in a separate dissenting opinion, adopted the objective approach to the defence of entrapment. See supra, pp. 46-9.
158. Supra, n. 104, p. 432.
159. Supra, n. 39.
160. Id., p. 372.
161. Supra, n. 104, p. 430.
162. Id., pp. 431-2.
163. Supra, n. 105.
164. Id., pp. 488-9.

165. Supra, n. 104, pp. 431-2.
166. The limitations of the due process clause would come into play only when the government activity in question violates some protected right of the accused rather than of a third party. See United States v. Payner, (1980) 447 U.S. 727 (U.S.S.C.).
167. Supra, n. 104, p. 435.
168. Supra, n. 105, p. 490. See also William E. MIKELL, The Doctrine of Entrapment in the Federal Courts, (1941-42) 90 U. of Pennsylvania L.R. 245, pp. 264-5.
169. Supra, n. 105, p. 498.
170. See Roger PARK, loc.cit., n. 36, pp. 185-90; Robert H. THOMSON, III, Elevation of Entrapment to a Constitutional Defense, (1973-74) 7 U. of Michigan Journal of Law Reform 361; Notes and Comments, The Serpent Bequiled Me and I Did Eat: The Constitutional Status of the Entrapment Defense, loc.cit., n. 146. Richard A. COWEN, loc.cit., n. 145, pp. 449, 455.
171. Stevens J. did not take part in the consideration or decision of this case.
172. See United States v. Janotti, supra, n. 152; United States v. Alexandro, (1982) 675 F. (2d) 34 (2nd Circ. C.A.); United States v. Kelly, supra, n. 152; United States v. Twigg, supra, n. 115. See also Leslie W. ABRAMSON, Lisa L. LINDEMAN, Entrapment and Due Process in the Federal Courts, (1980) 8 Am. J. Crim. Law 139.
173. Supra, n. 53.
174. Id., pp. 573-4.
175. Supra, n. 32. See also R. v. McCann, (1971) 56 Cr. App. R. 359 (Eng. C.A.).
176. Supra, n. 32, p. 472.
177. Id., p. 473.
178. (1967) 2 All. E.R. 1277 (Q.B.)
179. Id., p. 1280.
180. Per Warren C.J. in Sherman v. United States, supra, n. 39, p. 372.

181. (1953) 2 All. E.R. 775 (Q.B.).
182. Id., p. 779.
183. Supra, n. 32.
184. Id., p. 472.
185. Supra, pp. 65-6.
186. Supra, n. 175.
187. See J.D. HEYDON, loc.cit., n. 52, p. 277; J.D. McCLEAN, Informers and Agents Provocateurs, (1969) Crim. L.R. 527, p. 532.
188. (1848) 3 Cox C.C. 509 (Eng. Central Crim. Ct.).
189. (1848) 3 Cox C.C. 526 (Eng. Central Crim. Ct.).
190. (1909) 2 Cr. App. R. 53 (Eng. C.A.).
191. (1911) 6 Cr. App. R. 76 (Eng. C.A.).
192. Supra, n. 178.
193. Supra, p. 66.
194. Supra, n. 178, pp. 1279-80.
195. Supra, n. 53.
196. Supra, n. 32.
197. (1973) Crim. L.R. 45 (Inner London Quarter Sessions).
198. (1973) Crim. L.R. 748 (Eng. Central Crim. Ct.).
199. See Commentary, R. v. Burnett and Lee, (1973) Crim. L.R. 749.
200. (1974) 60 Cr. App. R. 150 (Eng. C.A.).
201. Id., p. 155.
202. See J.C. SMITH, Brian HOGAN, Criminal Law, 3rd ed., London, Butterworths, 1973, pp. 112-13; Glanville WILLIAMS, op.cit., n. 57, par. 256, pp. 782-9.
203. (1974) 60 Cr. App. R. 59 (Eng. C.A.).

204. Id., pp. 61-2. This statement, although referring to undercover infiltration of terrorist groups, is analogous to the remarks of Rehnquist J. in United States v. Russell supra., n. 104, p. 432, where he discusses: undercover infiltration of drug rings. See supra, p.56.
205. Supra, n. 203, p. 63, per the Lord Chief Justice.
206. Id., p. 62, per the Lord Chief Justice.
207. (1976) Crim. L.R. 127 (Eng. C.A.).
208. Supra, n. 32.
209. (1977) Crim. L.R. 104 (Eng. Central Crim. Ct.).
210. The existence of a discretion to exclude the evidence of an agent provocateur was acknowledged, but not exercised, by the Northern Ireland Courts - Martial Appeal Court in R. v. Murphy, (1965) N.I. 138. In New Zealand, the approach of the courts has been to deal with entrapment within the scope of the discretionary evidentiary exclusionary rule. See R. v. Pethia, (1977) 1 N.Z.L.R. 448 (S.C.); R. v. Capner, (1975) 1 N.Z.L.R. 414 (C.A.); R. v. O'Shannessy, N.Z. C.A., Wellington, October 8, 1973, 78/73. See also N.L.A. BARLOW, Recent Developments in New Zealand in the Law Relating to Entrapment: 1 and 2, (1976) N.Z.L.J. 304, 328.
211. (1979) 2 All. E.R. 1222 (H.L.) aff. (Eng. C.A.) p. 46.
212. Id., p. 64 (Eng. C.A.).
213. Supra, n. 211, p. 1226.
214. Id., p. 1235. The accused in this case was far from being an "otherwise innocent" person. Lord Salmon raised this, p. 1236.
215. Id., p. 1238.
216. Id., p. 1243.
217. Id., p. 1227.
218. Ibid.
219. Id., p. 1234.
220. Id., pp. 1235-6.

221. Lord Diplock indicated that if R. v. Murphy, supra, n. 210, suggested the contrary, it should no longer be regarded as good law. Id., p. 1227.
222. Supra, n. 211, p. 1230.
223. Id., p. 1231.
224. Id., p. 1247. See J.D. HEYDON, Entrapment and Unfairly Obtained Evidence in the House of Lords, (1980) Crim. L.R. 129; Commentary, R. v. Sang, (1979) Crim. L.R. 656; Allan C. HUTCHINSON, Neil R. WITHINGTON, Comments, R. v. Sang, (1980) 58 Can. Bar. Rev. 376.
225. See Eugene OSCAPELLA, loc.cit. n. 33; A.J. ASHWORTH, Defences of General Application: The Law Commission's Report No. 83: (3) Entrapment, (1978) Crim. L.R. 137; N.L.A. BARLOW, Entrapment and The Common Law: Is There a Place for the American Doctrine of Entrapment? (1978) 41 Modern L.R. 266; K.J.M. SMITH, The Law Commission Working Paper No. 55 on Codification of the Criminal Law. Defences of General Application: Official Instigation and Entrapment, (1975) Crim. L.R. 12; R.P. BRITAIN, "Entrapment" - The English Approach, (1974) 124 New L.J. 1072; Jennifer TEMKIN, Police Traps, (1974) 37 Modern L.R. 102; J.D. HEYDON, loc.cit., n. 52; K.M. DEVLIN, loc.cit., n. 33; J.D. McCLEAN, loc.cit., n. 187; Editorial, Incitement to Crime, (1969) 119 New L.J. 497; Editorial, Police Participation in Crime, (1969) 119 New L.J. 513; Editorial, Police Use of Informants, (1969) 119 New L.J. 513.
226. See the remarks of Laskin C.J.C. in R. v. Kirzner, supra no. 31, pp. 135-6, and Lamer J. in Rothman v. The Queen supra, n. 27, p. 74.
227. R. v. Kirzner, supra, n. 31, p. 136.
228. (1968) 3 C.R.N.S. 377 (S.C.C.) aff. (1968) 2 C.C.C. 50 (Alta. S.C.A.D.).
229. See R. v. Young, (1949) 94 C.C.C. 117 (Que. C.S.P.).
230. See also R. v. Titley, (1880) 14 Cox C.C. 502 (Eng. Central Crim. Ct.); R. v. Hillman, (1863) 9 Cox C.C. 386 (Eng. C.A.); R. v. Goodchild, (1846) 2 Car. & K. 292 (Eng. K.B.); Anonymous Case, (1811) 3 Camp. 73 (Eng. K.B.); Contra R. v. Hyland, (1898) 24 V.L.R. 101 (S.C.); R. v. Scudder, (1828) 3 Car. & P. 604 (Eng. K.B.); Note that the police officers involved in soliciting Titley, supra, were charged with incitement to commit the offence although the indictment was quashed for procedural reasons. See R. v. O'Callaghan, (1880) 14 Cox C.C. 499 (Eng. Central Crim. Ct.).

231. (1969) 3 C.C.C. 222 (Ont. C.A.).
232. See also R. v. Phillips, (1969-70) 8 C.R.N.S. 186 (N.S. Co. Ct.).
233. Supra, n. 231, p. 224.
234. See Davies v. Director of Public Prosecutions, (1954) 1 All. E.R. 507 (H.L.); R. v. Baskerville, (1916) 2 K.B. 658 (Eng. C.A.).
235. Supra, n. 32.
236. See also R. v. Gallant, (1970) 3 C.C.C. 263 (P.E.I.S.C.); Evans v. Pesce and Attorney General for Alberta, supra, n. 47; Bouchard v. The King, (1951) 101 C.C.C. 413 (Que. K.B.A.S.); R. v. Clay, (1946) 88 C.C.C. 36 (Que. K.B. A.S.); Prvor v. The King, (1938) 70 C.C.C. 345 (P.E.I. S.C.); R. v. Williams, (1934) 63 C.C.C. 216 (B.C.C.A.); R. v. Acker, (1934) 62 C.C.C. 269 (N.S. Co. Ct.); R ex rel. Leslev v. Morel, (1931) 1 W.W.R. 209 (Sask. K.B.); R. v. Kinney, (1930) 55 C.C.C. 350 (N.B.S.C.A.D.); R. v. Rice, (1929) 52 C.C.C. 380 (N.S.S.C.A.D.); R. v. Berdino, supra, n. 26; R. v. McCranor, (1918) 31 C.C.C. 130 (Ont. S.C.A.D.); Contra, R. v. Knezo, (1955) 115 C.C.C. 90 (B.C.S.C.); R. v. Rodgers, (1926) 46 C.C.C. 372 (Ont. Co. Ct.); R. v. Sands (No. 1), (1915) 25 C.C.C. 116 (Man. K.B.). See also Irénée LAGARDE, loc.cit., n. 33; A.E. POPPLE, Annotation: Agents Provocateurs, Police Spies and Informers, (1946) 1 C.R. 336.
237. R. v. Timar, (1969) 3 C.C.C. 185 (Ont. Distr. Ct.), infra, pp. 111-13; R. v. Kinney, supra, n. 236; R. v. Bandel, (1927) 47 C.C.C. 266 (Ont. Co. Ct.); R. v. Stephens, (1926) 45 C.C.C. 123 (Ont. Co. Ct.); R. v. Hyde, (1925) 44 C.C.C. 1 (Ont. Co. Ct.). Although courts refuse to recognize police officers as accomplices for evidentiary purposes, close scrutiny of their evidence may lead to the same results. See J.C. LEVY, Police Entrapment - A Note on Recent Developments, (1972) 20 Chitty's L.J. 331, p. 332.
238. Supra, n. 32, pp. 390-1.
239. Id., p. 391.
240. (1945) 84 C.C.C. 126 (Ont. C.A.).

241. Id., p. 139. Gillanders J.A. agreed but saw no reason to conclude that as a rule of general application the evidence of such officers should be scrutinized with greater care or suspicion. Note that in R. v. White (No.1), Ibid., leave to appeal from the judgement of the County Court, quashing the conviction of the accused by a Police Magistrate, was granted. The appeal was allowed in R. v. White (No.2), (1945) 84 C.C.C. 140 (Ont. C.A.).
242. See PHIPSON on Evidence, 12th ed., John Huxley BUZZARD, Richard MAY, M.N. HOWARD, (ed.), London, Sweet and Maxwell, 1976, par. 1633, pp. 685-6. The Supreme Court of Canada in Vigeant v. The King, (1930) 54 C.C.C. 301 (S.C.C.), would not consider a police spy an accomplice as long as he acted in that capacity from the outset, whereas the evidence of a person who was initially an accomplice but later became a police spy would require corroboration. See also R. v. Park Hotel (Sudbury) Ltd., (1966) 4 C.C.C. 158 (Ont. Distr. Ct.); R. v. Timar, supra, n:237.
243. (1982) 67 C.C.C. (2d) 1 (S.C.C.) aff. (1981) 58 C.C.C. (2d) 537 (B.C.C.A.).
244. Id., p. 17.
245. In R. v. Ridge, supra, n. 34, infra, pp. 120-1; R. v. Sampare, (1978) 6 B.C.L.R. 334 (Prov. Ct.); infra, pp. 136-8; R. v. Pratt, (1972) 19 C.R.N.S. 273 (N.W.T. Mag. Ct.); infra, pp. 117-18, although it was held that the police officers in question were not accomplices and accordingly corroboration was not required, the issue of entrapment was considered.
246. See supra, pp. 14-17.
247. See J.C. SMITH, Civil Law Concepts in the Criminal Law, (1972) 31 Cambridge L.J. 197.
248. (1914) 23 C.C.C. 169 (Sask. Distr. Ct.).
249. See R. v. Begeotas, (1912) 22 C.C.C. 113 (B.C.Co. Ct.); R. v. Davis, (1912) 22 C.C.C. 187 (Ont. H.C.). See also Contré v. Québec Liquor Commission, (1935) 65 C.C.C. 69 (Que. K.B.); Bisson v. Québec Liquor Commission, (1930) 48 C.B.R. 256 (Que.).
250. (1972) 7 C.C.C. (2d) 536 (Sask. Distr. Ct.).
251. Id., p. 541. See R. v. Hawthorne, (1971) 3 C.C.C. (2d) 505 (B.C. Co. Ct.); R. v. Poulsen, (1939) 72 C.C.C. 264 (B.C. Co. Ct.).

252. (1970) 1 C.C.C. 354 (Ont. C.A.).
253. (1952-53) S.C. c. 38 rep. by (1970) R.S.C. c. F-27, s. 34(1).
254. Added by An Act to Amend the Food and Drugs Act, (1960-61) S.C. c. 37, s. 1.
255. Supra, n. 252, p. 357. See R. v. Barr, (1976) 23 C.C.C. (2d) 116 (Ont. C.A.); Evans v. Pesce and Attorney General for Alberta, supra, n. 47; R. v. Burke, (1925) 43 C.C.C. 393 (B.C.S.C.); R. v. Donihee, (1921) 36 C.C.C. 293 (Ont. S.C.); Ex Parte Barker, (1891) 30 N.B.R. 406 (S.C.).
256. See R. v. Pratt, supra, n. 245; R. v. Begeotas, supra, no. 249; R. v. Gunn, (1905) 10 C.C.C. 148 (Que. C. S.P.).
257. (1902) 2 K.B. 287 (Eng. K.B.).
258. Supra, n. 26.
259. (1934) 1 W.W.R. 78 (B.C.C.A.). See also R. v. Chernecki, (1972) 16 C.R.N.S. 230 (B.C.C.A.).
260. (1973) 12 C.C.C. (2d) 337 (S.C.C.) aff. (1972) 6 C.C.C. (2d) 559 (Man. C.A.).
261. (1970) R.S.C. c. N-1.
262. Supra, n. 260, p. 563 (Man. C.A.).
263. Supra, n. 260, p. 342.
264. Id., p. 343.
265. See R. v. Barr, supra, n. 255, p. 119.
266. (1949) 95 C.C.C. 261 (Que. K.B.A.S.) aff. (1948) 93 C.C.C. 138 (Que. C.S.P.).
267. See R. v. O'Brien, (1954) 110 C.C.C. 1, where the Supreme Court of Canada held that there can be no conspiracy unless at least two persons agree and intend to participate in the unlawful act proposed.
268. Although this reasoning would clearly preclude a conviction for conspiracy, it was relied on to dismiss the Crown's appeal against the acquittal of attempted conspiracy. Nevertheless, the three opinions do disclose

additional reasons for not convicting of attempted conspiracy. Bissonnette J. stated that there could not be conspiracy any more than there could be an attempt to conspire, because the policewoman had called upon the accused for intervention, not from necessity and with the desire to commit an unlawful act, but just simply to set a trap for this woman in order to prepare a case against her. Supra, n. 266, p. 264. Gagné J. indicated that the policewoman suggested the agreement whereas the accused acquiesced. He queried how the accused could be convicted of the attempt when she had already been acquitted of the conspiracy without any appeal from this judgement. Supra, n. 266, pp. 265-6. Mackinnon J. pointed out that the dealings between the policewoman and the accused advanced far past an attempt to commit a conspiracy, the conspiracy having actually been accomplished and on that charge the accused had been acquitted. Supra, p. 269. *Re Impossible attempts*, see infra, n. 281.

269. (1968) 2 C.C.C. 247 (S.C.C.); rev. (1967) 3 C.C.C. 39 (Ont. C.A.).
270. See also Hutt v. The Queen, (1978) 38 C.C.C. (2d) 418 (S.C.C.).
271. With respect to consent and facilitation, see Glanville WILLIAMS, Theft, Consent and Illegality: Some Problems, (1977) *Crim. L.R.* 327; Glanville WILLIAMS, op.cit., n. 57, par. 251-55, pp. 770-82; J.D. HEYDON, loc.cit., n. 52, pp. 272-3.
272. See R. v. Miller and Page, (1965) 49 Cr. App. R. 241 (Eng. C.A.); R. v. Turvey, (1946) 2 All. E.R. 60 (C.A.); R. v. Lawrance, (1850) 4 Cox C.C. 438 (Eng. Central Crim. Ct.). See also State v. Neely, (1931) 300 P. 561 (Montana S.C.). With respect to other offences see (receiving etc.), Haughton v. Smith, (1973) 3 All. E.R. 1109 (H.L.); R. v. King, (1938) 2 All. E.R. 662 (C.A.); R. v. Villensky, (1892) 2 Q.B. 597 (Eng. Q.B.); R. v. Dolan, (1855) Dears 435 (Eng. Q.B.); Booth v. State, (1964) 398 P (2d) 863 (Oklahoma C.A.); People v. Jaffe, (1906) 78 N.E. 169 (N.Y.C.A.); (robbery), R. v. Macro, (1969) *Crim. L.R.* 205 (Eng. C.A.); R. v. Macdaniel, (1755) Fost. 121 (Eng. K.B.); (assault), Guarro v. United States, (1956) 237 F (2d) 578 (D.C. Circ. C.A.); (false pretences), R. v. Timar, supra, n. 237; R. v. Light, (1915) 24 Cox C.C. 718 (Eng. C.A.); R. v. Lyons (No. 1), (1910) 16 C.C.C. 152 (Que. Mag. Ct.); R. v. Perera, (1907) V.L.R. 240 (S.C.); R. v. Hensler, (1870), 11 Cox C.C. 570 (Eng. C.A.); R. v. Mills, (1857) 7 Cox C.C. 263 (Eng. C.A.); R. v. Roebuck, (1856) 7 Cox C.C. 126 (Eng. C.A.); (aiding an enemy to escape), R. v. Snyder, (1915) 24 C.C.C. 101 (Ont. S.C.A.D.); R. v. Martin, (1811) Russ. & Ry. 196 (Eng. K.B.).

273. See Martin v. Puttick, (1967) 1 All. E.R. 899 (Q.B.);  
R. v. Williams, (1843) 1 Car. & K. 194 (Eng. Q.B.);  
R. v. Egginton, (1801) 2 Leach 913 (Eng. K.B.)
274. R. v. Johnson and Jones, (1841) Car. & M. 218 (Eng. Q.B.).  
See also Love v. People (1896) 43 N.E. 710 (Illinois  
S.C.); People v. McCord, (1889) 42 N.W. 1106 (Michigan  
S.C.).
275. R. v. Chandler, (1913) 8 Cr. App. R. 82 (Eng. C.A.).  
See also State v. Currie, (1905) 102 N.W. 875 (North  
Dakota S.C.).
276. (1968) 1 C.C.C. 187 (S.C.C.).
277. Id., p. 189.
278. Ibid.
279. Ibid., See R. v. Bouillon, (1982) 7 W.C.B. 11 (Alta.  
Prov. Ct.) and R. v. Bonnar, (1977) 30 C.C.C. (2d) 55  
(N.S.S.C.A.D.), two theft cases where arguments of entrap-  
ment and absence of actus reus were rejected, the respec-  
tive courts finding that the owner merely provided the  
opportunity for the accused to commit theft without  
actively instigating or consenting to the commission of  
the offence itself.
280. Supra, n. 276, p. 190.
281. See sections 587 (formerly 567) and 24(1) of the  
Criminal Code. For example, see R. v. Timar, supra, n.  
237; R. v. Miller and Page, supra, n. 272 where, as a  
result of the involvement of the police or the intended  
victim, the accused was convicted of the attempt rather  
than the complete offence. But see Haughton v. Smith,  
supra, n. 272, where the House of Lords affirmed the  
quashing of the accused's conviction of attempting to  
handle stolen goods because the goods, as a result of  
police intervention, had lost their character of being  
stolen. The law regarding impossible attempts has  
generated much controversy. See Don STUART, Canadian  
Criminal Law: A Treatise, Toronto, The Carswell Company  
Limited, 1982, pp. 542-52; Glanville WILLIAMS, op.cit.,  
n. 57, par. 205-7, pp. 633-53; Sanford H. KADISH,  
Monrad G. PAULSEN, Criminal Law and Its Processes: Cases  
and Materials, 2nd ed., Boston, Little, Brown and Company,  
1969, pp. 393-410; Glanville WILLIAMS, Attempting the  
Impossible - A Reply, (1979-80) 22 Cr. L.Q. 49; Alan D.  
GOLD, "To Dream the Impossible Dream" : A Problem in  
Criminal Attempts (and Conspiracy) Revisited, (1978-79)  
21 Cr. L.Q. 218; Eugene M.A. MEEHAN, Attempt - Some

Rational Thoughts on its Rationale, (1976-77) 19 Gr. L.Q. 215; Glanville WILLIAMS, Criminal Attempts - A Reply, (1962) Crim. L.R. 300; J.C. SMITH, Two Problems in Criminal Attempts Re-Examined-II, (1962) Crim. L.R. 212; J.C. SMITH, Two Problems in Criminal Attempts, (1956-57) 70 Harvard L.R. 422, pp. 435-48; Edward R. KEEDY, Criminal Attempts at Common Law, (1953-54) 102 U. of Pennsylvania L.R. 464, pp. 476-89.

282. See André JODOUIN, Les Abus de Pouvoir et de Fonction en Droit Pénal Canadien, (1978) 19 C. de D. 21, pp. 49-50.
283. Supra, n. 237.
284. Id., p. 188.
285. Ibid., Traps are no excuse for criminal activity although they may, as in Timar, reduce culpability to the attempt. See R. v. Ady, (1835) 7 Car. & P. 140 (Eng. K.B.); R. v. Holden, (1809) Russ. & Ry. 154 (Eng. K.B.); People v. Hilfman, (1901) 70 N.Y.S. 621 (N.Y.S.C.A.D.). See also false pretence cases referred to, supra, n. 272.
286. Supra, pp. 53-4.
287. Supra, n. 237, p. 188.
288. Supra, n. 53.
289. An appeal as to sentence was allowed and the sentence varied.
290. Supra, pp. 15-16.
291. Supra, n. 53, pp. 10-11.
292. (1969) 4 C.C.C. 185 (Ont. C.A.) rev. by (1971) 1 C.C.C. (2d) 482 (S.C.C.). See infra, pp. 165-6.
293. Id., (S.C.C.). Re Abuse of Process see infra, Part II, Chapter I.
294. Supra, n. 53, p. 11. See Graham PARKER, loc.cit., n. 53.
295. Supra, n. 53, p. 11.
296. (1972) 17 C.R.N.S. 398 (Alta. S.C.).
297. Supra, n. 1.
298. Supra, n. 296, p. 400.
299. Supra, n. 245.

300. Supra, n. 237.
301. Supra, n. 5.
302. Supra, n. 1.
303. Supra, n. 39.
304. Supra, n. 245, p. 287.
305. (1978) 23 N.S.R. (2d) 550 (N.S.S.C.A.D.).
306. Id., pp. 559-60.
307. See supra, p. 40.
308. (1979) 6 C.R. (3d) 8 (N.S.Co.Ct.).
309. See Peòple v. Donovan, (1967) 279 N.Y.S. (2d) 404 (N.Y. Ct. of Special Sessions) where the state was estopped from prosecuting the accused for impaired driving where police officers, who found the accused inebriated and passed out inside her car which was parked on private property, suggested that she leave and when she drove away they arrested her.
310. Supra, n. 34.
311. Id., p. 268.
312. Supra, n. 53.
313. (1982) C.S.P. 1045 (Que.).
314. The accused was acquitted of a further count of trafficking in a narcotic for reasons of no concern here.
315. Supra, n. 313, pp. 1049-50.
316. Supra, pp. 53-4.
317. Supra, n. 31. See infra, pp. 144-7.
318. Supra, n. 313, p. 1051.
319. Supra, n. 53.
320. Supra, n. 34.

321. See also R. v. Hanaway and Lamaqa, (1982) 63 C.C.C. (2d) 44 (Ont. Distr. Ct.); leave to appeal to Ont. Div. Ct. dismissed, October 15, 1981, p. 55; R. v. Loveless, (1978-79) 3 W.C.B. 267 (B.C. Co. Ct.); R. v. Glushek, (1977-78) 2 W.C.B. 50 (Alta. S.C.); R. v. Bohman, (1975) 20 C.C.C. (2d) 117 (Ont. Distr. Ct.).
322. Supra, n. 259.
323. (1960-61) S.C. c. 35 rep. by (1970) R.S.C. c. N-1.
324. Supra, n. 53.
325. Supra, n. 259, p. 232.
326. Supra, n. 276.
327. Supra, n. 292 (S.C.C.).
328. Supra, n. 259, p. 232.
329. (1979) 44 C.C.C. (2d) 33 (P.E.I.S.C.A.D.).
330. (P.E.I.S.C.) cited Id., p. 49.
331. Supra, n. 276.
332. (1980) 16 C.R. (3d) 397 (Que. S.C.).
333. To the same effect, see R. v. Bouillon, supra, n. 279; R. v. Lawson, (1982) 7 W.C.B. 407 (Sask. Q.B.). See also R. v. White, (1982) 7 W.C.B. 264 (N.S.S.C.A.D.) where an application by the accused for judicial interim release pending his appeal from conviction for trafficking in L.S.D. was dismissed as the principle ground of appeal involved the issue of entrapment and accordingly the accused had not satisfied the burden of showing that the appeal was not frivolous. In R. v. Auger, (1979) 5 W.W.R. 543 (B.C.C.A.) the error in law of a Provincial Judge presiding at a preliminary inquiry in refusing to permit defence counsel to cross-examine a police officer on the issue of entrapment, because, in his view, such a defence did not exist in Canadian law, was held to be an error in the exercise of jurisdiction, not a refusal to exercise jurisdiction. An application for mandamus with certiorari in aid to quash the committal was accordingly dismissed. See also R. v. Triller, B.C.C.A. October 16, 1974.
334. (1970) 3 C.C.C. 398 (Ont. Co. Ct.).
335. Supra, n. 39.

336. Supra, n. 334, pp. 401-2.
337. Supra, n. 292.
338. Supra, n. 334, p. 402.
339. Supra, n. 292 (S.C.C.).
340. (1971) 15 C.R.N.S. 122 (B.C. Prov. Ct.).
341. Supra, n. 53.
342. Supra, n. 340, p. 124.
343. (1976) 5 W.W.R. 420 (B.C. Prov. Ct.).
344. Supra, n. 1.
345. Supra, n. 39.
346. Supra, n. 343, p. 429.
347. See Supra, Chapter I.
348. Supra, n. 261.
349. It is unclear from the case report whether Cronin Prov. Ct. J. was aware of the Supreme Court of Canada decision in R. v. Osborn, supra n. 292.
350. Supra, n. 245.
351. Id., p. 341.
352. Ibid.
353. (1970) 4 C.C.C. 1 (S.C.C.) rev. (1970) 3 C.C.C. 122 (Ont C.A.). See infra pp. 216-18. See also R. v. Sang, supra, n. 211 where the House of Lords held that a court had no discretion to exclude evidence obtained as the result of the activities of an agent provocateur. See supra, pp. 80-8.
354. (1982) 65 C.C.C. (2d) 158 (N.S. Co.Ct.).
355. Supra, n. 31. See infra pp. 144-7.
356. Supra, n. 313.
357. In a previous, but recent Nova Scotia decision, R. v. Bonnar, supra, n. 279, infra pp. 140-2, which was cited in Riphey, the Appeal Division, although holding that

entrapment did not arise on the facts, stated that if entrapment was established, the proper course would be to stay proceedings or discharge the accused as there would be an abuse of process. This contradiction (Bonnar and Rippey) within the same province gives some indication of the inconsistency with respect to the foundation and effect of the defence.

- 358. Supra, n. 279.
- 359. (N.S. Prov. Ct.) cited Id., p. 58.
- 360. Supra, n. 279, p. 64.
- 361. Id., p. 69.
- 362. (1979) C.S. 821 (Que.).
- 363. (1977) 35 C.C.C. (2d) 129 (S.C.C.) aff. (1976) 25 C.C.C. (2d) 555 (B.C.C.A.) rev. (1974) 16 C.C.C. (2d) 133 (B.C.S.C.). See infra, pp. 166-70.
- 364. Supra, n. 362, p. 829.
- 365. See (1980) 13 C.R. (3d) 326 (Que. S.C.) for the sentencing decision.
- 366. Supra, n. 53.
- 367. Supra, n. 31.
- 368. Ibid.
- 369. Id., p. 142.
- 370. Id., p. 138.
- 371. Id., p. 141. See Alan D. GOLD, Notes and Comments, Kirzner v. The Queen (1977-78) 20 Cr. L.Q. 166.
- 372. Supra, n. 53.
- 373. (1982) 69 C.C.C. (2d) 31 (S.C.C.) aff. (1980) 51 C.C.C. (2d) 401 (B.C.C.A.).
- 374. (B.C. Prov. Ct.) cited Id., p. 41 (S.C.C.).
- 375. Supra, n. 373, p. 405 (B.C.C.A.). Carrothers J.A. agreed with both of his brother Justices.
- 376. Supra, n. 373, p. 40.

377. Id., pp. 39-40. Ritchie J. addressed a further ground of appeal holding that the failure of the Crown to call the informer did not constitute an abuse of process.
378. Supra, n. 373, p. 38.
379. Supra, n. 276.
380. See Don STUART, Amato: Watersheds in Entrapment and Abuse of Process, (1982) 29 C.R. (3d) 54; Paul H. ROBINSON, loc.cit., n. 146, pp. 236-9.
381. Supra, n. 373, p. 60.
382. Id., pp. 61-2.
383. See Supra, Chapter 1, Section A-2.
384. Supra, n. 292 (S.C.C.).
385. Supra, n. 363.
386. Supra, n. 373, p. 61.
387. Id., p. 76.
388. Dickson J., with whom Martland, Beetz and Chouinard JJ. concurred, did not take a definitive position. Assuming the defence to be available, he held it did not arise in this case.
389. See R. v. Zatwarnicki, (1981) 8 Man. R. (2d) 444 (Man. C.A.) per Hubard J. dissenting; R. v. Zohr, (1980) 4 W.C.B. 220 (Ont. Co. Ct.); R. v. Sabloff, supra, n. 365; R. v. Amato, supra, n. 373 (B.C.C.A.), per Seaton J.A.; R. v. Burke, supra, n. 329. R. v. Kirzner, supra, n. 31 (Ont. C.A.); R. v. Chernecki, supra, n. 259 per Bull J.A.; R. v. Ormerod, supra, n. 53 per Laskin J.A. (as he then was); See also R. v. Price, (1971) 12 C.R.N.S. 131 (Ont. C.A.); R. v. Steinberg, (1967) 3 C.C.C. 48 (Ont. C.A.). See the comments of Estey J. in his dissenting judgement in Amato v. The Queen, supra, n. 373, pp. 74-5, in which he criticizes reliance upon mitigation of sentence as a judicial response to the problem of entrapment.
390. See M.L. FRIEDLAND, loc.cit., n. 52; Gilles BACHAND, Légalité et Piège Illégal, (1982) 12 R.D.U.S. 357; Don STUART, op.cit., n. 281, pp. 468-82; Bruce A. MACFARLANE, Drug Offences in Canada, Toronto, Canada Law Book Limited, 1979, pp. 468-88; Robert K. PATERSON,

loc.cit., n. 52; Michael STOBER, Entrapment, (1976) 7 R.G.D. 25; Barnett M. SNEIDEMAN, A Judicial Test for Entrapment: The Glimmerings of a Canadian Policy on Police-Instigated Crime (1973-74) 16 Cr. L.Q. 81; John David WATT, loc.cit., n. 95; Joel SHAFER, William J. SHERIDAN, loc.cit., n. 52.

391. See Céline LACERTE-LAMONTAGNE, L'Abus de Procédure en Droit Pénal, (1982) 42 R du B 69; Stanley A. COHEN, Observations on the Re-emergence of the Doctrine of Abuse of Process, (1981) 19 C.R. (3d) 310; André JODOUIN, loc.cit., n. 282, pp. 49-54; W.J. BRAITHWAITE, Developments in Criminal Law and Procedure: The 1979-80 Term, (1981) 2 Supreme Court L.R. 177, pp. 225-30; John A. OLAH, The Doctrine of Abuse of Process: Alive and Well in Canada, (1978) 1 C.R. (3d) 341; Stanley A. COHEN, Abuse of Process: The Aftermath of Rourke, (1977) 39 C.R.N.S. 349; Stanley A. COHEN, op.cit. n: 5, pp. 343-405; Jim ORTEGO; Matthew GOODE, Abuse of Process in Canadian Criminal Law: The New Equity? A paper presented for the Canadian Institute for the Administration of Justice, Dalhousie University, Halifax, 1977; Douglas, J. WRAY, The Abuse of Power Doctrine in Canadian Criminal Law, (1976) 34 U of Toronto Fac. L.R. 159; Law Reform Commission of Canada, op.cit., n. 66, pp. 18-20; E.G. EVASCHUK, The Rule Against Multiple Convictions and Abuse of Process, (1975) 28 C.R.N.S. 28; P.S. BARTON, Abuse of Process as a Plea in Bar of Trial, (1972-73) 15 Cr. L.Q. 437; Bruce HAINES, Annotation, Judicial Ombudsmanship - A Problem in Policy, (1971) 12 C.R.N.S. 11; Philip C. STENNING, Observations on the Supreme Court of Canada's Decision in R. v. Osborn, (1970-71) 13 Cr. L.Q. 164; Kenneth L. CHASSE, Annotation, Abuse of Process as a Control of Prosecutorial Discretion, (1970) 10 C.R.N.S. 392.

392. See Rachel GRONDIN, Le Sursis des Procédures pour Abus en Matière Pénale, Master of Laws thesis, University of Ottawa, 1981.

393. For a look at the varied situations giving rise to the doctrine of abuse of process, see Manfred ANGENE, Case References on Abuse of Process, (1977) 37 C.R.N.S. 153; Jim ORTEGO; Matthew GOODE, loc.cit., n. 391.

394. (1964) 2 All. E.R. 401 (H.L.) aff. (1963) 3 All. E.R. 510 (C.A.).

395. Id., p. 438.

396. Id., p. 442.
397. Id., p. 449.
398. Id., p. 406.
399. Id., p. 411.
400. Id., p. 432.
401. (1976) 2 All. E.R. 497 (H.L.) rev. (1975) 2 All. E.R. 1023 (C.A.).
402. Id., pp. 527-8.
403. Id., p. 533.
404. Id., p. 535.
405. Id., p. 511.
406. Supra, n. 211. See supra, pp. 80-8.
407. Supra, n. 211, (C.A.), p. 50.
408. Id., p. 63.
409. Supra, n. 211, pp. 1245-6.
410. With respect to a court's discretion to exclude legally admissible evidence, His Lordship, later in his judgment, conceded that in some circumstances, the principle of fairness is wide enough to embrace the way in which, after the crime, evidence has been obtained from the accused.
411. Supra, n. 211, p. 1245.
412. Supra, n. 292 (S.C.C.)
413. Id., p. 491.
414. Supra, n. 363.
415. (B.C. Co. Ct.) cited Id., p. 559 (B.C.C.A.). In the Supreme Court of Canada, Laskin C.J.C. noted, p. 132, that the trial judge thus invoked, without express reference however, section 2(e) of the Canadian Bill of Rights. The Chief Justice was unable to appreciate the application of this provision to the issue of abuse of process as it arises on the facts in this case.

Accordingly, he dealt with that issue as one not dependent on the Canadian Bill of Rights.

416. Mr. Justice McIntyre is now a member of the Supreme Court of Canada. It is noteworthy that in Amato v. The Queen, *supra*, n. 373, he derogated from his position in Rourke by concurring in the dissenting judgement of Estey J. which would have extended the scope and application of the doctrine of abuse of process into the investigatory stages.
417. Supra, n. 363, p. 564 (B.C.C.A.).
418. Id., p. 565.
419. Supra, n. 363, p. 145.
420. Ibid.
421. Id.; p. 146..
- 422.. Id., pp. 142-3.
423. Note that in Rourke, pp. 145-6, although Pigeon J. denied a general power to stay proceedings, he supported comments made by Viscount Dilhorne in Director of Public Prosecutions v. Humphrys, *supra*, n. 401, pp. 510-11, *supra*, p. 161 ., which allow the possibility that abuse of process may remain on as an exceptional power to stay proceedings. See Estey J., dissenting in Amato v. The Queen, *supra*, n. 373, p. 67. See also John A. OLAH, loc.cit., n. 391, pp. 357-8; Kenneth L. CHASSE, Practice Note, Abuse of Process - Will it Survive Rourke, (1977) 38 C.R.N.S. 270, p. 271. Note also that Pigeon J. concurred in the unanimous judgement of Dickson J. in R. v. Krannenbura, (1980) 51 C.C.C. (2d) 205 (S.C.C.) in which a reference, in obiter dicta, was made to a possible application of the doctrine of abuse of process.
424. Supra, n. 423.
425. See R. v. Belton, (1983) 9 W.C.B. 37 (Man. C.A.); Bonli v. Gosselin Prov. J., (1982) 25 C.R. (3d) 303 (Sask C.A.); R. v. Maxner, (1981) 61 C.C.C. (2d) 446 (N.S.S. C.A.D.); Re Riley and the Queen, (1981) 60 C.C.C. (2d) 193 (Ont. C.A.); Re Abarca and the Queen, (1981) 57 C.C.C. (2d) 410 (Ont. C.A.); Re Asselin and the Queen, (1981) 55 C.C.C. (2d) 332 (Que. C.A.); R. v. Bell, (1981) 6 W.C.B. 263 (B.C.C.A.); Re Haugen, (1981) 5 W.C.B. 406 (B.C.C.A.); Re Schell and the Queen, (1980) 50 C.C.C. (2d) 532 (Alta. C.A.); Re Abitibi Paper Company Limited and The Queen, (1979) 47 C.C.C. (2d) 487 (Ont. C.A.); Re Medicine Hat Greenhouses Ltd. and German and the Queen

- (No. 3), (1979) 45 C.C.C. (2d) 27 (Alta. S.C.A.D.);  
leave to appeal to S.C.C. refused, Feb. 5, 1979;  
R. v. Lebrun, (1979) 45 C.C.C. (2d) 300 (B.C.C.A.);  
Re Ball and the Queen, (1979) 44 C.C.C. (2d) 532 (Ont.  
C.A.); R. v. Catagas, (1978) 38 C.C.C. (2d) 296 (Man.  
C.A.); Re Orysiuk and the Queen, (1978) 37 C.C.C. (2d)  
445 (Alta. S.C.A.D.).
426. See Amato v. The Queen, *supra*, n. 373, p. 68 per Estey J.  
dissenting. Rourke v. The Queen, *supra*, n. 363, p. 567  
(B.C.C.A.), per McIntyre J.A. as he then was. It has  
been said that abuse of process has no application to  
the investigatory stages. See Rourke, p. 567 (B.C.C.A.);  
R. v. Haukness, *supra*, n. 343, pp. 435-6; Robert K.  
PATERSON, *loc.cit.*, n. 52, p. 270. This conclusion may  
be inferred from the comments of Lord Morris in Connelly  
v. Director of Public Prosecutions, *supra*, n. 394, p.  
411. See *supra*, p. 159.
427. See R. v. Osborn, *supra*, n. 292, pp. 190-1, per Jessup  
J.A. See also R. v. R.L. (1983) 70 C.C.C. (2d) 158  
(Que. Youth Ct.).
428. Thus the application should be made before the trial judge  
and should not be the subject of a separate hearing. See  
R. v. Ormerod, *supra*, n. 53, p. 19.
429. Supra, n. 211.
430. The alleged oppressiveness in Rourke was the delay prior  
to the laying of charges and not the conduct of the  
prosecution nor the form nor nature of the indictment.  
This allegation, although dealing with police conduct in  
the investigatory stages, does not relate to, and can be  
distinguished from, active police crime "detection"  
measures such as entrapment.
431. Supra, n. 53. See *supra*, pp. 113-16.
432. R. v. Ormerod, *supra*, n. 53, pp. 10-11.
433. Supra, n. 292.
434. Supra, n. 334. See *supra*, pp. 130-32.
435. Supra, n. 394.
436. Supra, n. 334, p. 402.
437. Supra, n. 259, p. 232. See *supra*, pp. 125-7.

438. Supra, n. 363.
439. Supra, n. 340. See supra, pp. 132-4.
440. Supra, n. 279. See supra, pp. 140-2.
441. Supra, n. 279, p. 64.
442. Abuse of process was rejected on the facts in R. v. Pratt, supra, n. 245, see supra, pp. 117-18. Abuse in the use of police traps was considered in R. v. Timar, supra, n. 237; see supra, pp. 111-13, although not in the context of abuse of process. Also unrelated to abuse of process is R. v. Sampare, supra, n. 350, see supra, pp. 136-8, where the actions of an undercover officer were frowned upon and to accept his evidence, would, it was held, be an abuse and his evidence was accordingly excluded.
443. Supra, n. 343. See supra, pp. 134-6.
444. Supra, n. 343, p. 435.
445. Supra, n. 362. See supra, pp. 142-4.
446. Supra, n. 363.
447. Supra, n. 34. See supra, pp. 120-1.
448. Supra, n. 31. See supra, pp. 144-7.
449. Supra, n. 363.
450. Supra, n. 373. See supra, pp. 147-54.
451. Note that Ritchie J. held that the failure of the Crown to call the informer did not amount to an abuse of process.
452. Although in Kirzner the Chief Justice left open the question of the application of the doctrine of abuse of process, he appeared to lean in favour of section 7(3) of the Criminal Code as a basis for the defence of entrapment. However, by concurring with Estey J. in Amato, he has, instead, as in R. v. Ormerod, supra, n. 53, supported abuse of process as the proper basis.
453. Supra, n. 292.
454. Supra, n. 363.
455. Supra, n. 373, p. 68.

456. Id., p. 73.
457. Id., p. 76. Note the similarity in the language used by Estey J. in his judgements in Amato and Rothman v. The Queen, supra, n. 27, see infra, pp. 225-6.
458. See supra, Part I, Chapter I, Section A-2.
459. Supra, n. 373, p. 63.
460. See Peter K. McWILLIAMS, Canadian Criminal Evidence, Toronto, Canada Law Book Limited, 1974, pp. 391-3; PHIPSON on Evidence, op.cit., n. 242, par. 91-102, 110; pp. 36-43, 46-7. Re the burden of proof according to the American objective approach, see supra, p. 50.
461. See N.L.A. BARLOW, loc.cit., n. 225.
462. See Paul H. ROBINSON, loc.cit., n. 146, pp. 236-9.
463. Because of the uncertainty of the general availability of the doctrine of abuse of process, it is unclear whether a stay of proceedings is included as a remedy under section 24 of the Charter of Rights and Freedoms. Note that section 7 of the Charter has been raised as a basis for abuse of process. See Re Bruneau and the Queen, (1982) 69 C.C.C. (2d) 200 (B.C.S.C.); Re Girouard and the Queen, (1982) 68 C.C.C. (2d) 261 (B.C.S.C.). See infra, Chapter III, Section B-4, and abuse of process cases cited in n. 570.
464. Note that the composition of the Supreme Court of Canada has changed since Rourke v. The Queen, supra, n. 363. Pigeon and Martland JJ., who were opposed to the application of the doctrine of abuse of process, have retired. McIntyre J., now a member of the Court, delivered the judgement of the British Columbia Court of Appeal in Rourke. Although he found no oppression on the facts of that case, he did support the existence of the doctrine. Estey J., with whom Laskin C.J.C., McIntyre and Lamer JJ. concurred, applied the doctrine in a dissenting judgement in Amato v. The Queen, supra, n. 373. Laskin C.J.C. also adopted the doctrine in Rourke. Dickson J. concurred with the Chief Justice in Rourke although he neither applied nor mentioned abuse of process in Amato. In R. v. Krannenburg, supra, n. 423, however, he referred, in obiter dicta, to its possible application. It is clear, though, that five members of the present Court have expressed themselves in favour of a court's inherent power to stay proceedings founded on an abuse of process. Nevertheless, such expressions have yet to find consensus

in the same decision. See R. v. Vermette, (1983) 30 C.R. (3d) 129 (Que. S.C.), p. 162.

465. R. v. City of Sault Ste. Marie, (1978) 40 C.C.C. (2d) 353 (S.C.C.).
466. R. v. Paquette, (1977) 30 C.C.C. (2d) 417 (S.C.C.). It was held in Paquette that the common law defence of duress was preserved by section 7(3) and applied to an accused charged as a party to an offence, since section 17 of the Code was by its terms limited to cases where the accused has himself committed the offence.
467. Moraentaler v. The Queen, (1975) 20 C.C.C. (2d) 449 (S.C.C.); aff. (1974) 17 C.C.C. (2d) 289 (Que. C.A.).
468. Kienapple v. The Queen, (1974) 15 C.C.C. (2d) 524 (S.C.C.).
469. R. v. Riddle, (1980) 48 C.C.C. (2d) 365 (S.C.C.).
470. Kowbel v. The Queen, (1954) 18 C.R. 380 (S.C.C.).
471. For a discussion of the distinction between justification and excuse, see Don STUART, op.cit., n. 281, pp. 378-80; George P. FLETCHER, Rethinking Criminal Law, Boston, Little, Brown, 1978, pp. 759-75; George P. FLETCHER, The Individualization of Excusing Conditions, (1973-74) 47 Southern California L.R. 1269; Law Reform Commission of Canada, Criminal Law, The General Part: Liability and Defences, Working Paper 29, Ottawa, Minister of Supply and Services Canada, 1982, Chapter II, pp. 35-119. With respect to entrapment as an excuse, see Paul H. ROBINSON, loc.cit., n. 146, pp. 236-9.
472. R. v. Curry, (1913) 21 C.C.C. 273 (N.S.S.C.A.D.) p. 301; aff'd. by (1913) 22 C.C.C. 191 (S.C.C.).
473. See Bruce A. MacFARLANE, op.cit., n. 390, p. 486; Robert K. PATERSON, loc.cit., n. 52, pp. 273-4; Law Reform Commission of Canada: Towards a Codification of Canadian Criminal Law, Study Paper, Ottawa, Information Canada, 1976, par. 2.16 - 2.33, pp. 28-33.
474. Section 19 is the forerunner of our present section 7(3).
475. Report of the Royal Commission Appointed to Consider the Law Relating to Indictable Offences (Draft Code of 1879), London, England, printed by George Edward Eyre and William Spottiswoode, 1879, p. 10.
476. Supra, n. 31.
477. Id., pp. 137-8.

478. Supra, n. 373.
479. Id., p. 75.
480. Id., pp. 58-60.
481. See supra, Part I, Chapter I, Section A-1.
482. See Peter K. McWILLIAMS, op.cit., n. 460, pp. 391-3; PHIPSON on Evidence, op.cit., n. 242, par. 91-102, 110, pp. 36-43, 46-7. Re the burden of proof according to the American subjective approach, see supra, p. 40.
483. This onus was applied in R. v. Sabloff, supra, n. 362. See also the remarks of Laskin C.J.C. in R. v. Kirzner, supra, n. 31, p. 141.
484. See Don STUART, op.cit., n. 281, p. 382.
485. Supra, n. 31.
486. Id., p. 139.
487. Supra, n. 362. See supra, pp. 142-4.
488. Supra, n. 362, p. 829.
489. Supra, n. 340. See supra, pp. 132-4.
490. Supra, n. 343. See supra, pp. 134-6.
491. Supra, n. 354. See supra, pp. 138-9.
492. In R. v. Kirzner, supra, n. 31, Dickson and Estey JJ. concurred in the judgement of the Chief Justice in which he left open the question of the defence of entrapment and its recognition under section 7(3) of the Criminal Code. Spence J., who also concurred, has since retired from the Court. In Amato v. The Queen, supra, n. 373, Chief Justice Laskin, McIntyre and Lamer JJ. concurred in the dissenting judgement of Estey J. in which he held that the roots of the doctrine of entrapment were to be found in the common law and that section 7(3) was the authority for courts to adopt the defence of entrapment. Dickson J. did not find entrapment on the facts in Amato. Thus Laskin C.J.C., Dickson, Estey, McIntyre and Lamer JJ. are amenable to encompassing entrapment under common law principles.
493. (1982) U.K. c. 11.

494. Human rights statutes will continue to regulate conduct between individuals. For example, see The Individual's Rights Protection Act, (1980) R.S.A. c. I-2; Canadian Human Rights Act, (1976-77) S.C. c.33. See however, Dale GIBSON, The Charter of Rights and the Private Sector, (1982) 12 Manitoba L.J. 213, where Professor Gibson states his view that the Charter operates in the private sector.
495. See E.G. EWASCHUK, The Charter: An Overview and Remedies, (1982) 26 C.R. (3d) 54, p. 56. See R. v. Reale, (1975) 22 C.C.C. (2d) 571 (S.C.C.), where the Supreme Court of Canada upheld a decision of the Ontario Court of Appeal allowing the accused's appeal from his conviction for non-capital murder and directing a new trial because the trial judge failed to permit an interpreter to interpret his charge to the jury on the ground that the jury would be distracted thereby violating section 2(g) of the Canadian Bill of Rights. See also Re Southam Inc. and The Queen (No. 2), (1983) 70 C.C.C. (2d) 264 (Ont. H.C.).
496. The word "everyone" in the Charter appears to include corporate entities. See E.G. EWASCHUK, loc.cit., n. 495. pp. 66-7; Southam Inc. v. Hunter, (1982) 68 C.C.C. (2d) 356 (Alta. Q.B.); R. v. Balderstone, (1983) 9 W.C.B. 11 (Man. Q.B.).
497. Pursuant to section 32(2), this section will not have effect until three years after the proclamation. Presumably, this will allow Parliament and the legislatures sufficient time to amend existing legislation so that it can conform to the Charter.
498. The Canadian Bill of Rights remains in force.
499. But see The Queen in Right of New Brunswick v. Fisherman's Wharf Ltd., N.B.Q.B., April 28, 1982, where Dickson J., in obiter dicta, referred to section 26 of the Charter and construed section 7 as comprising the right to enjoyment of property which extends to security of the person. See also Griswold v. State of Connecticut, (1965) 381 U.S. 479 (U.S.S.C.), where Goldberg J. treated unenumerated rights retained in the Ninth Amendment to the United States Constitution as having the same constitutional guarantees as enumerated Amendment rights.
500. (1970) R.S.C. c. C-34.
501. (1970) R.S.C. Appendix III. For an analogy between the Canadian Bill of Rights and the Charter see Peter W. HOGG, A Comparison of the Canadian Charter of Rights and Freedoms with the Canadian Bill of Rights in Walter S.

TARNOPOLSKY, Gérald A. BEAUDOIN, (ed), The Canadian Charter of Rights and Freedoms: Commentary, Toronto, The Carswell Company Limited, 1982, pp. 1-23.

502. Supra, n. 493.
503. A. V. DICEY, Introduction to the Study of the Law of the Constitution, 8th ed., London, Macmillan and Co., Limited, 1915, pp. 198-9.
504. (1974) 15 C.C.C. (2d) 505 (S.C.C.). See also the judgements of Ritchie J. in R. v. Miller and Cockriell, (1977) 31 C.C.C. (2d) 177 (S.C.C.), pp. 195-6; Attorney General of Canada v. Lavell, (1973) 23 C.R.N.S. 197 (S.C.C.), p. 210; Robertson and Rosetanni v. The Queen, (1964) 1 C.C.C. 1 (S.C.C.), pp. 8-9..
505. Supra, n. 504, p. 511.
506. Id., p. 513.
507. Ibid.
508. See William E. CONKLIN, Interpreting and Applying the Limitations Clause: An Analysis of Section 1, (1982) 4 Supreme Court L.R. 75, pp. 85-6; Irwin COTLER, Freedom of Assembly, Association, Conscience and Religion (s. 2(a), (c) and (d)) in Walter S. TARNOPOLSKY, Gérald A. BEAUDOIN, (ed), op.cit. n. 501, pp. 135; Kenneth M. LYSYK, The Rights and Freedoms of the Aboriginal Peoples of Canada, Ss. 25, 35 and 37 in Walter S. TARNOPOLSKY, Gérald A. BEAUDOIN, (ed), op.cit. n. 501, p. 479; Walter S. TARNOPOLSKY, Just Deserts or Cruel and Unusual Treatment or Punishment? Where Do We Look for Guidance? (1978) 10 Ottawa L.R. 1, pp. 13-28. See also Re Southam Inc. and The Queen (No.1), (1983) 70 C.C.C. (2d) 257 (Ont. H.C.), p. 263 per Smith J.
509. R. v. Drybones, (1970) 3 C.C.C. 355 (S.C.C.). See Peter W. HOGG, loc.cit., n. 501, p. 10.
510. See R. v. Simon, (1982) 68 C.C.C. (2d) 86 (N.W.T.S.C.) where the words "arbitrarily detained or imprisoned" in section 9 of the Charter were given the same meaning as "arbitrary detention, imprisonment" in section 2(a) of the Canadian Bill of Rights. See also R. v. Holman, (1982) 28 C.R. (3d) 378 (B.C. Prov. Ct.). In R. v. Gallant, (1983) 70 C.C.C. (2d) 213 (Ont. Prov. Ct.), guarantees of fundamental justice and the presumption of innocence in sections 7 and 11(d) of the Charter were held not to be novel principles of law, although the Charter entrenched them as constitutional rights. See

Neil FINKELSTEIN, The Relevance of Pre-Charter Case Law for Post-Charter Adjudication, (1982) 4 Supreme Court L.R. 267.

511. For example, sections 8, 10(b) and 11(b) do not appear to have equivalents in the law prior to the enactment of the Charter. See R. v. Silber, (1983) 69 C.C.C. (2d) 147 (B.C. Prov. Ct.) where sections 8 and 10(b) were considered to be new rights. See also R. v. Tontarelli, (1982) 8 W.C.B. 259 (Ont. Co. Ct.). Section 10(b) affirms a positive right and involves a compulsory corresponding duty on the state through the police to comply. This is unlike section 2(c)(ii) of the Canadian Bill of Rights, which phrased the right to counsel in terms of a right one is not to be deprived of by law. Of course, a breach of section 10(b) provides an aggrieved person with a variety of remedies not contemplated by section 2, particularly recourse to section 24(2) to exclude evidence obtained subsequent to the breach. In R. v. Beason, (1982) 68 C.C.C. (2d) 540 (Ont. Co. Ct.) it was held that although the Charter entrenches certain pre-existing rights, the rights in sections 11(b) and (i) are rights which have never been clearly defined before the Charter. See also Re Panarctic Oils Limited and The Queen, (1983) 69 C.C.C. (2d) 393 (N.W.T.S.C.) where de Weerd J. regarded section 11(b) as a new right.
512. (1982) 67 C.C.C. (2d) 19 (Ont. H.C.).
513. Id., pp. 27-8. See also the remarks of Zuber J.A. in R. v. Altseimer, (1983) 1 C.C.C. (3d) 7 (Ont. C.A.), p. 13 and O'Driscoll J. in Re R. and Siegel, (1982) 29 C.R. (3d) 81 (Ont. H.C.), p. 95.
514. Supra, n. 504.
515. Id., p. 9.
516. Note the French version of section 1 and the term "règle de droit". See Re Federal Republic of Germany and Rauca, (1983) 70 C.C.C. (2d) 416 (Ont. H.C.); appeal dismissed April 12, 1983 (Ont. C.A.), p. 428 (Ont. H.C.) per Evans C.J.
517. See Québec Association of Protestant School Boards v. Attorney General of Quebec (No. 2), (1983) 140 D.L.R. (3d) 33 (Que. S.C.); Re Federal Republic of Germany and Rauca, supra, n. 516; Re Jamieson and the Queen, (1983) 70 C.C.C. (2d) 430 (Que. S.C.); R. v. Demelo, (1983) 9 W.C.B. 43 (B.C. Prov. Ct.); R. v. Maltby, (1983) 9 W.C.B. 9 (Sask. Q.B.); R. v. W., (1983) 1 C.C.C. (3d)

- 268 (Ont. Prov. Ct.); R. v. S.B., (1983) 1 C.C.C. (3d) 73 (B.C.S.C.); Re Southam Inc. and the Queen (No. 1), supra, n. 508; R. v. Campagna, (1983) 70 C.C.C. (2d) 236 (B.C. Prov. Ct.); R. v. Newall (No. 4), (1983) 70 C.C.C. (2d) 10 (B.C.S.C.); R. v. Banville, (1983) 30 C.R. (3d) 59 (N.B. Prov. Ct.); Re Gittens and the Queen, (1982) 68 C.C.C. (2d) 438 (Fed. Ct. Tr. Div.); Re Skapinker and Law Society of Upper Canada, (1982) 68 C.C.C. (2d) 300 (Ont. H.C.); R. v. Allan, (1982) 8 W.C.B. 58 (Alta. Q.B.); R. v. Lundrigan, (1982) 67 C.C.C. (2d) 37 (Ont. Prov. Ct.); R. v. Ibrahim, (1982) 8 W.C.B. 78 (Que. C.S.P.); R. v. Rolbin, (1982) 8 W.C.B. 78 (Que. C.S.P.); aff'd by (Que. S.C.), p. 507; R. v. Holman, supra, n. 510; Herbert MARX, Entrenchment, Limitations and Non-Obstante (Ss. 1, 33 and 52) in Walter S. TARNOPOLSKY, Gérald A. BEAUDOIN, op.cit., n. 501, p. 61; William E. CONKLIN, loc.cit., n. 508.
518. The French version stipulates "dont la justification puisse se démontrer". See Re Federal Republic of Germany and Rauca, supra, n. 516, pp. 427-8; R. v. S.B., supra, n. 517.
519. With regard to the evidentiary burden see infra, n. 604.
520. See Re Federal Republic of Germany and Rauca, supra, n. 516, pp. 427-8; E.G. EWASCHUK, loc.cit., n. 495, p. 61.
521. See R. v. Piraino, (1982) 67 C.C.C. (2d) 28 (Ont. H.C.), p. 31, where O'Leary J., in ruling that the method of jury selection provided by the Criminal Code, does not contravene the Charter, stated:
- Were my ruling otherwise, it would constitute a declaration that all criminal trials have heretofore been unfair. That is manifestly not true.
522. The ruling in Moraentaler v. The Queen, supra, n. 467, that a Provincial Court of Appeal has the power to set aside a jury acquittal, enter a verdict of guilty and convict the accused was modified by Parliamentary amendment to section 613(4)(b) of the Criminal Code. See Criminal Law Amendment Act, 1975, (1974-75-76) S.C. c. 93, s. 75. In R. v. Wray, supra, n. 353, a decision sparking much controversy, Parliament did not see fit to intervene although amendments were enacted in limited areas, e.g. section 178.16 C.C., see infra, p. 223.

523. See Re Federal Republic of Germany and Rauca, *supra*, n. 516, p. 22. E. G. EWASCHUK, *loc.cit.*, n. 495, p. 428. See also Curr v. The Queen, (1972) 7 C.C.C. (2d) 181 (S.C.C.); *aff.* (1971) 4 C.C.C. (2d) 24 (Ont. C.A.); pp. 191-2, 194 (S.C.C.) per Laskin J., as he then was.
524. Over the years there have been modifications to the supremacy of the legislative arm of government as a result of determinations by the courts of legislative vices between Parliament and provincial legislatures in addition to the applications of the Canadian Bill of Rights to federal statutes; see E.G. EWASCHUK, *loc.cit.* n. 495, p. 55.
525. See R. Roy McMURTRY, The New Charter and the Role for Lawyers, Notes for remarks made to a Conference on the Impact of the New Charter of Rights and Freedoms on Canadian Business, Toronto, February 5, 1982, pp. 8-10.
526. *Id.*, pp. 13-16, where Mr. McMurtry, the Attorney General of Ontario, indicated that section 33 is a "safety valve provision to be resorted to only in the most exceptional circumstances, such as where the courts may feel compelled to interpret the provisions of the Charter in a manner offensive to the overwhelming sense of right and justice in the community on a particular policy issue", p.13. As an example, he referred to Criminal Code sections 281.1(1) and 281.2(1) relating to hate propaganda. These sections, he explained, limit freedom of expression and if the courts did not view these sections as reasonable limits on section 2(b) of the Charter, then section 33 may be properly invoked. The "notwithstanding clause" in the Canadian Bill of Rights has only been resorted to on one occasion, i.e. during the 1970 "October crisis" in Quebec. See Public Order (Temporary Measures) Act 1970, *supra*, n. 16, section 12. Political reality will ensure that section 33 will only be invoked in exceptional circumstances not violating the spirit of the Charter.
527. (1970) R.S.C. App. II. In Attorney General for Canada and Dupond v. City of Montreal and the Attorney General for Quebec, (1978) 2 S.C.R. 770, Beetz J., who delivered the judgement of the Court, rejected the implied bill of rights doctrine, pp. 796-8.
528. See Daniel L. ROTENBERG, *loc.cit.*, n. 53, pp. 883-4, although the author refers to the United States Constitution.
529. Ibid.

530. See Earl JOWITT, (Gen. ed), The Dictionary of English Law, Clifford Walsh, (ed), London, Sweet & Maxwell Limited, 1959, pp. 1560-1; Walter S. TARNOPOLSKY, The Canadian Bill of Rights, 2nd ed., Toronto, The Macmillan Company of Canada, Limited, 1978, pp. 1-2.
531. See Henry Campbell BLACK, Black's Law Dictionary, 5th ed., contributing authors, Joseph R. NOLAN, M.J. CONNOLY, St. Paul, Minn., West Publishing Co., 1979, p. 833; Walter S. TARNOPOLSKY, op.cit., n. 530, pp. 2-3; Patrice GARANT, Fundamental Freedoms and Natural Justice (Section 7) in Walter S. TARNOPOLSKY, Gérald A. BEAUDOIN, (ed), op.cit. n. 501, pp. 258-63.
532. See Henry Campbell BLACK, op.cit., n. 531, p. 827; Patrice GARANT, loc.cit., n. 531, pp. 263-4.
533. See Henry Campbell BLACK, op.cit. n. 531, p. 1217; Patrice GARANT, loc.cit., n. 531, pp. 264-5.
534. See Patrice GARANT, loc.cit., n. 531, pp. 265-75.
535. (1972) 7 C.C.C. (2d) 474 (S.C.C.; aff. (1971) 4 C.C.C. (2d) 504 (Ont. C.A.); rev. (1971) 4 C.C.C. (2d) 506 (Ont. H.C.)).
536. Id., p. 479. See also Lowry and Lepper v. The Queen, (1972) 6 C.C.C. (2d) 531 (S.C.C.); Mitchell v. The Queen, (1976) 24 C.C.C. (2d) 241 (S.C.C.); Kosobok v. Solicitor General of Canada, (1977) 30 C.C.C. (2d) 49 (Fed. Ct. Tr. Div.); McCann v. The Queen, (1976) 29 C.C.C. (2d) 337 (Fed. Ct. Tr. Div.); R. v. Institutional Head of Beaver Creek Correctional Camp, Ex Parte MacCaud, (1969) 1 C.C.C. 371 (Ont. C.A.); Ex Parte McCaud, (1965) 1 C.C.C. 168 (Ont. C.A.); aff. by (S.C.C.) p. 170n; Re State of Wisconsin and Armstrong, (1973) 10 C.C.C. (2d) 271 (Fed. C.A.); leave to appeal to S.C.C. dismissed, March 5, 1973.
537. See Peter W. HOGG, Canada Act 1982: Annotated, Toronto, The Carswell Company Limited, 1982, p. 27; Patrice GARANT, loc.cit., n. 531, p. 278; Walter S. TARNOPOLSKY, op.cit., n. 530, pp. 264-74. Professor Tarnopolsky is of the view that the terms fundamental justice, natural justice, substantial justice and universal justice are synonymous. See also S.A. DE SMITH, de Smith's Judicial Review of Administrative Action, 4th ed., J.M. Evans, (ed), London, Stevens & Sons Limited, 1980, pp. 156-277; Re Jamieson and the Queen, supra, n. 517, p. 438, per Durand J., R. v. Holman, supra, n. 510, pp. 388-9, per McCarthy Prov. J. See also generally; Paul JACKSON, Natural Justice, London, Sweet & Maxwell, 1973. For a comparative view of "natural justice", see D.J. HEWITT, Natural Justice, Butterworths, Sydney, 1972.

538. Supra, n. 536. See also Lowry and Lepper v. The Queen, supra, n. 536, where a fair hearing of a criminal trial was held to include the matter of sentence. See also Tameshwar v. The Queen, (1957) A.C. 476 (P.C.), where it was held that the absence of the trial judge at a view by the jury, where witnesses gave evidence, departed from the essential principles of justice.
539. Supra, n. 536, p. 380.
540. See supra, pp. 55-63.
541. See James A. BALLENTINE, Ballentine's Law Dictionary, 3rd ed., William S. ANDERSON, (ed), Rochester, N.Y., The Lawyers Cooperative Publishing Company, 1969, p. 380; Henry Campbell BLACK, op.cit., n. 531, pp. 449, 1083, 1281.
542. See Max RADIN, Radin Law Dictionary, 2nd ed., Lawrence G. GREENE, (ed), Dobbs Terry, N.Y., Oceana Publications, Inc., 1970, pp. 103-4.
543. For an analysis of the American position, see Albert S. ABÉL, The Bill of Rights in the United States: What Has it Accomplished? (1959) 37 Can. Bar Rev. 147; W.J. BROCKELBANK, The Role of Due Process in American Constitutional Law, (1953-54) 39 Cornell L.Q. 561; Monrad G. PAULSEN, The Persistence of Substantive Due Process in the States, (1949-50) 34 Minnesota L.R. 91; J. Roland PENNOCK, John W. CHAPMAN, (ed), Due Process, New York, New York University Press, 1977; Rodney L. MOTT, Due Process of Law, New York, Da Capo Press, 1973; Walter S. TARNOPOLSKY, op.cit., n. 530, pp. 224-7; Patrice GARANT, loc.cit., n. 531, p. 275. See also 16A Corp. Jur. Sec., par. 567-707, pp. 536-1205.
544. Sutt v. Sutt, (1969) 1 O.R. 169 (C.A.) per Schroeder J.A. Procedural and substantive matters do overlap on occasion. As Laskin C.J.C. stated in Morgentaler v. The Queen, supra, n. 467, p. 462, "there is often an interaction of means and ends". See also Peter W. HOGG, op.cit., n. 537, p. 27, where Professor Hogg stated that "matters of procedure shade into matters of substance".
545. See William Sharp McKECHNIE, Magna Carta: A Commentary on the Great Charter of King John, 2nd ed., N.Y., Burt Franklin, 1914; Rodney L. MOTT, op.cit., n. 543, pp. 1-8, 30-45; J.C. HOLT, Magna Carta, Cambridge, G.B.; Cambridge University Press, 1965; Charles A. MILLER, The Forest of Due Process of Law: The American

Constitutional Tradition in J. Roland PENNOCK, John W. CHAPMAN, (ed), op.cit., n. 543, pp. 3-6; C.H. McILWAIN, Due Process of Law in Magna Carta, (1914) 14 Columbia L.R. 27.

546. See Edward COKE, The Second Part of the Institutes of the Laws of England, 3rd ed., London, Printed for A. Crooke and others, 1669, pp. 50-55; William Sharp McKECHNIE, op.cit., n. 545, pp. 375-81; J.C. HOLT, op.cit., n. 545, p. 9, but see C.H. McILWAIN, loc.cit., n. 545, pp. 32-3; Rodney L. MOTT, op.cit., n. 543, pp. 4-5, 76-9.
547. W.J. BROCKELBANK, loc.cit., n. 543, p. 565:
548. See Geoffrey MARSHALL, Due Process in England in J. Roland PENNOCK, John W. CHAPMAN, (ed), op.cit., n. 543, pp. 69-89; J.C. HOLT, op.cit., n. 545, p. 9; Walter S. TARNOPOLSKY, op.cit., n. 530, pp. 222-3; C.H. McILWAIN, loc.cit., n. 545, pp. 44-51; Rodney L. MOTT, op.cit., n. 543, pp. 30-85. For a comparative view of due process of law, see Wallace MENDELSON, Foreign Reactions to American Experience with "Due Process of Law", (1955) 41 Virginia L.R. 493.
549. See Curr v. The Queen, supra, n. 523. See the comments of Walter S. TARNOPOLSKY, op.cit., n. 530, pp. 122-3, 224-35; Stanley A. COHEN, op.cit., n. 5, pp. 4-17; Patrice GARANT, loc.cit., n. 531, pp. 275-8. See also Ivan C. RAND, Except by Due Process of Law, (1961) 2 Osgoode Hall L.J. 171.
550. Peter W. HOGG, op.cit., n. 537, pp. 28-9. See also M.L. FRIEDLAND, Legal Rights Under The Charter, (1982) 24 Cr. L.Q. 430, pp. 432-3; Patrice GARANT, loc.cit., n. 531, pp. 278-90. See the following cases where section 7 was held to have been violated. R. v. Vermette, supra, n. 464; R. v. M., (1983) 70 C.C.C. (2d) 123 (Ont. Prov. Ct.); R. v. V.T.W., (1983) 30 C.R. (3d) 193 (N.S. Fam. Ct.); R. v. Demelo, supra, n. 517; Re Cadeddu, (1983) 9 W.C.B. 13 (Ont. H.C.); R. v. Campagna, supra, n. 517. See the following cases where it was held that section 7 was not violated. R. v. Carter, (1983) 31 C.R. (3d) 76 (Ont. C.A.); Re Jamieson and the Queen, supra, n. 517; R. v. Clarke, (1983) 9 W.C.B. 45 (B.C.S.C.); R. v. Frankforth, (1983) 70 C.C.C. (2d) 448 (B.C. Co. Ct.); R. v. Newall (No. 4), supra, n. 517; R. v. Holman, supra, n. 510; Re Gittens and the Queen, supra, n. 517; R. v. Piraino, supra, n. 521; R. v. Gallant, supra, n. 510; R. v. Rolbin, supra, n. 517; R. v. Duff, (1982) 8 W.C.B. 504 (B.C. Prov. Ct.). See also Re Bruneau and the Queen, supra, n. 463; Re Girouard and the Queen, supra, n. 463; R. v. D.M., (1983) 30 C.R. (3d) 210 (Ont. Prov. Ct.); R. v. W., supra, n. 517; R. v. Grant,

Alta Q.B., Edmonton, 8203-0781, April 20, 1982.

551. See the judgements of Lamer and Estey JJ. in Rothman v. The Queen, supra, n. 27. See also M.L. FRIEDLAND, loc.cit., n. 550, pp. 433-5.
552. Supra, n. 1.
553. Supra, n. 36.
554. Supra, n. 39.
555. Reasonable suspicion is not a constitutionally imposed requirement in the United States. See supra, n. 152.
556. Supra, n. 373.
557. Id., p. 76.
558. Ibid.
559. Supra, n. 279.
560. Id., p. 64.
561. Supra, n. 343.
562. Id., p. 442.
563. In the United States, courts have expressed entrapment to be repugnant, shocking and unfair. It has been suggested that the courts have been thinking in a "due process" constitutional framework. See Richard A. COWEN, loc.cit., n. 145, p. 449.

Despite the fact that the defence of entrapment in the United States is not of a constitutional dimension, the United States Supreme Court, in United States v. Russell, supra, n. 104, pp. 431-2, supra, pp. 55-8, alluded to the possibility of monitoring police conduct on due process principles in "a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction". In the more recent decision of Hampton v. United States, supra, n. 105, supra, pp. 58-63, a plurality opinion of the Supreme Court restricted this due process approach to situations where the government activity in question violates some protected right of the accused. A constitutional basis for entrapment or quasi-entrapment defences should not be ruled out, however. In Hampton,

five Justices, although not all arriving at the same conclusion, would apply due process principles and the Court's supervisory powers in the face of outrageous police conduct notwithstanding the predisposition of the accused. Subsequent to Hampton, the concept of fundamental fairness inherent in the guarantee of due process has been reflected in lower court decisions. See supra, n. 172.

564. See supra, Part 1, Chapter III.
565. Sorrells v. United States, supra, n. 1, p. 454, per Roberts J.
566. See R. v. Drybones, supra, n. 509.
567. For a review of proposals based on intergovernmental negotiations leading up to section 24 in its present form see Dale GIBSON, Enforcement of the Canadian Charter of Rights and Freedoms (Section 24) in Walter S. TARNOPOLSKY, Gérald A. BEAUDOIN, (ed), op.cit., n. 501, pp. 492-3; E.G. EWASCHUK, loc.cit., n. 495, pp. 64-66; H. Scott FAIRLEY, Enforcing the Charter: Some Thoughts on an Appropriate and Just Standard for Judicial Review, (1982) 4 Supreme Court L.R. 217 pp. 219-24.
568. With respect to standing, see Peter W. HOGG, op.cit., n. 537, pp. 64-6; E.G. EWASCHUK, loc.cit., n. 495, pp. 68-9; Dale GIBSON, loc.cit., n. 567, pp. 493-500; H. Scott FAIRLEY, loc.cit., n. 567, pp. 224-7; Re Southam Inc. and the Queen, (No. 1), supra, n. 508, p. 264, per Smith J.; Re Jamieson and the Queen, supra, n. 517, p. 436, per Durand J. See also the following pre-Charter standing cases decided by the Supreme Court of Canada: Minister of Justice of Canada v. Borowski, (1982) 64 C.C.C. (2d) 97 (S.C.C.); Re Nova Scotia Board of Censors and McNeil, (1976) 32 C.R.N.S. 376 (S.C.C.); Thorson v. Attorney General of Canada, (1975) 1 S.C.R. 138.
569. See R. v. Garrett, (1907) 1 K.B. 881 (Eng. C.A.), pp. 885-6; Re Potma and the Queen, supra, n. 512, pp. 23-4; Re R. and Siegel, supra, n. 513, pp. 87-8, 95; R. v. Vermette, supra, n. 464, pp. 140-1; Re Burns, (1982) 8 W.C.B. 450 (Ont. H.C.). See also E.G. EWASCHUK, loc.cit., n. 495, pp. 69-71; Dale GIBSON, loc.cit., n. 567, pp. 500-2; H. Scott FAIRLEY, loc.cit., n. 567, pp. 227-8.
570. A declaratory judgement may be an available remedy as well. See Re Southam Inc. and the Queen (No. 1), supra, n. 508; R. v. S.B., supra, n. 517; Re Jamieson and the Queen, supra, n. 517; Quebec Association of Protestant School Boards v. Attorney General of Québec (No. 2), supra, n. 517.

Whether or not a stay of proceedings is an available remedy is subject to controversy. See supra, Part II, Chapter I. In Re Girouard and the Queen, supra, n. 463, it was held that since an evidentiary error by a judge is not an abuse of process, it was not necessary to decide whether the language of section 7 of the Charter is a statutory basis for the abuse of process doctrine. In Re Bruneau and the Queen, supra, n. 463, it was noted, in obiter dicta regarding abuse of process, that the principles of fundamental justice under the Charter may be called in aid to deal with a case where those principles have been overridden. In R. v. Vermette, supra n. 464, Greenberg J. held that the accused's rights under sections 7 and 11(d) of the Charter were violated as a result of public comments made by the Premier of Quebec respecting those involved in the trial and accordingly, proceedings were stayed pursuant to section 24(1). See also the following cases in which a stay of proceedings was considered as a Charter remedy: R. v. Cameron, (1983) 70 C.C.C. (2d) 532 (Alta. Q.B.); Re Burrows and the Queen, (1983) 70 C.C.C. (2d) 527 (Man. Q.B.); R. v. Baldinelli, (1983) 70 C.C.C. (2d) 474 (Ont. Prov. Ct.); R. v. Daiale, (1983) 9 W.C.B. 47 (Que. S.C.); R. v. Balderstone, supra, n. 496; Re Burns, supra, n. 569; R. v. Blackstock, (1982) 8 W.C.B. 363 (Sask. Prov. Ct.); R. v. Petahtegoose, (1982) 8 W.C.B. 362 (Ont. Prov. Ct.); R. v. Marquez, (1982) 8 W.C.B. 334 (Man. Co. Ct.); R. v. Wilson, (1982) 8 W.C.B. 105 (Alta. Prov. Ct.).

571. See Re R. and Siegel, supra, n. 513, p. 87.

572. The French version of section 24(2) may give rise to a different interpretation.

573. See the remarks of Eberle J. in Re Potma and the Queen, supra, n. 512, pp. 23-4 and O'Driscoll J. in Re R. and Siegel, supra, n. 513, pp. 87-8, 95. See also R. v. Gallant, supra, n. 510; Peter W. HOGG, op.cit., n. 537, p. 68; E.G. EWASCHUK, loc.cit., n. 495, p. 74; Dale GIBSON, loc.cit., n. 567, pp. 512-13.

574. Prerogative writs would be unavailable to challenge the grant or refusal of a remedy under section 24, there being no jurisdictional issue. See Government of the Republic of Italy v. Piperno, (1982) 66 C.C.C. (2d) 1 (S.C.C.); Attorney General for Quebec v. Cohen, (1979) 46 C.C.C. (2d) 473 (S.C.C.); Patterson v. The Queen, (1970) 2 C.C.C. (2d) 227 (S.C.C.); Re Potma and the Queen, supra, n. 512; Re Anson and the Queen, (1983) 1 C.C.C. (3d) 279 (B.C.S.C.); E.G. EWASCHUK, loc.cit., n. 495, p. 70. Furthermore, powers of courts of appeal are not expanded, therefore any appeal from interlocutory rulings under sections

24(1) or (2) would have to wait until a final judgement of conviction or acquittal.

575. See Peter W. HOGG, op.cit., n. 537, p. 67.

576. See Rothman v. The Queen, supra, n. 27, p. 74, where Lamer J. stated, with respect to the effect of police conduct upon the admissibility of a confession: "There first must be a clear connection between the obtaining of the statement and the conduct". See Dale GIBSON, loc.cit., n. 567, pp. 524-6.

577. This reasoning may determine the admissibility of derivative evidence. This is assuming section 24(2) applies to derivative evidence although it does not distinguish it from primary evidence as in section 178.16(2) of the Criminal Code. If section 24(2) is extended to apply to derivative evidence, the remoteness of such evidence from the constitutional violation will likely affect a court's determination of whether or not the administration of justice would be brought into disrepute. See Peter W. HOGG, op.cit., n. 537, pp. 67-8; See also E.G. EWASCHUK, loc.cit., n. 495, p. 85. See American cases cited infra, n. 617.

578. Note that it is the admission of the evidence, not the obtaining of it, that must be such that it would bring the administration of justice into disrepute, although the manner of obtaining evidence may certainly affect its admission under section 24(2).

579. Supra, n. 353.

580. Supra, n. 353 (Ont. C.A.), p. 123.

581. Supra, n. 353, p. 17.

582. Id., p. 22.

583. Id., p. 12 per Cartwright C.J.C. See also R. v. James, (1979) 7 C.R. (3d) 17 (Ont. Co. Ct.) p. 27, where, in ruling statements inadmissible, Borins, Co. Ct. J. stated:

It is my opinion that the statement was obtained as a result of conduct of which the Crown ought not to seek to take advantage. Notwithstanding what was said in R. v. Wray ..., it is my view that there exists a discretion to exclude evidence otherwise admissible which is to

be exercised not only in exceptional circumstances such as when the police have acted without authority, but also in cases where they have been guilty of trickery or have misled someone or in other respects have acted in a reprehensible manner.

But see His Honour's subsequent decision in R. v. Dinardo, (1981) 61 C.C.C. (2d) 52 (Ont. Co. Ct.) in which James was distinguished.

584. Supra, n. 509

585. (1972) 7 C.C.C. (2d) 417 (S.C.C.); rev. (1971) 4 C.C.C. (2d) 462 (Ont. C.A.).

586. (1975) 18 C.C.C. (2d) 65 (S.C.C.); aff. (1973) 5 N.S.R. (2d) 73 (S.C.A.D.). Future situations which approximate those in Hogan and Brownridge must be considered in light of the interpretation of "arrested" or "detained" in Chromiak v. The Queen, (1980) 49 C.C.C. (2d) 257 (S.C.C.). See R. v. Altseimer, supra, n. 513. But see R. v. Therens, (1983) 70 C.C.C. (2d) 468 (Sask. Prov. Ct.).

587. Supra, n. 586, p. 80.

588. Id., p. 81.

589. Id., p. 72.

590. Id., p. 73.

591. See André JODOUIN, Commentaire sur Regina v. Wray, (1970) 1 R.G.D. 390; A.F. SHEPPARD, Restricting the Discretion to Exclude Admissible Evidence, (1971-72) 14 Cr.L.Q. 334; D.W. ROBERTS, The Legacy of Regina v. Wray, (1972) 50 Can. Bar Rev. 19; Stanley A. COHEN, op.cit., n. 5, pp. 57-61. See also M.S. WEINBERG, The Judicial Discretion to Exclude Relevant Evidence, (1975) 21 McGill L.J. 1; J.D. HEYDON, Illegally Obtained Evidence (1) and (2), (1973) Crim. L.R., 603, 690; Glanville WILLIAMS, loc.cit., n. 44.

592. See Quimet Committee, op.cit., n. 5, pp. 72-5, although this report was released 15 months prior to the Supreme Court of Canada decision in Wray; Law Reform Commission of Canada, The Exclusion of Illegally Obtained Evidence, Study Paper, 1974, Ottawa, Information Canada, 1974, p. 29; Law Reform Commission of Canada, Report on Evidence, Ottawa, Information Canada, 1975, pp. 61-2 and section 15 of the proposed Evidence Code, p. 22; McDonald Commission

Second Report, *op.cit.* n. 29, Vol. 2, pp. 1036-1047, 1115-6 (Recommendation 283); Uniform Law Conference of Canada, The Uniform Evidence Act 1981: A Basis for Uniform Evidence Legislation, Report No. 37A, Edmonton, Institute of Law Research and Reform, 1982, p. 28 and section 22 of the Act, p. 55. D.C. McDONALD, Some Observations on the Proposed Uniform Evidence Act, (1982) 24 Cr. L.Q. 298 pp. 319-24.

593. Criminal Law Amendment Act, 1977, (1976-77) S.C. c.53, s.10.
594. Supra, n. 586, p. 80. See supra, p. 220.
595. The words, "est susceptible de déconsidérer l'administration de la justice", of the French version is capable of a broader interpretation.
596. Supra, n. 27.
- 597.. Id., p. 38.
598. Id., p. 42, per Martland J.
599. Id., p. 59.
600. Id., pp. 73-4.
601. Id., pp. 74-5. See Rochin v. People of California, (1952) 342 U.S. 165 (U.S.S.C.) p. 172, where the United States Supreme Court held that forcing upon the accused the use of an emetic to remove narcotics from his stomach was conduct that "shocks the conscience" and offends the due process clause of the Fourteenth Amendment.
602. See for example R. v. Hynds, (1983) 70 C.C.C. (2d) 186 (Alta. Q.B.); R. v. Soaz, (1982) 16 M.V.R. 59 (B.C.S.C.); R. v. MacIntyre, (1983) 69 C.C.C. (2d) 162 (Alta. Q.B.); R. v. Collins, (1982) 8 W.C.B. 509 (B.C. Co. Ct.); R. v. Paulsen, (1982) 8 W.C.B. 223 (B.C. Co. Ct.); R. v. Tonarelli, supra, n. 511; R. v. Burton, (1983) 9 W.C.B. 38 (Nfld. Prov. Ct.); R. v. Therens, supra, n. 586; R. v. Steube, (1982) 7 W.C.B. 364 (Ont. Distr. Ct.); R. v. Esau, (1982) 8 W.C.B. 264 (Man. Prov. Ct.); R. v. Shea, (1982) 7 W.C.B. 365 (Ont. Prov. Ct.). The above decisions demonstrate the application by some courts of Lamer J.'s "shock test" and further, that illegality and unconstitutionality are not necessarily synonymous.

603. For a more comprehensive discussion of these factors, see Dale GIBSON, loc.cit., n. 567, pp. 516-24. See also Peter W. HOGG, op.cit., n. 537, p. 67; E.G. EWASCHUK, loc.cit., n. 495, pp. 78-9; Röthman v. The Queen, supra, n. 27, p. 74; R. v. Samson (No. 7), (1982) 37 O.R. (2d) 237 (Co. Ct.), pp. 251-2; and see the studies referred to, supra, n. 592.
604. It would appear that the Crown could appeal the exclusion of evidence in view of the compelling nature of the exclusion and since admissibility of evidence is considered to be a question of law, R. v. Simpson, (1977) 35 C.C.C. (2d) 337 (Ont. C.A.). For their limited purpose, applications under sections 24(1) and (2) are subject to different rules than those governing the proceedings in which they arise. It is reasonable to assume that since there must be an application, the burden of proof lies on the applicant to establish his claim. Section 24(2) is more explicit in its wording, e.g. concludes, established, than section 24(1) and supports this view. "Established" has been judicially interpreted to denote that the burden may be discharged on a preponderance of evidence. See R. v. Appleby, (1971) 3 C.C.C. (2d) 354 (S.C.C.); R. v. Soag, supra, n. 602, pp. 61-2. This is consistent with the fact that section 24 is used for civil as well as criminal remedies. Since under section 24(1), the court must be of the view that a guaranteed right or freedom of the applicant is infringed or denied, it would be consistent for the onus to be placed on the applicant under this subsection as well, particularly when one considers that the potential remedies may be more damaging than under section 24(2). For the same reason, it would be illogical to impose any lesser burden on the applicant under section 24(1) than exists under section 24(2). See E.G. EWASCHUK, loc.cit., n. 495, p. 73; Re Federal Republic of Germany and Rauca, supra, n. 516, pp. 427-8; Re Jamieson and the Queen, supra, n. 517, pp. 435-6; R. v. Wilson, supra, n. 570. Applications under section 24 are available only in the event of an infringement or denial of Charter rights or freedoms which, in turn, are subject to reasonable limits in virtue of section 1. An interesting question arises as to whether proof of the lack or unreasonableness of such limits is part of the applicant's burden of proof or whether, once the breach is proved, the burden shifts to the Crown to demonstrate the existence of such limits and then to justify them as reasonable. The predominant view would place this burden on the Crown. See Re Federal Republic of Germany and Rauca, supra, n. 516, pp. 427-8; Re Jamieson and the Queen, supra, n. 517, p. 436; Quebec Association of Protestant School Boards v. Attorney General of Quebec (No. 2), supra, n. 517, pp. 57-9; R. v. S.B., supra, n. 517, p. 79; Re Southam Inc. and the Queen (No. 1), supra, n. 508, p. 263; Re Cadeddu, supra, n. 550; R. v. W., supra, n. 517, p. 276; R. v. Holman, supra, n. 510, p. 394; Herbert MARX,

loc.cit., n. 517, pp. 68-70; Neil FINKELSTEIN, loc.cit. n. 510, pp. 267, 273, 284. For an analysis of a legal as opposed to an evidentiary burden of proof, see PHIFSON on Evidence, op.cit., n. 242, par. 91-102, 140, pp. 36-43, 46-7; Peter K. McWILLIAMS, op.cit., n. 460, pp. 391-3; E. G. EWASCHUK, loc.cit., n. 495, pp. 60, 71-2.

605. Supra, n. 27, pp. 74-5. See supra, p. 228.

606. Supra, n. 353.

607. In affirming a conviction in R. v. Letendre, (1976) 25 C.C.C. (2d) 180 (Man. C.A.), Chief Justice Freedman ruled that in his view the police acted contrary to section 2(c)(ii) of the Canadian Bill of Rights, however with respect to the effect of the breach, he added, at p. 183:

Let me say at once that I reject the notion that any such breach must result in the exclusion of a statement subsequently obtained from an accused. Rejection is not an automatic consequence of a breach. Whether an accused's statement to the police will be admitted or rejected will depend in the last analysis on whether it was voluntary or not. In the inquiry on the issue of voluntariness police delay in facilitating access to a lawyer will be a factor to be considered, sometimes indeed a decisive factor. The facts of the particular case will determine the result.

See also, R. v. Dinardo, supra, n. 583; R. v. Chow, (1979) 43 C.C.C. (2d) 215 (B.C.C.A.); R. v. Whynott, (1976) 27 C.C.C. (2d) 321 (N.S.S.C.A.D.); R. v. Deleo, (1972) 18 C.R.N.S. 261 (Ont. Co. Ct.); O'Connor v. The Queen, (1966) 48 C.R. 270 (S.C.C.); R. v. Steeves, (1964), 42 C.R. 234 (N.S.S.C.A.D.); R. v. Emele, (1940) 74 C.C.C. 76 (Sask. C.A.); R. v. White, (1908) 15 C.C.C. 30 (Ont. C.A.).

608. In R. v. McCorkell cited in Notes and Comments (1964-65) 7 Cr. L.Q. 395 (Ont. H.C.), p. 396, former Chief Justice Gale, in considering a breach of section 2(c)(ii) of the Canadian Bill of Rights, stated:

Strictly speaking, I concede that these statements were probably voluntary on his part within the meaning of that word under the authorities. However, in my discretion, I am not going to allow them to be admitted as part of the trial, believing as I do that

the sanctity of the relationship between a solicitor and his client—is not to be lightly frittered away and ought not to be violated, even though innocently as in this case.

In Turgeon v. R., (1981) 20 C.R. (3d) 269 (Que. C.A.); leave to appeal to S.C.C. granted, March 16, 1981, the Quebec Court of Appeal also ruled inadmissible a statement made after a denial of the accused's right to counsel contrary to section 2(c)(ii) of the Canadian Bill of Rights, Dubé J.A. holding that it would be practically impossible for the statement to be free and voluntary. Dubé J.A. considered the question of illegally obtained evidence at p. 284-6. See also R. v. James, supra, n. 583, which was, however, distinguished in a later case, R. v. Dinardo, supra, n. 583, by the same Judge, arriving at an opposite result. See also R. v. Wright, (1980) 4 W.C.B. 78 (Ont. Co. Ct.); R. v. Ballegeer, (1969) 3 C.C.C. 353 (Man. C.A.); R. v. McLeod, (1968-69) 5 C.R.N.S. 101 (Ont. C.A.); R. v. McLean, (1957) 126 C.C.C. 395 (B.C.S.C.); Fred KAUFMAN, The Admissibility of Confessions, 3rd ed., Toronto, The Carswell Company Limited, 1979, pp. 177, 235-53. From the above, it becomes clear that in the realm of confessions, courts have excluded confessions due to illegalities in their obtention, not necessarily affecting voluntariness, without expressly recognizing any inherent discretion to do so, but under the pretext of the voluntary confession rule.

609. See supra, Part I, Chapter II. However, in the recent case of R. v. Sang, supra, n. 211, the House of Lords confirmed the existence of a narrow discretion to exclude unfairly obtained evidence, without setting its precise limits.

610. In R. v. Sang, supra, n. 211, p. 1230, Lord Diplock stated:

What the judge at the trial is concerned with is not how the evidence sought to be adduced by the prosecution has been obtained but with how it is used by the prosecution at the trial.

611. Supra, n. 27.

612. Subsequent to Rothman, Landry J. of the Quebec Superior Court, in R. v. Clot, (1982) 27 C.R. (3d) 324, 342, 344 (Que. S.C.), had to determine, *inter alia*, the admissibility of statements made by an accused, firstly to two police officers impersonating a psychiatrist and a priest at a police station after a court remanded the accused for medical observation and again, the next day, to two other

police officers. In ruling the statements inadmissible, Landry J. referred to the judgements of Lamer and Estey JJ. in Rothman. He expressed his concern for the integrity of the judicial system and for individual rights as follows at p. 341:

Comme la torture autrefois a pu amener les tribunaux à établir des règles d'admissibilité des déclarations extra-judiciaires, il apparaît que des situations comme celles décrites ici peuvent constituer une invitation pour les tribunaux à contrôler leurs propres procédures en adoptant les règles nécessaires à la protection de l'intégrité du système judiciaire et des droits fondamentaux du citoyen.

613. For a review of American constitutional history, see Joseph STORY, Commentaries on the Constitution of the United States, 4th ed.; Thomas M. Cooley, (ed), Vol. I and II, Boston, Little, Brown and Company 1873; Edward DUMBAULD, The Constitution of the United States, Norman, Oklahoma, University of Oklahoma Press, 1964; Alfred H. KELLY, Winfred A. HARBISON, The American Constitution: Its Origins and Development, 4th ed., New York, W.W. Norton & Company, Inc., 1970.
614. See Mapp v. Ohio, (1963) 367 U.S. 643 (U.S.S.C.).
615. Silverthorne Lumber Co., Inc. v. United States, (1920) 251 U.S. 385 (U.S.S.C.), p. 183 per Holmes J.
616. See Boyd v. United States, (1886) 116 U.S. 616 (U.S.S.C.). In Weeks v. United States, (1914) 232 U.S. 383 (U.S.S.C.), the remedy was restricted to federal courts whereas in Mapp v. Ohio, supra, n. 614, the Supreme Court extended the exclusionary rule to prosecutions in state courts, giving effect to the due process clause of the Fourteenth Amendment. See also Miranda v. State of Arizona, (1966) 384 U.S. 436 (U.S.S.C.).
617. See Silverthorne Lumber Co., Inc. v. United States, supra, n. 615. Secondary or derivative evidence is not automatically suppressed but is subject to exceptional rules for admitting such evidence. See Wong Sun v. United States, (1963) 371 U.S. 471 (U.S.S.C.); Alderman v. United States, (1969) 394 U.S. 165 (U.S.S.C.); United States v. Ceccolini, (1978) 435 U.S. 268 (U.S.S.C.); Brown v. Illinois, (1975) 422 U.S. 590 (U.S.S.C.); Bynum v. United States, (1960) 274 F (2d) 767 (D.C. Circ. C.A.). See also E.G. EWASCHUK, loc.cit., n. 495, pp. 84-5.

618. People v. Defore, (1926) 150 N.E. 585 (N.Y.C.A.), p. 588 per Cardozo J.
619. Id., p. 587.
620. See Stone v. Powell, (1976) 428 U.S. 465 (U.S.S.C.), p. 490, per Powell J. See also Rakas v. Illinois, (1978) 439 U.S. 128 (U.S.S.C.), p. 137 per Rehnquist J.
621. R. v. Leatham, (1861) 8 Cox C.C. 498 (Eng. Q.B.), p. 501, per Crompton J. But see R. v. Sang, supra, n. 211.
622. See United States v. Payner, supra, n. 166; Wong Sun v. United States, supra, n. 617; Alderman v. United States, supra, n. 617; Rakas v. Illinois, supra, n. 620; Flast v. Cohen, (1968) 392 U.S. 83 (U.S.S.C.).
623. See Chapman v. California, (1967) 386 U.S. 18 (U.S.S.C.); United States v. Wade, (1967) 388 U.S. 218 (U.S.S.C.); Milton v. Wainwright, (1972) 407 U.S. 371 (U.S.S.C.); Chambers v. Maroney, (1970) 399 U.S. 42 (U.S.S.C.).
624. United States v. Williams, (1980) 622 F (2d) 830 (5th Circ. C.A.).
625. Ibid.
626. Id., p. 840, per Gee and Vance, Circ. JJ.
627. See Elkins v. United States, supra, n. 83, p. 217, per Stewart J.; United States v. Calandra, (1974) 414 U.S. 338 (U.S.S.C.), pp. 347-53, per Powell J.; Terry v. State of Ohio, (1968) 392 U.S. 1 (U.S.S.C.), pp. 12, 28-9, per Warren C.J.; Stone v. Powell, supra, n. 620, judgements of Powell J. and Burger C.J.; Mapp v. Ohio, supra, n. 614, p. 656, per Clark J.; United States v. Peltier, (1975) 422 U.S. 531 (U.S.S.C.), judgements of Rehnquist J. for the Court and Brennan J. dissenting. See also the remarks of Laskin J., as he then was, in Hogan v. The Queen, supra, n. 586, pp. 80-1.
628. This deterrent effect would not extend to police activities unrelated to acquiring evidence where the object of the challenged action is maintenance of order and not prosecution for crime. The exclusionary rule would, as a result, be diluted. See Terry v. State of Ohio, supra, n. 627 pp. 13-14, per Warren C.J.; Dallin H. OAKS, Studying the Exclusionary Rule in Search and Seizure, (1969-70) 37 U. of Chicago L.R. 665, pp. 720-4. Furthermore, it has been suggested that police officers might fabricate testimony to comply with constitutional requirements and thereby circumvent the exclusionary rule. See Miranda v. State of Arizona,

- supra, n. 616, pp. 505, 516, per Harlan J. dissenting; Dallin H. OAKS, supra, p. 708. The exclusionary rule has been subject to much controversy. For a critique of the effectiveness of the rule, see Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, supra, n. 44, per Burger C.J. dissenting; Stone v. Powell, supra, n. 620; Frank J. McGARR, The Exclusionary Rule: An Ill Conceived and Ineffective Remedy in Claude R. SOWLE, (ed), Police Power and Individual Freedom: The Quest for Balance, Chicago, Aldine Publishing Company, 1969, p. 99; Dallin OAKS, supra; Charles Alan WRIGHT, Must the Criminal Go Free if the Constable Blunders? (1971-72) 50 Texas L.R. 736. For comparative views of the exclusionary rule, see Claude R. SOWLE, (ed), Part II, The Exclusionary Rule Regarding Illegally Seized Evidence, supra, pp. 75-128; Law Reform Commission of Canada, The Exclusion of Illegally Obtained Evidence, op.cit., n. 592, pp. 15-17; Glanville WILLIAMS, loc.cit., n. 44, pp. 347-9.
629. Elkins v. United States, supra, n. 83, p. 222, per Stewart J.
630. See Terry v. State of Ohio, n. 627, pp. 12-13 per Warren C.J.; Weeks v. United States, supra, n. 616, pp. 393-4 per Day J.; Mapp v. Ohio, supra, n. 614, pp. 659-60 per Clark J.; Stone v. Powell, supra, n. 620, pp. 484-5 per Powell J.; Olmstead v. United States, supra, n. 85, p. 485 per Brandeis J. dissenting and pp. 469-71 per Holmes J. dissenting; United States v. Peltier, supra, n. 627, judgments of Rehnquist J. for the Court and Brennan J. dissenting; United States v. Calandra, supra, n. 627, pp. 356-67, per Brennan J. dissenting.
631. Supra, n. 27.
632. With respect to the limited impact in Canada, of American constitutional law, see Morgentaler v. The Queen, supra, n. 467, p. 459, per Laskin C.J.C. (dissenting judgement); R. v. Gardiner, (1982) 68 C.C.C. (2d) 477 (S.C.C.), pp. 512-3 per Dickson J.; R. v. Saxell, (1981) 59 C.C.C. (2d) 176 (Ont. C.A.), p. 188, per Weatherston J.A.; R. v. Smythe, supra, n. 75, (Ont. H.C.), pp. 112-13, per Wells C.J.; Levitz v. Ryan, (1973) 9 C.C.C. (2d) 182 (Ont. C.A.), p. 186-7, per Arnup J.A.; R. v. Prov. Ct. JJ., Ex Parte Nevin, (1971) 2 C.C.C. (2d) 469 (Ont. C.A.), pp. 474-5, per Jessup J.A.
633. See supra, Part II, Chapter I and n. 570.
634. See E.G. EWASCHUK, loc.cit., n. 495, p. 73.

635. In this analysis of entrapment and the Charter, the instigators referred to have been police officers or their agents, i.e. informers, agents provocateurs, etc. Other persons with no relation to the police or the authorities may, in a similar manner, engage in entrapment. Although the application of the principles of fundamental justice, in depriving individuals of certain rights, seems to be restricted to state action and further, limitations on rights are those imposed by the state, the fact of a prosecution subsequent to activities by such a "lay" entrapper could be taken to signify state ratification of unauthorized entrapment. Be that as it may, the remoteness of the state from the instigation and the removal of the entrapper from police or prosecutorial functions, would unlikely be deemed to bring the administration of justice into disrepute.

Arguments raising the different treatment of an accused according to the status of the entrapper have been rejected in the United States. See supra, p. 40. See also Dale GIBSON, loc.cit., n. 567, pp. 515-16.

636. See the judgements of Lamer and Estey JJ. in Rothman v. The Queen, supra, n. 27.

637. Supra, n. 27, pp. 74-5.

638. In Edwards v. Attorney General for Canada, (1930) A.C. 124 (P.C.), p. 136, Lord Sankey, in regard to the interpretation of the British North America Act and the eligibility of women in the senate, stated:

The British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits. The object of the Act was to grant a Constitution to Canada.... Their Lordships do not conceive it to be the duty of this Board - it is certainly not their desire - to cut down the provisions of the Act by a narrow and technical construction, but rather to give it a large and liberal interpretation ....

See also Attorney General for Ontario v. Attorney General for Canada, (1947) A.C. 127 (P.C.), p. 154, where, in considering the interpretation of the British North America Act, in view of legislation making the Supreme Court of Canada the ultimate appeal court for Canada, Lord Jowitt, L.C. stated:

It is, as their Lordships think, irrelevant that the question is one that might have seemed unreal at the date of the British North America Act. To such an organic statute the flexible interpretation must be given which changing circumstances require, ....

See also Quebec Association of Protestant School Boards v. Attorney General of Quebec (No. 2), supra, n. 517, pp. 54-7; R. v. Vermette, supra, n. 464, pp. 148-9; R. v. S.B., supra, n. 517, p. 79; Dale GIBSON, Interpretation of the Canadian Charter of Rights and Freedoms: Some General Considerations in Walter S. TARNOPOLSKY, Gérald A. BEAUDOIN, (ed), op.cit., n. 501, p. 25. But note the following cautionary remarks of Zuber J.A. in R. v. Altseimer, supra, n. 513, p. 13:

In view of the number of cases in Ontario trial courts in which Charter provisions are being argued, and especially in view of some of the bizarre and colourful arguments being advanced, it may be appropriate to observe that the Charter does not intend a transformation of our legal system or the paralysis of law enforcement. Extravagant interpretations can only trivialize and diminish respect for the Charter which is a part of the supreme law of this country.

See also Re R. and Siegel, supra, n. 513, p. 95; Re Potma and the Queen, supra, n. 512, pp. 427-8.

639. The power to grant conditional or absolute discharges is limited by the terms of section 662.1(1) of the Criminal Code. For example, this sentencing alternative is unavailable in the case of offences for which a minimum punishment is prescribed by law or offences punishable by imprisonment for 14 years or for life. This provision would therefore exclude discharges in many drug cases.
640. Supra, n. 353.
641. Supra, n. 27.
642. Supra, n. 373.
643. Ibid.
644. See Roger PARK, loc.cit., n. 36, p. 267; Ben A. HARDY, loc.cit., n. 117, pp. 188-90.

645. Supra, n. 373.
646. Op.cit., n. 5, pp. 75-6.
647. Id., pp. 79-80.
648. Second Report, op.cit., n. 29, Vol. 2, p. 1051.
649. Id., p. 1052.
650. Id., pp. 1053, 1116, (Recommendation 284).
651. Second Report, op.cit., n. 29, Vol. 2, pp. 1053, 1116, (Recommendation 285).

BIBLIOGRAPHY

I . Legislation and Regulations

- An Act to Amend the Food and Drugs Act, (1960-61) S.C. c.37.
- The British North America Act, 1867, (1970) R.S.C. App. II.
- Canada Act, 1982, (1982) U.K. c.11.
- Canadian Bill of Rights, (1970) R.S.C. App. III.
- Canadian Human Rights Act, (1976-77) S.C. c.33.
- Criminal Code, (1970) R.S.C. c. C-34.
- Criminal Law Amendment Act, 1975, (1974-75-76) S.C. c.93.
- Criminal Law Amendment Act, 1977, (1976-77) S.C. c.53.
- Food and Drugs Act, (1952-53) S.C. c.38; rep. by (1970) R.S.C. c. F-27.
- Food and Drug Regulations, (1978) S.O.R. c.870.
- The Individual's Rights Protection Act, (1980) R.S.A. c. 1-2.
- Narcotic Control Act, (1970) R.S.C. c. N-1; rep. (1960-61) S.C. c. 35.
- Narcotic Control Regulations, (1978) S.O.R. c.1041.
- The Police Act, (1970) R.S.A. c.278; rep. by (1980) R.S.A. c. P-12.
- Police Act, (1977) S.N.B. c. P-9.2.
- Public Order (Temporary Measures) Act, 1970, (1970-71-72) S.C. c.2.

II Jurisprudence.

Alderman v. United States, (1969) 394 U.S. 165 (U.S.S.C.).

Amato v. The Queen, (1982) 69 C.C.C. (2d) 31 (S.C.C.); aff. (1980) 51 C.C.C. (2d) 401 (B.C.C.A.).

Amsden v. Rogers, (1916) 26 C.C.C. 389 (Sask S.C.).

Anonymous Case, (1811) 3 Camp. 73 (Eng. K.B.).

Attorney General for Canada and Dupond v. City of Montreal and The Attorney General for Québec, (1978) 2 S.C.R. 770.

Attorney General of Canada v. Lavell, (1973) 23 C.R.N.S. 197 (S.C.C.).

Attorney General for Ontario v. Attorney General for Canada, (1947) A.C. 127 (P.C.).

Attorney General for Québec v. Cohen, (1979) 46 C.C.C. (2d) 473 (S.C.C.).

Attorney General of Québec and Keable v. Attorney General of Canada, (1979) 43 C.C.C. (2d) 49 (S.C.C.).

Beaver v. The Queen, (1957) 118 C.C.C. 129 (S.C.C.).

Bisson v. Québec Liquor Commission, (1930) 48 C.B.R. 256.

Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, (1971) 403 U.S. 388 (U.S.S.C.).

Board of Commissioners of Excise of Onondaga County v. Backus, (1864) 29 How. Pr. 33 (N.Y.S.C.).

Bonli v. Gosselin Prov. J., (1982) 25 C.R. (3d) 303 (Sask. C.A.).

Booth v. State, (1964) 398 P. (2d) 863 (Oklahoma C.A.).

Bouchard v. The King, (1951) 101 C.C.C. 413 (Que. K.B.A.S.).

Boucher v. The Queen, (1955) 20 C.R. 1 (S.C.C.).

Boyd v. United States, (1886) 116 U.S. 616 (U.S.S.C.).

Brannan v. Peek, (1947) 2 All. E.R. 572 (K.B.).

Brown v. Illinois, (1975) 422 U.S. 590 (U.S.S.C.).

Browning v. J.W.H. Watson (Rochester) Ltd., (1953) 2 All. E.R. 775 (Q.B.D.);

Brownridge v. The Queen, (1972) 7 C.C.C. (2d) 417 (S.C.C.);  
rev. (1971) 4 C.C.C. (2d) 462 (Ont. C.A.).

Bynum v. United States, (1960) 274 F. (2d) 767 (D.C. Circ. C.A.).

Casey v. United States, (1928) 276 U.S. 413 (U.S.S.C.).

Chambers v. Maronev, (1970) 399 U.S. 42 (U.S.S.C.).

Chapman v. California, (1967) 386 U.S. 18 (U.S.S.C.).

Chaput v. Romain, (1955) S.C.R. 834.

Chartier v. Attorney General of Québec, (1979) 9 C.R. (3d) 97 (S.C.C.).

Chromiak v. The Queen, (1980) 49 C.C.C. (2d) 257 (S.C.C.).

City of Norfolk v. McFarland, (1956) 145 F. Supp. 258 (U.S. Distr. Ct., E.D. Va., Norfolk Div.).

Connelly v. Director of Public Prosecutions, (1964) 2 All. E.R. 401 (H.L.); aff. (1963) 3 All. E.R. 510 (C.A.).

Contré v. Québec Liquor Commission, (1935) 65 C.C.C. 69 (Que. K.B.).

Curr v. The Queen, (1972) 7 C.C.C. (2d) 181 (S.C.C.); aff. (1971) 4 C.C.C. (2d) 24 (Ont. C.A.).

Davies v. Director of Public Prosecutions, (1954) 1 All. E.R. 507 (H.L.).

Director of Public Prosecutions v. Humphrys, (1976) 2 All. E.R. 497 (H.L.); rev. (1975) 2 All. E.R. 1023 (C.A.).

Duke v. The Queen, (1972) 7 C.C.C. (2d) 474 (S.C.C.); aff. (1971) 4 C.C.C. (2d) 504 (Ont. C.A.); rev. (1971) 4 C.C.C. (2d) 506 (Ont. H.C.).

Edwards v. Attorney General for Canada, (1930) A.C. 124 (P.C.).

Elkins v. United States, (1960) 364 U.S. 206 (U.S.S.C.).

Evans v. Pesce and Attorney General for Alberta, (1969-70) 8 C.R.N.S. 201 (Alta. S.C.).

Ex Parte Barker, (1891) 30 N.B.R. 406 (S.C.).

- Ex Parte McCaud, (1965) 1 C.C.C. 168 (Ont. C.A.); aff. by (S.C.C.) p. 170 n.
- Flast v. Cohen, (1968) 392 U.S. 83 (U.S.S.C.).
- Gaynor v. Allen, (1959) 2 All. E.R. 644 (Q.B.).
- Glover v. Mackay, (1961) 131 C.C.C. 183 (Ont. Co. Ct.).
- Government of the Republic of Italy v. Piperno, (1982) 66 C.C.C. (2d) 1 (S.C.C.).
- Gowan v. Smith, (1909) 122 N.W. 286 (Michigan S.C.).
- Gregoroff v. State, (1982) 285 S.E. (2d) 537 (Ga. S.C.).
- Grimm v. United States, (1895) 156 U.S. 604 (U.S.S.C.).
- Griswold v. State of Connecticut, (1965) 381 U.S. 479 (U.S.S.C.).
- Guarro v. United States, (1956) 237 F. (2d) 578 (D.C. Circ. C.A.).
- Hampton v. United States, (1976) 425 U.S. 484 (U.S.S.C.); aff. (1974) 507 F. (2d) 832 (8th Circ. C.A.).
- Haughton v. Smith, (1973) 3 All. E.R. 1109 (H.L.).
- Hogan v. The Queen, (1975) 18 C.C.C. (2d) 65 (S.C.C.); aff. (1973) 5 N.S.R. (2d) 73 (S.C.A.D.).
- Hutt v. The Queen, (1978) 38 C.C.C. (2d) 418 (S.C.C.).
- Irwin v. The Queen, (1968) 3 C.R.N.S. 377 (S.C.C.); aff. (1968) 2 C.C.C. 50 (Alta. S.C.A.D.).
- Johnson v. Phillips, (1975) 3 All. E.R. 682 (Q.B.).
- Kienapple v. The Queen, (1974) 15 C.C.C. (2d) 524 (S.C.C.).
- Kosobook v. Solicitor General of Canada, (1977) 30 C.C.C. (2d) 49 (Fed. Ct. Tr. Div.).
- Kowbel v. The Queen, (1954) 18 C.R. 380 (S.C.C.).
- Lemay v. The Queen, (1954) 14 C.R. 89 (S.C.C.).
- Lemieux v. The Queen, (1968) 1 C.C.C. 187 (S.C.C.).
- Levitz v. Ryan, (1973) 9 C.C.C. (2d) 182 (Ont. C.A.).
- Lewis v. United States, (1966) 385 U.S. 206 (U.S.S.C.).

Lilly v. State of West Virginia, (1928) 29 F (2d) 61 (4th Circ. C.A.).

Lopez v. United States, (1963) 373 U.S. 427 (U.S.S.C.).

Love v. People, (1896) 43 N.E. 710 (Illinois S.C.).

Lowry and Lepper v. The Queen, (1972) 6 C.C.C. (2d) 531 (S.C.C.).

Mapp v. Ohio, (1963) 367 U.S. 643 (U.S.S.C.).

Martin v. Puttick, (1967) 1 All. E.R. 899 (Q.B.).

Masciale v. United States, (1958) 356 U.S. 386 (U.S.S.C.).

McCann v. The Queen, (1976) 29 C.C.C. (2d) 337 (Fed. Ct. Tr. Div.).

Milton v. Wainwright, (1972) 407 U.S. 371 (U.S.S.C.).

Minister of Justice of Canada v. Borowski, (1982) 64 C.C.C. (2d) 97 (S.C.C.).

Miranda v. State of Arizona, (1966) 384 U.S. 436 (U.S.S.C.).

Mitchell v. The Queen, (1976) 24 C.C.C. (2d) 241 (S.C.C.).

Morogentaler v. The Queen, (1975) 20 C.C.C. (2d) 449 (S.C.C.);  
aff. (1974) 17 C.C.C. (2d) 289 (Que. C.A.).

O'Brien v. United States, (1931) 51 F (2d) 674 (7th Circ. C.A.).

O'Connor v. The Queen, (1966) 48 C.R. 270 (S.C.C.).

Olmstead v. United States, (1928) 277 U.S. 438 (U.S.S.C.).

Osborn v. United States, (1966) 385 U.S. 323 (U.S.S.C.).

O'Sullivan v. Michus, (1914) 23 C.C.C. 169 (Sask. Distr. Ct.).

Palmer v. The Queen, (1980) 50 C.C.C. (2d) 193 (S.C.C.).

Pasquier v. Neale, (1902) 2 K.B. 287 (Eng. K.B.).

Patterson v. The Queen, (1968) 2 C.C.C. 247 (S.C.C.); rev. (1967)  
3 C.C.C. 39 (Ont. C.A.).

Patterson v. The Queen, (1970) 2 C.C.C. (2d) 227 (S.C.C.).

Poitras v. The Queen, (1973) 12 C.C.C. (2d) 337 (S.C.C.); aff.  
(1972) 6 C.C.C. (2d) 559 (Man. C.A.).

People v. Defore, (1926) 150 N.E. 585 (N.Y.C.A.).

People v. Donovan, (1967) 279 N.Y.S. (2d) 404 (N.Y. Ct. of Special Sessions).

People v. Hilfman, (1901) 70 N.Y.S. 621 (N.Y.S.C.A.D.).

People v. Jaffe, (1906) 78 N.E. 169 (N.Y.C.A.).

People v. McCord, (1889) 42 N.W. 1106 (Michigan S.C.).

People v. Murn, (1922) 190 N.W. 666 (Michigan S.C.).

Polski v. United States, (1929) 33 F. (2d) 686 (8th Circ. C.A.); cert. denied (1929) 280 U.S. 591 (U.S.S.C.).

Priestman v. Colanalo, (1959) S.C.R. 615.

Pryor v. The King, (1938) 70 C.C.C. 345 (P.E.I.S.C.).

The Queen in Right of New Brunswick v. Fisherman's Wharf Ltd., N.B.Q.B., April 28, 1982.

Québec Association of Protestant School Boards v. Attorney General of Québec (No. 2), (1983) 140 D.L.R. (3d) 33 (Que. S.C.).

R. v. Aeker, (1934) 62 C.C.C. 269 (N.S. Ct.).

R. v. Ady, (1835) 7 Car. & P. 140 (Eng. K.B.).

R. v. Allan, (1982) 8 W.C.B. 58 (Alta. Q.B.).

R. v. Altseimer, (1983) 1 C.C.C. (3d) 7 (Ont. C.A.).

R. v. Ameer and Lucas, (1977) Crim. L.R. 104 (Eng. Central Crim. Ct.).

R. v. Appleby, (1971) 3 C.C.C. (2d) 354 (S.C.C.).

R. v. Auger, (1979) 5 W.W.R. 543 (B.C.C.A.).

R. v. Balderstone, (1983) 9 W.C.B. 11 (Man. Q.B.).

R. v. Baldinelli, (1983) 70 C.C.C. (2d) 474 (Ont. Prov. Ct.).

R. v. Balleger, (1969) 3 C.C.C. 353 (Man. C.A.).

R. v. Bandel, (1927) 47 C.C.C. 266 (Ont. Co. Ct.).

R. v. Banville, (1983) 30 C.R. (3d) 59 (N.B. Prov. Ct.).

- R. v. Barr, (1976) 23 C.C.C. (2d) 116 (Ont. C.A.).
- R. v. Baskerville, (1916) 2 K.B. 658 (Eng. C.A.).
- R. v. Baxter, (1980) 16 C.R. (3d) 397 (Que. S.C.).
- R. v. Beason, (1982) 68 C.C.C. (2d) 540 (Ont. Co. Ct.).
- R. v. Begeotas, (1912) 22 C.C.C. 113 (B.C. Co. Ct.).
- R. v. Bell, (1981) 6 W.C.B. 263 (B.C.C.A.).
- R. v. Belton, (1983) 9 W.C.B. 37 (Man. C.A.).
- R. v. Berdino, (1924) 42 C.C.C. 309 (B.C.C.A.).
- R. v. Bickley, (1909) 2 Cr. App. R. 53 (Eng. C.A.).
- R. v. Birtles, (1969) 53 Cr. App. R. 469 (Eng. C.A.).
- R. v. Blackstock, (1982) 8 W.C.B. 363 (Sask. Prov. Ct.).
- R. v. Bohman, (1975) 20 C.C.C. (2d) 117 (Ont. Distr. Ct.).
- R. v. Bonnar, (1977) 30 C.C.C. (2d) 55 (N.S.S.C.A.D.).
- R. v. Bouillon, (1982) 7 W.C.B. 41 (Alta. Prov. Ct.).
- R. v. Burke, (1925) 43 C.C.C. 393 (B.C.S.C.).
- R. v. Burke, (1979) 44 C.C.C. (2d) 33 (P.E.I.S.C.A.D.).
- R. v. Burnett and Lee, (1973) Crim. L.R. 748 (Eng. Central Crim. Ct.).
- R. v. Burnshine, (1974) 15 C.C.C. (2d) 505 (S.C.C.).
- R. v. Burton, (1983) 9 W.C.B. 48 (Nfld. Prov. Ct.).
- R. v. Cameron, (1983) 70 C.C.C. (2d) 532 (Alta. Q.B.).
- R. v. Campagna, (1983) 70 C.C.C. (2d) 236 (B.C. Prov. Ct.).
- R. v. Capner, (1975) 1 N.Z.L.R. 411 (C.A.).
- R. v. Carter, (1983) 31 C.R. (3d) 76 (Ont. C.A.).
- R. v. Catagas, (1978) 38 C.C.C. (2d) 296 (Man. C.A.).
- R. v. Chandler, (1913) 8 Cr. App. R. 82 (Eng. C.A.).

- R. v. Chernecki, (1972) 16 C.R.N.S. 230 (B.C.C.A.).
- R. v. Chow, (1979) 43 C.C.C. (2d) 215 (B.C.C.A.).
- R. v. Christian, (1982) 7 W.C.B. 467 (Ont. Prov. Ct.).
- R. v. City of Sault Ste. Marie, (1978) 40 C.C.C. (2d) 353 (S.C.C.).
- R. v. Clarke, (1983) 9 W.C.B. 45 (B.C.S.C.).
- R. v. Clay, (1946) 88 C.C.C. 36 (Que. K.B.A.S.).
- R. v. Clot, (1982) 27 C.R. (3d) 324, 342, 344 (Que. S.C.).
- R. v. Collins, (1982) 8 W.C.B. 509 (B.C. Co. Ct.).
- R. v. Commissioner of Police of the Metropolis, Ex Parte Blackburn, (1968) 2 W.L.R. 893 (Eng. C.A.).
- R. v. Curry, (1913) 21 C.C.C. 273 (N.S.S.C.A.D.); aff. by (1913) 22 C.C.C. 191 (S.C.C.).
- R. v. Daigle, (1983) 9 W.C.B. 47 (Que. S.C.).
- R. v. Davis, (1912) 22 C.C.C. 187 (Ont. H.C.).
- R. v. Deleo, (1972) 18 C.R.N.S. 261 (Ont. Co. Ct.).
- R. v. Demelo, (1983) 9 W.C.B. 43 (B.C. Prov. Ct.).
- R. v. Dinardo, (1981) 61 C.C.C. (2d) 52 (Ont. Co. Ct.).
- R. v. D.M., (1983) 30 C.R. (3d) 210 (Ont. Prov. Ct.).
- R. v. Dolan, (1855) Dears 435 (Eng. Q.B.).
- R. v. Donihee, (1921) 36 C.C.C. 293 (Ont. S.C.).
- R. v. Dowling, (1848) 3 Cox C.C. 509 (Eng. Central Crim. Ct.).
- R. v. Drybones, (1970) 3 C.C.C. 355 (S.C.C.).
- R. v. Duff, (1982) 8 W.C.B. 504 (B.C. Prov. Ct.).
- R. v. Emele, (1940) 74 C.C.C. 76 (Sask. C.A.).
- R. v. Esau, (1982) 8 W.C.B. 264 (Man. Prov. Ct.).
- R. v. Foulder, Foulkes, and Johns, (1973) Crim. L.R. 45 (Inner London Quarter Sessions).

- R. v. Frankforth, (1983) 70 C.C.C. (2d) 448 (B.C. Co. Ct.).
- R. v. Gallant, (1970) 3 C.C.C. 263 (P.E.I.S.C.).
- R. v. Gallant, (1983) 70 C.C.C. (2d) 213 (Ont. Prov. Ct.).
- R. v. Gardiner, (1982) 68 C.C.C. (2d) 477 (S.C.C.).
- R. v. Garrett, (1907) 1 K.B. 881 (Eng. C.A.).
- R. v. Gauthier, (1982) C.S.P. 1045 (Que.).
- R. v. Geswein, (1982) 8 W.C.B. 260 (Man. Prov. Ct.).
- R. v. Glushek, (1977-78) 2 W.C.B. 50 (Alta. S.C.).
- R. v. Goodchild, (1846) 2 Car. & K. 292 (Eng. K.B.).
- R. v. Grant, Alta. Q.B. Edmonton, 8203-0781, April 20, 1982.
- R. v. Gunn, (1905) 10 C.C.C. 148 (Que. C.S.P.).
- R. v. Hanaway and Lamaca, (1982) 63 C.C.C. (2d) 44 (Ont. Distr. Ct.); leave to appeal to Ont. Div. Ct. dismissed, October 15, 1981, p. 55.
- R. v. Haukness, (1976) 5 W.W.R. 420 (B.C. Prov. Ct.).
- R. v. Haverstock, (1979) 6 C.R. (3d) 8 (N.S. Co. Ct.).
- R. v. Hawthorne, (1971) 3 C.C.C. (2d) 505 (B.C. Co. Ct.).
- R. v. Hensler, (1870) 11 Cox C.C. 570 (Eng. C.A.).
- R. v. Heuser, (1911) 6 Cr. App. R. 76 (Eng. C.A.).
- R. v. Hillman, (1863) 9 Cox C.C. 386 (Eng. C.A.).
- R. v. Hills, (1924) 44 C.C.C. 329 (Alta. S.C.A.D.).
- R. v. Holden, (1809) Russ. & Ry. 154 (Eng. K.B.).
- R. v. Holman, (1982) 28 C.R. (3d) 378 (B.C. Prov. Ct.).
- R. v. Hopkins, (1978) 23 N.S.R. (2d) 550 (N.S.S.C.A.D.).
- R. v. Hyde, (1925) 44 C.C.C. 1 (Ont. Co. Ct.).
- R. v. Hyland, (1898) 24 V.L.R. 101 (S.C.).
- R. v. Hynds, (1983) 70 C.C.C. (2d) 186 (Alta. Q.B.).

- R. v. Ibrahim, (1982) 8 W.C.B. 78 (Que. C.S.P.).
- R. v. Institutional Head of Beaver Creek Correctional Camp, Ex Parte MacCaud, (1969) 1 C.C.C. 371 (Ont. C.A.).
- R. v. James, (1979) 7 C.R. (3d) 17 (Ont. Co. Ct.).
- R. v. Johnson and Jones, (1841) Car. & M. 218 (Eng. Q.B.).
- R. v. Prov. Ct. JJ., Ex Parte Nevin, (1971) 2 C.C.C. (2d) 469 (Ont. C.A.).
- R. v. King, (1938) 2 All. E.R. 662 (C.A.).
- R. v. Kinney, (1930) 55 C.C.C. 350 (N.B.S.C.A.D.).
- R. v. Kirzner, (1978) 38 C.C.C. (2d) 131 (S.C.C.); aff. (1977) 32 C.C.C. (2d) 76 (Ont. C.A.).
- R. v. Knezo, (1955) 115 C.C.C. 90 (B.C.S.C.).
- R. v. Kotyszyn, (1949) 95 C.C.C. 261 (Que. K.B.A.S.); aff. (1948) 93 C.C.C. 138 (Que. C.S.P.).
- R. v. Krannenburg, (1980) 51 C.C.C. (2d) 205 (S.C.C.).
- R. v. Lawrance, (1850) 4 Cox C.C. 438 (Eng. Central Crim. Ct.).
- R. v. Lawson, (1982) 7 W.C.B. 407 (Sask. Q.B.).
- R. v. Leatham, (1861) 8 Cox C.C. 498 (Eng. Q.B.).
- R. v. Lebrun, (1979) 45 C.C.C. (2d) 300 (B.C.C.A.).
- R. v. Letendre, (1976) 25 C.C.C. (2d) 180 (Man. C.A.).
- R. v. Light, (1915) 24 Cox C.C. 718 (Eng. C.A.).
- R. v. Loveless, (1978-79) 3 W.C.B. 267 (B.C. Co. Ct.).
- R. v. Lundriqan, (1982) 67 C.C.C. (2d) 37 (Ont. Prov. Ct.).
- R. v. Lyons. (No. 1), (1910) 16 C.C.C. 152 (Que. Mag. Ct.).
- R. v. M., (1983) 70 C.C.C. (2d) 123 (Ont. Prov. Ct.).
- R. v. Macdaniel, (1754) 1 Leach 44 (Eng. K.B.).
- R. v. Macdaniel, (1755) Fost. 121 (Eng. K.B.).
- R. v. MacDonald, (1971) 15 C.R.N.S. 122 (B.C. Prov. Ct.).

- R. v. MacIntyre, (1983) 69 C.C.C. (2d) 162 (Alta. Q.B.).
- R. v. Macro, (1969) Crim. L.R. 205 (Eng. C.A.).
- R. v. Madigan, (1970) 1 C.C.C. 354 (Ont. C.A.).
- R. v. Mah Qun Non, (1934) 1 W.W.R. 78 (B.C.C.A.).
- R. v. Maltby, (1983) 9 W.C.B. 9 (Sask. Q.B.).
- R. v. Marquez, (1982) 8 W.C.B. 334 (Man. Co. Ct.).
- R. v. Martin, (1811) Russ. & Ry. 196 (Eng. K.B.).
- R. v. Maxner, (1981) 61 C.C.C. (2d) 446 (N.S.S.C.A.D.).
- R. v. McCann, (1971) 56 Cr. App. R. 359 (Eng. C.A.).
- R. v. McCorkell, (1964-65) 7 Cr. L.Q. 395 (Ont. H.C.).
- R. v. McCranor, (1918) 31 C.C.C. 130 (Ont. S.C.A.D.).
- R. v. McEvilly and Lee, (1974) 60 Cr. App. R. 150 (Eng. C.A.).
- R. v. McLean, (1957) 126 C.C.C. 395 (B.C.S.C.).
- R. v. McLeod, (1968-69) 5 C.R.N.S. 101 (Ont. C.A.).
- R. v. Mealey and Sheridan, (1974) 60 Cr. App. R. 59 (Eng. C.A.).
- R. v. Miller and Cockriell, (1977) 31 C.C.C. (2d) 177 (S.C.C.).
- R. v. Miller and Page, (1965) 49 Cr. App. R. 241 (Eng. C.A.).
- R. v. Mills, (1857) 7 Cox C.C. 263 (Eng. C.A.).
- R. v. Mortimer, (1910) 5 Cr. App. R. 199 (Eng. C.A.).
- R. v. Mullins, (1848) 3 Cox C.C. 526 (Eng. Central Crim. Ct.).
- R. v. Murphy, (1965) N.I. 138 (Courts Martial App. Ct.).
- R. v. Newall (No. 4), (1983) 70 C.C.C. (2d) 10 (B.C.S.C.).
- R. v. O'Brien, (1954) 110 C.C.C. 1 (S.C.C.).
- R. v. O'Callaghan, (1880) 14 Cox C.C. 499 (Eng. Central Crim. Ct.).
- R. v. Ormerod, (1969) 4 C.C.C. 3 (Ont. C.A.).
- R. v. Osborn, (1971) 1 C.C.C. (2d) 482 (S.C.C.); rev. (1969) 4 C.C.C. 185 (Ont. C.A.).

- R. v. O'Shannessy, N.Z.C.A., Wellington, October 8, 1973, 78/73.
- R. v. Paquette, (1977) 30 C.C.C. (2d) 417 (S.C.C.).
- R. v. Park Hotel (Sudbury) Ltd., (1966) 4 C.C.C. 158 (Ont. Distr. Ct.).
- R. v. Paulsen, (1982) 8 W.C.B. 223 (B.C. Co. Ct.).
- R. v. Perera, (1907) V.L.R. 240 (S.C.).
- R. v. Petahtegoose, (1982) 8 W.C.B. 362 (Ont. Prov. Ct.).
- R. v. Petheran, (1936) 65 C.C.C. 151 (Alta. S.C.A.D.).
- R. v. Pethia, (1977) 1 N.Z.L.R. 448 (S.C.).
- R. v. Phillips, (1969-70) 8 C.R.N.S. 186 (N.S. Co. Ct.).
- R. v. Piraino, (1982) 67 C.C.C. (2d) 28 (Ont. H.C.).
- R. v. Paulsen, (1939) 72 C.C.C. 264 (B.C. Co. Ct.).
- R. v. Pratt, (1972) 19 C.R.N.S. 273 (N.W.T. Mag. Ct.).
- R. v. Price, (1971) 12 C.R.N.S. 131 (Ont. C.A.).
- R. v. Reale, (1975) 22 C.C.C. (2d) 571 (S.C.C.).
- R. v. Redshaw, (1975) 31 C.R.N.S. 255 (Ont. Co. Ct.).
- R. v. Rice, (1929) 52 C.C.C. 380 (N.S.S.C.A.D.).
- R. v. Riddle, (1980) 48 C.C.C. (2d) 365 (S.C.C.).
- R. v. Ridge, (1980) 51 C.C.C. (2d) 261 (B.C.C.A.).
- R. v. Rippey, (1982) 65 C.C.C. (2d) 158 (N.S. Co. Ct.).
- R. v. R.L., (1983) 70 C.C.C. (2d) 158 (Que. Youth Ct.).
- R. v. Rodaers, (1926) 46 C.C.C. 372 (Ont. Co. Ct.).
- R. v. Roebuck, (1856) 7 Cox C.C. 126 (Eng. C.A.).
- R. v. Rolbin, (1982) 8 W.C.B. 78 (Que. C.S.P.); aff. by (Que. S.C.) p. 507.
- R. v. Rudd, (1775) 1 Leach 115 (Eng. K.B.).
- R. v. Sabloff, (1979) C.S. 821 (Que.).

- R. v. Sabloff, (1980) 13 C.R. (3d) 326 (Que. S.C.).
- R. v. Sampare, (1978) 6 B.C.L.R. 334 (Prov. Ct.).
- R. v. Samson, (No. 7), (1982) 37 O.R. (2d) 237 (Ct. Ct.).
- R. v. Sands, (No. 1), (1915) 25 C.C.C. 116 (Man. K.B.).
- R. v. Sang, (1979) 2 All. E.R. 1222 (H.L.); aff. (Eng. C.A.). p.46.
- R. v. Saxell, (1981) 59 C.C.C. (2d) 176 (Ont. C.A.).
- R. v. S.B., (1983) 1 C.C.C. (3d) 73 (B.C.S.C.).
- R. v. Scudder, (1828) 3 Car. & P. 604 (Eng. K.B.).
- R. v. Shea, (1982) 7 W.C.B. 365 (Ont. Prov. Ct.).
- R. v. Shipley, (1970) 3 C.C.C. 398 (Ont. Co. Ct.).
- R. v. Silber, (1983) 69 C.C.C. (2d) 147 (B.C. Prov. Ct.).
- R. v. Simon, (1982) 68 C.C.C. (2d) 86 (N.W.T.S.C.).
- R. v. Simpson, (1977) 35 C.C.C. (2d) 337 (Ont. C.A.).
- R. v. Sim, (1954) 108 C.C.C. 380 (Alta. S.C.).
- R. v. Sirois, (1972) 17 C.R.N.S. 398 (Alta. S.C.).
- R. v. Smythe, (1971) 3 C.C.C. (2d) 366 (S.C.C.); aff. (Ont. C.A.), p. 97; aff. (Ont. H.C.), p.98.
- R. v. Snyder, (1915) 24 C.C.C. 101 (Ont. S.C.A.D.).
- R. v. Soaz, (1982) 16 M.V.R. 59 (B.C.S.C.).
- R. v. Steeves, (1964) 42 C.R. 234 (N.S.S.C.A.D.).
- R. v. Steinberg, (1967) 3 C.C.C. 48 (Ont. C.A.).
- R. v. Stephens, (1926) 45 C.C.C. 123 (Ont. Co. Ct.).
- R. v. Steube, (1982) 7 W.C.B. 364 (Ont. Distr. Ct.).
- R. v. Timar, (1969) 3 C.C.C. 185 (Ont. Distr. Ct.).
- R. v. Titley, (1880) 14 Cox C.C. 502 (Eng. Central Crim. Ct.).
- R. v. Tontarelli, (1982) 8 W.C.B. 259 (Ont. Co. Ct.).
- R. v. Triller, B.C.C.A., October 16, 1974.
- R. v. Therens, (1983) 70 C.C.C. (2d) 468 (Sask. Prov. Ct.).

- R. v. Turvey, (1946) 2 All. E.R. 60 (C.A.).
- R. v. Vermette, (1983) 30 C.R. (3d) 129 (Que. S.C.).
- R. v. Villensky, (1892) 2 Q.B. 597 (Eng. Q.B.).
- R. v. V.T.W., (1983) 30 C.R. (3d) 193 (N.S. Fam. Ct.).
- R. v. W., (1983) 1 C.C.C. (3d) 268 (Ont. Prov. Ct.).
- R. v. Walker, (1980) 8 C.C.C. (2d) 126 (Ont. Co. Ct.).
- R. v. Warren, (1972) 7 C.C.C. (2d) 536 (Sask. Distr. Ct.).
- R. v. White, (1908) 15 C.C.C. 30 (Ont. C.A.).
- R. v. White, (No. 1), (1945) 84 C.C.C. 126 (Ont. C.A.).
- R. v. White, (No. 2), (1945) 84 C.C.C. 140 (Ont. C.A.).
- R. v. White, (1982) 7 W.C.B. 264 (N.S.S.C.A.D.).
- R. v. Whynott, (1976) 27 C.C.C. (2d) 321 (N.S.S.C.A.D.).
- R. v. Williams, (1843) 1 Car. & K. 194 (Eng. K.B.).
- R. v. Williams, (1934) 63 C.C.C. 216 (B.C.C.A.).
- R. v. Willis and others, (1976) Crim. L.R. 127 (Eng. C.A.).
- R. v. Wilson, (1982) 8 W.C.B. 105 (Alta. Prov. Ct.).
- R. v. Woods, (1969) 3 C.C.C. 222 (Ont. C.A.).
- R. v. Wray, (1970) 4 C.C.C. 1 (S.C.C.); rev. (1970) 3 C.C.C. 122 (Ont. C.A.).
- R. v. Wright, (1980) 4 W.C.B. 78 (Ont. Co. Ct.).
- R. v. Young, (1949) 94 C.C.C. 117 (Que. C.S.P.).
- R. v. Zatwarnicki, (1981) 8 Man. R. (2d) 444 (Man. C.A.).
- R. v. Zohr, (1980) 4 W.C.B. 220 (Ont. Co. Ct.).
- Re Abarca and the Queen, (1981) 57 C.C.C. (2d) 410 (Ont. C.A.).
- Re Abitibi Paper Company Limited and the Queen, (1979) 47 C.C.C. (2d) 487 (Ont. C.A.).
- Re Anson and the Queen, (1983) 1 C.C.C. (3d) 279 (B.C.S.C.).

- Re Asselin and the Queen, (1981) 55 C.C.C. (2d) 332 (Que. C.A.).
- Re Ball and the Queen, (1979) 44 C.C.C. (2d) 532 (Ont. C.A.).
- Re Bruneau and the Queen, (1982) 69 C.C.C. (2d) 200 (B.C.S.C.).
- Re Burns, (1982) 8 W.C.B. 450 (Ont. H.C.).
- Re Burrows and the Queen, (1983) 70 C.C.C. (2d) 527 (Man. Q.B.).
- Re Cadeddu, (1983) 9 W.C.B. 13 (Ont. H.C.).
- Re Federal Republic of Germany and Rauca, (1983) 70 C.C.C. (2d) 416 (Ont. H.C.); app. dismissed April 12, 1983 (Ont. C.A.).
- Re Girouard and the Queen, (1982) 68 C.C.C. (2d) 261 (B.C.S.C.).
- Re Gittens and the Queen, (1982) 68 C.C.C. (2d) 438 (Fed. Ct. Tr. Div.).
- Re Haugen, (1981) 5 W.C.B. 406 (B.C.C.A.).
- Re Jamieson and the Queen, (1983) 70 C.C.C. (2d) 430 (Que. S.C.).
- Re Medicine Hat Greenhouses Ltd. and German and the Queen (No. 3), (1979) 45 C.C.C. (2d) 27 (Alta. S.C.A.D.); leave to appeal to S.C.C. refused, February 5, 1979.
- Re Nova Scotia Board of Censors and McNeil, (1976) 32 C.R.N.S. 376 (S.C.C.).
- Re Orysiuk and the Queen, (1978) 37 C.C.C. (2d) 445 (Alta. S.C.A.D.).
- Re Panarctic Oils Limited and the Queen, (1983) 69 C.C.C. (2d) 393 (N.W.T.S.C.).
- Re Potma and the Queen, (1982) 67 C.C.C. (2d) 19 (Ont. H.C.).
- Re R. and Siegel, (1982) 29 C.R. (3d) 81 (Ont. H.C.).
- Re Riley and the Queen, (1981) 60 C.C.C. (2d) 193 (Ont. C.A.).
- Re Schell and the Queen, (1980) 50 C.C.C. (2d) 532 (Alta. C.A.).
- Re Skapinker and Law Society of Upper Canada, (1982) 68 C.C.C. (2d) 300 (Ont. H.C.).
- Re Southam Inc. and the Queen (No. 1), (1983) 70 C.C.C. (2d) 257 (Ont. H.C.).
- Re Southam Inc. and the Queen (No. 2), (1983) 70 C.C.C. (2d) 264 (Ont. H.C.).

Re State of Wisconsin and Armstrong, (1973) 10 C.C.C. (2d) 271.  
(Fed. C.A.); leave to appeal to S.C.C. dismissed, March 5,  
1973.

R. ex rel. Lesley v. Morel, (1931) 1 W.W.R. 209 (Sask. K.B.).

Rakas v. Illinois, (1978) 439 U.S. 128 (U.S.S.C.).

Reagan v. People, (1949) 210 P (2d) 991 (Cal. S.C.).

Robertson and Rosetanni v. The Queen, (1964) 1 C.C.C. 1 (S.C.C.).

Rochin v. People of California, (1952) 342 U.S. 165 (U.S.S.C.).

Roncarelli v. Duplessis, (1959) S.C.R. 121.

Rothman v. The Queen, (1981) 59 C.C.C. (2d) 30 (S.C.C.); aff.  
(1979) 42 C.C.C. (2d) 377 (Ont. C.A.).

Rourke v. The Queen, (1977) 35 C.C.C. (2d) 129 (S.C.C.); aff.  
(1976) 25 C.C.C. (2d) 555 (B.C.C.A.); rev. (1974) 16 C.C.C.  
(2d) 133 (B.C.S.C.).

Sears v. United States, (1965) 343 F (2d) 139 (5th Circ. C.A.).

Sherman v. United States, (1958) 356 U.S. 369 (U.S.S.C.); rev.  
(1957) 240 F (2d) 949 (2nd Circ. C.A.).

Sifton v. Brunet, (1919) 31 C.C.C. 1 (Que. C.S.P.).

Silverthorne Lumber Co., Inc. v. United States, (1920) 251 U.S.  
385 (U.S.S.C.).

Sneddon v. Stevenson, (1967) 2 All. E.R. 1277 (Q.B.).

Sorrells v. United States, (1932) 287 U.S. 435 (U.S.S.C.); rev.  
(1932) 57 F (2d) 973 (4th Circ. C.A.).

Southam Inc. v. Hunter, (1982) 68 C.C.C. (2d) 356 (Alta. Q.B.).

State v. Currie, (1905) 102 N.W. 875 (North Dakota S.C.).

State v. Knight, (1976) 230 S.E. (2d) 732 (W. Va. S. Ct. of Appeals).

State v. Neely, (1931) 300 P. 561 (Montana S.C.).

State v. Trophy, (1899) 78 Mo. App. 206 (Kansas City C.A.).

Stone v. Powell, (1976) 428 U.S. 465 (U.S.S.C.).

Sutt v. Sutt, (1969) 1 O.R. 169 (C.A.).

Tameshwar v. The Queen, (1957) A.C. 476 (P.C.).

Terry v. State of Ohio, (1968) 392 U.S. 1 (U.S.S.C.).

Thorson v. Attorney General of Canada, (1975) 1 S.C.R. 138.

Turgeon v. R., (1981) 20 C.R. (3d) 269 (Que. C.A.); leave to appeal to S.C.C. granted, March 16, 1981.

United States v. Alexandro, (1982) 675 F (2d) 34 (2nd Circ. C.A.).

United States v. Burkley, (1978) 591 F (2d) 903 (D.C. Circ. C.A.); cert. denied (1979) 440 U.S. 966 (U.S.S.C.).

United States v. Calandra, (1974) 414 U.S. 338 (U.S.S.C.).

United States v. Ceccolini, (1978) 435 U.S. 268 (U.S.S.C.).

United States v. Conversano, (1969) 412 F (2d) 1143 (3rd Circ. C.A.); cert. denied (1969) 396 U.S. 905 (U.S.S.C.).

United States v. Garcia, (1977) 546 F (2d) 613 (5th Circ. C.A.); cert. denied (1977) 430 U.S. 958 (U.S.S.C.).

United States v. Janotti, (1982) 673 F (2d) 578 (3rd Circ. C.A.); cert. denied (1982) 402 S. Ct. 2906.

United States v. Kelly, (1982) 539 F. Supp. 363 (D.C. Distr. Ct.).

United States v. Mayo, (1974) 498 F (2d) 713 (D.C. Circ. C.A.).

United States v. Myers, (1980) 635 F (2d) 932 (2nd Circ. C.A.); cert. denied (1980) 449 U.S. 956 (U.S.S.C.).

United States v. Payner, (1980) 447 U.S. 727 (U.S.S.C.).

United States v. Peltier, (1975) 422 U.S. 531 (U.S.S.C.).

United States v. Russell, (1973) 411 U.S. 423 (U.S.S.C.); rev. (1972) 459 F (2d) 671 (9th Circ. C.A.).

United States v. Sherman, (1952) 200 F (2d) 880 (2nd Circ. C.A.).

United States v. Silva, (1959) 180 F. Supp. 557 (U.S. Distr. Ct., So. Distr. N.Y.).

United States v. Twigg, (1978) 588 F (2d) 373 (3rd Circ. C.A.).

United States v. Wade, (1967) 388 U.S. 218 (U.S.S.C.).

United States v. Williams, (1980) 622 F (2d) 830 (5th Circ. C.A.).

Vetrovec and Gaja v. The Queen, (1982) 67 C.C.C. (2d) 1 (S.C.C.);  
aff. (1981) 58 C.C.C. (2d) 537 (B.C.C.A.).

Vigeant v. The King, (1930) 54 C.C.C. 301 (S.C.C.).

Weeks v. United States, (1914) 232 U.S. 383 (U.S.S.C.).

Wilson v. People, (1939) 87 P (2d) 5 (Col. S.C.).

Wong Sun v. United States, (1963) 371 U.S. 471 (U.S.S.C.).

Woo Wai v. United States, (1915) 223 F. 412 (9th Circ. C.A.).

III Doctrine

A Texts

BAILEY, F. Lee and ROTHBLATT, Henry B., Handling Narcotic and Drug Cases, Rochester, N.Y., The Lawyers Cooperative Publishing Company, 1972, 549 p.

BALLENTINE, James A., Ballentine's Law Dictionary, 3rd Edition, William S. Anderson (ed), Rochester, N.Y., The Lawyers Cooperative Publishing Company, 1969, 1429 p.

BAUDOIN, Jean-Louis, La Responsabilité Civile Delictuelle, Montréal, Les Presses de l'Université de Montréal, 1973, 567 p.

BECKER, Howard S., (ed), The Other Side: Perspectives on Deviance, New York, The Free Press, 1964, 297 p.

BENT, Alan E. and ROSSUM, Ralph A., Police, Criminal Justice, and the Community, New York, Harper and Row, 1976, 384 p.

BERNHEIM, David, Defense of Narcotics Cases, Vol. 1, New York, Matthew Bender & Co. Inc., 1982, 448 p.

BLACK, Henry Campbell, Black's Law Dictionary, 5th Edition, Joseph R. Nolan, M.J. Connolly, contributing authors, St. Paul, Minnesota, West Publishing Company, 1979, 1511 p.

BLACKSTONE, William, Commentaries on the Laws of England, Vol. IV, 1st Edition, Oxford, The Clarendon Press, 1769, 492 p.

BLOCH, Herbert A. and GEIS, Gilbert, Man, Crime, and Society: The Forms of Criminal Behaviour, New York, Random House Inc., 1967, 642 p.

BRACON on the Laws and Customs of England, Vol. II, George E. Woodbine (ed), Cambridge, Mass., Harvard University Press, 1968, 449 p.

CALDWELL, Robert G., Criminology, 2nd Edition, New York, The Ronald Press Company, 1965, 774 p.

COHEN, Stanley A., Due Process of Law: The Canadian System of Criminal Justice, Toronto, The Carswell Company Limited, 1977, 429 p.

COHEN, Stanley (ed), Images of Deviance, Middlesex, England, Penguin Books Ltd., 1975, 255 p.

COKE, Edward, The Second Part of the Institutes of the Laws of England, 3rd Edition, London, printed for A. Crooke and others, 1669, 788 p.

COKE, Edward, The Third Part of the Institutes of the Laws of England, 4th Edition, London, printed for A. Crooke and others, 1669, 400 p.

Corpus Juris Secundum, Vol. 16 A, Brooklyn, N.Y., The American Law Book Co., 1952, 1452 p.

DAVIS, Kenneth Culp, Discretionary Justice: A Preliminary Inquiry, Baton Rouge, Louisiana State University Press, 1969, 233 p.

DEL BUONO, Vincent M., (ed), Criminal Procedure in Canada, Toronto, Butterworths, 1982, 497 p.

DE SMITH, S.A., de Smith's Judicial Review of Administrative Action, 4th Edition, J.M. Evans (ed), London, Stevens & Sons Limited, 1980, 626 p.

DEVLIN, Patrick, The Criminal Prosecution in England, London, Oxford University Press, 1966, 118 p.

DICEY, A.V., Introduction to the Study of the Law of the Constitution, 8th Edition, London, Macmillan and Co., Limited, 1915, 577 p.

DUMBAULD, Edward, The Constitution of the United States, Norman, Oklahoma, University of Oklahoma Press, 1964, 502 p.

FLETCHER, George P., Rethinking Criminal Law, Boston, Little, Brown, 1978, 898 p.

GOLD, Alan D., Annual Review of Criminal Law: 1982, Toronto, The Carswell Company Limited, 1982, 212 p.

GOLDSTEIN, Herman, Policing a Free Society, Cambridge, Mass., Ballinger Publishing Company, 1977, 371 p.

GRIFFITHS, Curt T. and KLEIN, John F. and VERDUN-JONES, Simon N., Criminal Justice in Canada: An Introductory Text, Toronto, Butterworths, 1980, 359 p.

GRONDIN, Rachel, Le Sursis des Procédures pour Abus en Matière Pénale, Master of Laws Thesis, University of Ottawa, 1981, 213 p.

GROSMAN, Brian A., The Prosecutor: An Inquiry into the Exercise of Discretion, Toronto, University of Toronto Press, 1969, 121 p.

GROSMAN, Brian A., Police Command, Toronto, Macmillan of Canada, 1975, 154 p.

HALE, Matthew, The History of the Pleas of the Crown, Vol. II, 1st Edition, London, printed by E. and R. Nutt, and R. Gosling, 1736, 612 p.

HAWKINS, William, A Treatise of the Pleas of the Crown, Vol. II, 3rd Edition, London, printed by E. and R. Nutt, and R. Gosling, 1739, 542 p.

HEWITT, D.J., Natural Justice, Butterworths, Sydney, 1972, 374 p.

HOGG, Peter W., Canada Act 1982: Annotated, Toronto, The Carswell Company Limited, 1982, 155 p.

HOLT, J.C., Magna Carta, Cambridge, G.B., Cambridge University Press, 1965, 378 p.

The Holy Bible, King James Version, New York, American Bible Society, 1816, 1111 p.

JACKSON, Paul, Natural Justice, London, Sweet & Maxwell, 1973, 88 p.

JOWITT, Earl, (Gen. ed), The Dictionary of English Law, Clifford Walsh (ed), London, Sweet & Maxwell Limited, 1959, 1905 p.

KADISH, Sanford H. and PAULSEN, Monrad G., Criminal Law and Its Processes: Cases and Materials, 2nd Edition, Boston, Little, Brown and Company, 1969, 1462 p.

KAMISAR, Yale and LAFAVE, Wayne R. and ISRAEL, Jerold H., Modern Criminal Procedure: Cases, Comments and Questions, 4th Edition, St. Paul, Minn., West Publishing Company, 1974, 1644 p.

KAUFMAN, Fred, The Admissibility of Confessions, 3rd Edition, Toronto, The Carswell Company Limited, 1979, 394 p.

KELLY, Alfred H. and HARBISON, Winfred A., The American Constitution: Its Origins and Development, 4th Edition, New York, W.W. Norton & Company, Inc., 1970, 1211 p.

KELLY, William and KELLY, Nora, Policing in Canada, Toronto, Macmillan of Canada, 1976, 704 p.

LAFAVE, Wayne R., Arrest: The Decision to Take a Suspect into Custody, Frank J. Remington (ed), Boston, Little, Brown & Company, 1965, 540 p.

LAFAVE, Wayne R. and SCOTT Jr., Austin W., Criminal Law, St. Paul, Minn., West Publishing Company, 1972, 763 p.

LINDEN, Allen M., (ed), Studies in Canadian Tort Law, Toronto, Butterworths, 1968, 612 p.

LINDEN, Allen M., Canadian Tort Law, 3rd Edition, Toronto, Butterworths, 1982, 737 p.

MacFARLANE, Bruce A., Drug Offences in Canada, Toronto, Canada Law Book Limited, 1979, 607 p.

McKECHNIE, William Sharp, Magna Carta: A Commentary on the Great Charter of King John, 2nd Edition, N.Y., Burt Franklin, 1914, 532 p.

McWILLIAMS, Peter K., Canadian Criminal Evidence, Agincourt, Ont., Canada Law Book Limited, 1974, 703 p.

MILLER, Frank W., Prosecution: The Decision to Charge a Suspect with a Crime, Frank J. Remington (ed), Boston, Little, Brown and Company, 1969, 366 p.

MOTT, Rodney L., Due Process of Law, New York, Da Capo Press, 1973, 721 p.

OXNER, Sandra, (ed), Criminal Justice, Toronto, The Carswell Company Limited, 1982, 282 p.

PACKER, Herbert L., The Limits of the Criminal Sanction, Stanford, California, Stanford University Press, 1968, 385 p.

PENNOCK, J. Roland and CHAPMAN, John W., (ed), Due Process, New York, New York University Press, 1977, 362 p.

PERKINS, Rollin M., Perkins on Criminal Law, 2nd Edition, Mineola, N.Y., The Foundation Press, Inc., 1969, 1115 p.

PHIPSON on Evidence, 12th Edition, John Huxley Buzzard, Richard May, M.N. Howard, (ed), London, Sweet and Maxwell, 1976, 1014 p.

RADIN, Max, Radin Law Dictionary, 2nd Edition, Lawrence G. Greene (ed), Dobbs Ferry, N.Y., Oceana Publications, Inc., 1970, 402 p.

RADZINOWICZ, Leon, A History of English Criminal Law and its Administration from 1750: Volume 2: The Clash Between Private Initiative and Public Interest in the Enforcement of the Law, London, Stevens & Sons Limited, 1956, 751 p.

RADZINOWICZ, Leon and WOLFGANG, Marvin E., (ed), Crime and Justice: Volume 1: The Criminal in Society, New York, Basic Books, Inc., 1971, 515 p.

- RADZINOWICZ, Leon and WOLFGANG, Marvin E., (ed), Crime and Justice: Volume II: The Criminal in the Arms of the Law, New York, Basic Books, Inc., 1971, 703 p.
- ST. J. MACDONALD, R. and HUMPHREY, John P., (ed), The Practice of Freedom: Canadian Essays on Human Rights and Fundamental Freedoms, Toronto, Butterworths, 1979, 460 p.
- SCHUR, Edwin M., Crimes Without Victims, Englewood Cliffs, N.J., Prentice Hall, Inc., 1965, 180 p.
- SKOLNICK, Jerome H., Justice Without Trial: Law Enforcement in Democratic Society, New York, John Wiley & Sons Inc., 1966, 279 p.
- SMITH, J.C. and HOGAN, Brian, Criminal Law, 3rd Edition, London, Butterworths, 1973, 678 p.
- SOWLE, Claude R., (ed), Police Power and Individual Freedom: The Quest for Balance, Chicago, Aldine Publishing Company, 1969, 287 p.
- STORY, Joseph, Commentaries on the Constitution of the United States, 4th Edition, Thomas M. Cooley (ed), Vol. I and II, Boston, Little, Brown and Company, 1873, Vol. I, 752 p., Vol. II, 737 p.
- STUART, Don, Canadian Criminal Law: A Treatise, Toronto, The Carswell Company Limited, 1982, 602 p.
- TARNOPOLSKY, Walter Surma, The Canadian Bill of Rights, 2nd Edition, Toronto, The Macmillan Company of Canada, Limited, 1978, 436 p.
- TARNOPOLSKY, Walter S. and BEAUDOIN, Gérald A., (ed), The Canadian Charter of Rights and Freedoms: Commentary, Toronto, The Carswell Company Limited, 1982, 590 p.
- TIFFANY, L.P. and McINTYRE, JR., D.M. and ROTENBERG, D.L., Detection of Crime, Frank J. Remington (ed), Boston, Little, Brown and Company, 1967, 286 p.
- VOLLMER, August, The Police and Modern Society, Montclair, N.J., Patterson Smith, 1971, 253 p.
- WILLIAMS, Glanville, Criminal Law: The General Part, 2nd Edition, London, Stevens & Sons Limited, 1961, 929 p.

B Articles

- ABEL, Albert S., The Bill of Rights in The United States: What has it Accomplished? (1959) 37 Can. Bar Rev. 147-188
- ABRAMSON, Leslie W. and LINDEMAN, Lisa L., Entrapment and Due Process in the Federal Courts, (1980) 8 Am. J. Crim. Law 139-182.
- ANGENE, Manfred, Case References on Abuse of Process, (1977) 37 C.R.N.S. 153-225.
- Annotation, Entrapment to Commit Crime with View to Prosecution Therefor, (1922) 18 A.L.R. 146-192.
- ARMOUR, J., Annotation, Police Traps and Incitements to Crime, (1933) 59 C.C.C. 273-301.
- ARVAY, J.J., Developments in Criminal Law and Procedure: The 1980-81 Term, (1982) 3 Supreme Court L.R. 171-309.
- ASHWORTH, A.J., Defences of General Application: The Law Commission's Report No. 83: (3) Entrapment, (1978) Crim. L.R. 137-140.
- BACHAND, Gilles, Légalité et Piège Illégal, (1982) 12 R.D.U.S. 357-394.
- BAKER, Newman F., The Prosecutor - Initiation of Prosecution, (1932-33) 23 J. Crim. L.C. & P.S. 770-796.
- BAKER, Newman F. and DE LONG, Earl H., The Prosecuting Attorney: Powers and Duties in Criminal Prosecution, (1933-34) 24 J. Crim. L.C. & P.S. 1025-1065.
- BANCROFT, David P., Administration of the Affirmative Trap and The Doctrine of Entrapment: Device and Defense, (1963-64) 31 U. of Chicago L.R. 137-179.
- BARKER, B.M., Police Discretion and the Principle of Legality, (1965-66) 8 Cr. L.Q. 400-407.
- BARLOW, N.L.A., Recent Developments in New Zealand in the Law Relating to Entrapment: 1 and 2, (1976) N.Z.L.J. 304-312, 328-334.
- BARLOW, N.L.A., Entrapment and the Common Law: Is There a Place for the American Doctrine of Entrapment? (1978) 41 Modern L.R. 266-285.

- BARTON, P.S., Abuse of Process as a Plea in Bar of Trial, (1972-73) 15 Cr. L.Q. 437-463.
- BERMAN, Peter S. and GOLDENBERG, Norman, Entrapment - A Call for the Elimination of the Ninth Circuit Prohibition Against Pleading Inconsistent Defenses, (1972) 4 Southwestern U.L.R. 121-133.
- BOROVYOY, Alan, The Powers of the Police and the Freedoms of the Citizen, in ST. J. MACDONALD, R., HUMPHREY, John P. (ed), The Practice of Freedom: Canadian Essays on Human Rights and Fundamental Freedoms, Toronto, Butterworths, 1979, 425-446.
- BOWKER, W.F., Basic Rights and Freedoms: What are They? (1959) 37 Can. Bar Rev. 43-65.
- BRAITHWAITE, W.J., Developments in Criminal Law and Procedure: The 1979-80 Term, (1981) 2 Supreme Court L.R. 177-234.
- BRITTAIN, R.P., "Entrapment" - The English Approach, (1974) 124 New L.J. 1072-1073.
- BROCKELBANK, W.J., The Role of Due Process in American Constitutional Law, (1953-54) 39 Cornell L.Q. 561-591.
- BUCKNER, D.E., Annotation, Entrapment to Commit Bribery or Offer to Bribe, (1960) 69 A.L.R. (2d) 1397-1445.
- BULL, Henry H., The Career Prosecutor of Canada, (1962) 53 J. Crim. L.C. & P.S. 89-96.
- CHASSE, Kenneth L., Practice Note, Abuse of Process - Will it Survive Rourke, (1977) 38 C.R.N.S. 270-1.
- CHASSE, Kenneth L., Annotation, Abuse of Process as a Control of Prosecutorial Discretion, (1970) 10 C.R.N.S. 392-408.
- CHASSE, Kenneth L., The Role of The Prosecutor in OXNER, Sandra, (ed), Criminal Justice, Toronto, The Carswell Company Limited, 1982, 79-99.
- CINI, Dale A., Due Process of Law and the Entrapment Defense, (1964) U. of Illinois Law Forum 821-827.
- COHEN, Stanley A., Abuse of Process: The Aftermath of Rourke, (1977) 39 C.R.N.S. 349-365.
- COHEN, Stanley, Criminal Procedure and The Canadian Charter of Rights and Freedoms in DEL BUONO, Vincent M., (ed), Toronto, Butterworths, 1982, 1-26.

- COHEN, Stanley A., Observations on the Re-emergence of the Doctrine of Abuse of Process, (1981) 19 C.R. (3d) 310-326.
- Commentary, R. v. Burnett and Lee, (1973) Crim. L.R. 749.
- Commentary, R. v. Sang, (1979) Crim. L.R. 656.
- Comment, The Assertion of Inconsistent Defenses in Entrapment Cases, (1970-71) 56 Iowa L.R. 686-695.
- CONKLIN, William E., Interpreting and Applying the Limitations Clause: An Analysis of Section 1, (1982) 4 Supreme Court L.R. 75-88.
- COTLER, Irwin, Freedom of Assembly, Association, Conscience and Religion (S. 2(a), (c) and (d)) in TARNOPOLSKY, Walter S., BEAUDOIN, Gérald A., (ed), The Canadian Charter of Rights and Freedoms: Commentary, Toronto, The Carswell Company Limited, 1982, 123-211.
- COWEN, Richard A., The Entrapment Doctrine in The Federal Courts and Some State Court Comparisons, (1958-59) 49 J. Crim. L.C. & P.S. 447-455.
- DAVIS, Edward M., Victimless Crimes - The Case for Continued Enforcement, (1973) 1 J. Police Sci. & Admin. 11-20.
- DAVIS, R.P., Annotation, Availability of Defense of Entrapment Where Accused Denies Participating at All in Offense, (1958) 61 A.L.R. (2d) 677-682.
- DE FEO, Michael A., Entrapment as a Defense to Criminal Responsibility: Its History, Theory and Application, (1967) 1 U. of San Francisco L.R. 243-276.
- DEJA, Daniel R., Entrapment in the Federal Courts: Sixty Years of Frustration, (1974-75) 10 New England L.R. 179-252.
- DEVLIN, K.M., Informers, Spies and Agents Provocateurs, (1971) 19 Chitty's L.J. 65-68.
- DIX, George E., Undercover Investigations and Police Rulemaking, (1974-75) 53 Texas L.R. 203-294.
- DONNELLY, Richard C., Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs, (1951) 60 Yale L.J. 1091-1131.
- DUDMAN, Jan Mark, The Defense of Entrapment in Administrative Proceedings, (1973-74) 1 Pepperdine L.R. 316-325.

Editorial, Incitement to Crime, (1969) 119 New L.J. 497-498.

Editorial, Police Participation in Crime, (1969) 119 New L.J. 513.

Editorial, Police Use of Informants, (1969) 119 New L.J. 513.

ELA, Beth, Criminal Law - Entrapment - Predisposition of Defendant Crucial Factor in Entrapment Defense, (1973-74) 59 Cornell L.R. 546-568.

EWASCHUK, E.G., The Rule Against Multiple Convictions and Abuse of Process, (1975) 28 C.R.N.S. 28-55.

EWASCHUK, E.G., The Charter: An Overview and Remedies, (1982) 26 C.R. (3d) 54-91.

FAIRLEY, H. Scott, Enforcing the Charter: Some Thoughts on an Appropriate and Just Standard for Judicial Review, (1982) 4 Supreme Court L.R. 217-254.

FINKELSTEIN, Neil, The Relevance of Pre-Charter Case Law for Post-Charter Adjudication, (1982) 4 Supreme Court L.R. 267-286.

FLETCHER, George P., The Individualization of Excusing Conditions, (1973-74) 47 Southern California L.R. 1269-1309.

FRIDMAN, G.H.L., Punitive Damages in Tort, (1970) 48 Can. Bar Rev. 373-409.

FRIEDLAND, M.L., Controlling Entrapment, (1982) U. of Toronto L.J. 1-30.

FRIEDLAND, M.L., Legal Rights under the Charter, (1982) 24 Cr. L.Q. 430-454.

GARANT, Patrice, Fundamental Freedoms and Natural Justice (Section 7) in TARNOPOLSKY, Walter S., BEAUDOIN, Gérald A., (ed), The Canadian Charter of Rights and Freedoms: Commentary, Toronto, The Carswell Company Limited, 1982, 257-290.

GIBSON, Dale, Interpretation of the Canadian Charter of Rights and Freedoms: Some General Considerations in TARNOPOLSKY, Walter S., BEAUDOIN, Gérald A., (ed), The Canadian Charter of Rights and Freedoms: Commentary, Toronto, The Carswell Company Limited, 1982, 25-39.

GIBSON, Dale, Enforcement of the Canadian Charter of Rights and Freedoms (Section 24) in TARNOPOLSKY, Walter S.,

- BEAUDOIN, Gérald A., (ed), The Canadian Charter of Rights and Freedoms: Commentary, Toronto, The Carswell Company Limited, 1982, 489-527.
- GIBSON, Dale, The Charter of Rights and the Private Sector, (1982) 12 Manitoba L.J. 213-219.
- GITCHOFF, G. Thomas, and ELLENBOGEN, Joseph, and ELLENBOGEN, Elsie, Victimless Crimes: The Case Against Continued Enforcement, (1973) 1 J. Police Sci. & Admin. 401-408.
- GOLD, Alan D., Notes and Comments, Kirzner v. The Queen, (1977-78) 20 Cr. L.Q. 166-169.
- GOLD, Alan D., "To Dream the Impossible Dream": A Problem in Criminal Attempts (and Conspiracy) Revisited, (1978-79) 21 Cr. L.Q. 218-244.
- GOLD, Alan D., The Legal Rights Provisions - A New Vision or Déjà Vu? (1982) 4 Supreme Court L.R. 107-130.
- GOLDSTEIN, Joseph, Police Discretion Not to Invoke the Criminal Process: Low Visibility Decisions in the Administration of Justice, (1959-60) 69 Yale L.J. 543-594.
- GOODNOW, John S., Entrapment: An Analysis of Disagreement, (1965) 45 Boston U. L.R. 542-571.
- GOURLIE, William C., Role of the Prosecutor: Fair Minister of Justice with Firm Convictions, (1982) 12 Manitoba L.J. 31-42.
- GRANT, Alan, The Police: Organization, Personnel and Problems in ST. J. MACDONALD, R., HUMPHREY, John P. (ed), The Practice of Freedom: Canadian Essays on Human Rights and Fundamental Freedoms, Toronto, Butterworths, 1979, 405-424.
- GROOT, Roger D., The Serpent Bequiled Me and I (Without Scianter) Did Eat - Denial of Crime and The Entrapment Defense, (1973) U. of Illinois-Law Forum 254-278.
- HAINES, Bruce, Annotation, Judicial Ombudsmanship - A Problem in Policy, (1971) 12 C.R.N.S. 11-28.
- HARDY, Ben A., The Traps of Entrapment, (1974-75) 3 Am. J. Crim. Law 165-204.
- HEYDON, J.D., The Corroboration of Accomplices, (1973) Crim. L.R. 264-281.
- HEYDON, J.D., Illegally Obtained Evidence (1) and (2), (1973) Crim. L.R. 603-612, 690-699.

- HEYDON, J.D., The Problems of Entrapment, (1973) Cambridge L.J. 268-286.
- HEYDON, J.D., Entrapment and Unfairly Obtained Evidence in the House of Lords, (1980) Crim. L.R. 129-135.
- HITCHLER, W.H., Entrapment as a Defense in Criminal Cases, (1937-38) 42 Dickinson L.R. 195-203.
- HOGG, Peter W., A Comparison of the Canadian Charter of Rights and Freedoms with the Canadian Bill of Rights in TARNOPOLSKY, Walter S., BEAUDOIN, Gérald A., (ed), The Canadian Charter of Rights and Freedoms: Commentary, Toronto, The Carswell Company Limited, 1982, 1-23.
- HUMPHREYS, Christmas, The Duties and Responsibilities of Prosecuting Counsel, (1955) Crim. L.R. 739-748.
- HUTCHINSON, Allan C., and WITHINGTON, Neil R., Comments, R. v. Sana, (1980) 58 Can. Bar Rev. 376-390.
- JODOUIN, André, Commentaire sur Regina v. Wrav, (1970) 1 R.G.D. 390-394.
- JODOUIN, André, Les Abus de Pouvoir et de Fonction en Droit Pénal Canadien, (1978) 19 C. de D. 21-54.
- KADISH, Sanford H., Overcriminalization in RADZINOWICZ, Leon, WOLFGANG, Marvin E., (ed), Crime and Justice: Volume 1: The Criminal in Society, New York, Basic Books, Inc., 1971, 56-71.
- KEEDY, Edward R., Criminal Attempts at Common Law, (1953-54) 102 U. of Pennsylvania L.R. 464-489.
- LACERTE-LAMONTAGNE, Céline, L'Abus de Procédure en Droit Pénal, (1982) 42 R. du B. 69-90.
- LAGARDE, Irénée, Indicateur, Agent Provocateur et Complice, (1964) 10 McGill L.J. 38-59.
- LEDERMAN, W.R., The Nature and Problems of a Bill of Rights, (1959) 37 Can. Bar Rev. 4-15.
- LEVY, J.C., Police Entrapment - A Note on Recent Developments, (1972) 20 Chitty's L.J. 331-336.
- LIVERMORE, Joseph M., Enforcement Workshop: Abscam Entrapment, (1981) 17 Crim. L. Bull. 69-72.
- LYSYK, Kenneth M., The Rights and Freedoms of the Aboriginal Peoples of Canada, (Ss. 25, 35 and 37) in TARNOPOLSKY,

- Walter S., BEAUDOIN, Gérald A., (ed), The Canadian Charter of Rights and Freedoms: Commentary, Toronto, The Carswell Company Limited, 1982, 467-488.
- MARSHALL, Geoffrey, Due Process in England in PENNOCK, J. Roland, CHAPMAN, John W., (ed), Due Process, New York, New York University Press, 1977, 69-89.
- MARX, Herbert, Entrenchment, Limitations and Non-Obstante (Ss. 1, 33 and 52) in TARNOPOLSKY, Walter S., BEAUDOIN, Gérald A., (ed), The Canadian Charter of Rights and Freedoms: Commentary, Toronto, The Carswell Company Limited, 1982, 61-74.
- MATHES, William C., and JONES, Robert T., Toward a "Scope of Official Duty" Immunity for Police Officers in Damage Actions, (1964-65) 53 Georgetown L.J. 889-914.
- MCCARROLL, William J., The Prosecutor's Duty of Fairness in OXNER, Sandra, (ed), Criminal Justice, Toronto, The Carswell Company Limited, 1982, 101-102.
- McCLEAN, J.D., Informers and Agents Provocateurs, (1969) Crim. L.R. 527-537.
- McDONALD, D.C., Some Observations on the Proposed Uniform Evidence Act, (1982) 24 Cr. L.Q. 298-330.
- McGARR, Frank J., The Exclusionary Rule: An Ill Conceived and Ineffective Remedy in SOWLE, Claude R., (ed), Police Power and Individual Freedom: The Quest for Balance, Chicago, Aldine Publishing Company, 1969, 99-103.
- McILWAIN, C.H., Due Process of Law in Magna Carta, (1914) 14 Columbia L.R. 27-51.
- McMURTRY, R. Roy, The New Charter and the Role for Lawyers, Notes for remarks made to a Conference on the Impact of the New Charter of Rights and Freedoms on Canadian Business, Toronto, February 5, 1982, 1-22.
- McWHINNEY, Edward, The Supreme Court and the Bill of Rights - The Lessons of Comparative Jurisprudence, (1959) 37 Can. Bar Rev. 16-42.
- MEEHAN, Eugene M.A., Attempt - Some Rational Thoughts on its Rationale, (1976-77) 19 Cr. L.Q. 215-240.
- MENDELSON, Wallace, Foreign Reactions to American Experience with "Due Process of Law", (1955) 41 Virginia L.R. 493-503.

- MIKELL, William E., The Doctrine of Entrapment in the Federal Courts, (1941-42) 90 U. of Pennsylvania L.R. 245-265.
- MILLER, Charles A., The Forest of Due Process of Law: The American Constitutional Tradition in PENNOCK, J. Roland, CHAPMAN, John W., (ed), Due Process, New York, New York University Press, 1977, 3-68.
- MURCHISON, Kenneth M., The Entrapment Defense in Federal Courts: Modern Developments, (1976) 47 Mississippi L.J. 573-619.
- Note, Prosecutor's Discretion, (1954-55) 103 U. of Pennsylvania L.R. 1057-1087.
- Note, Entrapment, (1959-60) 73 Harvard L.R. 1333-1345.
- Notes and Comments, Criminal Law - Entrapment by Federal Officers, (1958) 33 N.Y.U.L.R. 1033-1041.
- Notes and Comments, The Serpent Bequiled Me and I Did Eat: The Constitutional Status of the Entrapment Defense, (1964-65) 74 Yale L.J. 942-955.
- Notes and Comments, Judicial Control of Secret Agents, (1966-67) 76 Yale L.J. 994-1019.
- Notes, Entrapment by Government Officials, (1928) 28 Columbia L.R. 1067-1075.
- OAKS, Dallin H., Studying the Exclusionary Rule in Search and Seizure, (1969-70) 37 U. of Chicago L.R. 665-757.
- OLAH, John A., The Doctrine of Abuse of Process: Alive and Well in Canada, (1978) 1 C.R. (3d) 341-367.
- ORFIELD, Lester B., The Defense of Entrapment in the Federal Courts, (1967) Duke L.J. 39-71.
- ORTEGO, Jim; and GOODE, Matthew, Abuse of Process in Canadian Criminal Law: The New Equity? A paper presented for the Canadian Institute for the Administration of Justice, Dalhousie University, Halifax, 1977, 1-354.
- OSBOROUGH, Nial, Police Prosecutorial Discretion and the Police Image: Reflections on the Problem in England, (1966) 5 W. Ont. L.R. 62-78.
- OSCAPELLA, Eugene, A Study of Informers in England, (1980) Crim. L.R. 136-146.
- PARKER, Graham, Comments, R. v. Ormerod, (1970) 48 Can. Bar Rev. 178-189.

- PARK, Roger, The Entrapment Controversy, (1975-76) 60 Minnesota L.R. 163-274.
- PATERSON, Robert K., Towards a Defence of Entrapment, (1979) 17 Osgoode Hall L.J. 261-284.
- PAULSEN, Monrad G., The Persistence of Substantive Due Process in the States, (1949-50) 34 Minnesota L.R. 91-118.
- PERLEY, Warren, Should Police Pay Witnesses for Testimony? The Gazette, Montréal, November 20, 1982, p. B-4.
- POPPEL, A.E., Annotation, Agents Provocateurs, Police Spies and Informers, (1946) 1 C.R. 336-339.
- QUICK, Albert T., Attitudinal Aspects of Police Compliance with Procedural Due Process, (1978) 6 Am. J. Crim. Law 25-56.
- RAND, Ivan C., Except by Due Process of Law, (1961) 2 Osgoode Hall L.J. 171-190.
- ROBERTS, D.W., The Legacy of Regina v. Wray, (1972) 50 Can. Bar Rev. 19-38.
- ROBINSON, Paul H., Criminal Law Defenses: A Systematic Analysis, (1982) 82 Columbia L.R. 199-291.
- ROSSUM, Ralph A., The Entrapment Defense and the Teaching of Political Responsibility: The Supreme Court as Republican Schoolmaster, (1978) 6 Am. J. Crim. Law 287-306.
- ROTENBERG, Daniel L., The Police Detection Practice of Encouragement, (1963) 49 Virginia L.R. 871-903.
- SCHWARTZ, Louis B., Morals Offenses and the Model Penal Code, (1963) 63 Columbia L.R. 669-686.
- SHAFER, Joel, and SHERIDAN, William J., The Defence of Entrapment, (1970) 8 Osgoode Hall L.J. 277-299.
- SHEPPARD, A.F., Restricting the Discretion to Exclude Admissible Evidence, (1971-72) 14 Cr. L.Q. 334-352.
- SMITH, J.C., Two Problems in Criminal Attempts, (1956-57) 70 Harvard L.R. 422-448.
- SMITH, J.C., Two Problems in Criminal Attempts Re-Examined - II, (1962) Crim. L.R. 212-222.
- SMITH, J.C., Civil Law Concepts in the Criminal Law, (1972) 31 Cambridge L.J. 197-224.

- SMITH, K.J.M., The Law Commission Working Paper No. 55 on Codification of the Criminal Law, Defences of General Application: Official Instigation and Entrapment, (1975) Crim. L.R. 12-22.
- SNEIDEMAN, Barnett M., A Judicial Test for Entrapment: The Glimmerings of a Canadian Policy on Police-Instigated Crime, (1973-74) 16 Cr. L.Q. 81-111.
- STENNING, Philip C., Observations on the Supreme Court of Canada's Decision in R. v. Osborn, (1970-71) 13 Cr. L.Q. 164-183.
- STOBER, Michael, Entrapment, (1976) 7 R.G.D. 25-69.
- STUART, Don, Amato: Watersheds in Entrapment and Abuse of Process, (1982) 29 C.R. (3d) 54-59.
- TANFORD, J. Alexander, Entrapment: Guidelines for Counsel and the Courts, (1977) 13 Crim. L. Bull. 5-29.
- TARNOPOLSKY, Walter S., Just Deserts or Cruel and Unusual Treatment or Punishment? Where Do We Look for Guidance? (1978) 10 Ottawa L.R. 1-34.
- TEMKIN, Jennifer, Police Traps, (1974) 37 Modern L.R. 102-104.
- THOMSON, III, Robert H., Elevation of Entrapment to a Constitutional Defense, (1973-74) 7 U. of Michigan Journal of Law Reform 361-387.
- TURNER, Keith, The Role of Crown Counsel in Canadian Prosecutions, (1962) 40 Can. Bar Rev. 438-459.
- WATT, John David, The Defence of Entrapment, (1971) 13 Cr. L.Q. 313-341.
- WEILER, Paul C., The Control of Police Arrest Practices: Reflections of a Tort Lawyer in LINDEN, Allen M., (ed) Studies in Canadian Tort Law, Toronto, Butterworths, 1968, 416-469.
- WEILER, Paul C., "Who Shall Watch the Watchmen?" - Reflections on Some Recent Literature About the Police, (1968-69) 11 Cr. L.Q. 420-433.
- WEILER, Paul, The Supreme Court of Canada and the Doctrines of Mens Rea, (1971) 49 Can. Bar Rev. 280-363.
- WEINBERG, M.S., The Judicial Discretion to Exclude Relevant Evidence, (1975) 21 McGill L.J. 1-41.
- WILLIAMS, Glanville, Evidence Obtained by Illegal Means, (1955) Crim. L.R. 339-349.

WILLIAMS, Glanville, Discretion in Prosecuting, (1956) Crim. L.R. 222-231.

WILLIAMS, Glanville, Criminal Attempts - A Reply, (1962) Crim. L.R. 300-307.

WILLIAMS, Glanville, Theft, Consent and Illegality: Some Problems, (1977) Crim. L.R. 327-338.

WILLIAMS, Glanville, Attempting the Impossible - A Reply, (1979-80) 22 Cr. L.Q. 49-57.

WILLIAMS, Paul W., The Defense of Entrapment and Related Problems in Criminal Prosecution, (1959-60) 28 Fordham L.R. 399-418.

WILSON, James Q., Police Discretion in RADZINOWICZ, Leon, WOLFGANG, Marvin E., (ed), Crime and Justice: Volume II: The Criminal in the Arms of the Law, New York, Basic Books, Inc., 1971, 253-269.

WRAY, Douglas J., The Abuse of Power Doctrine in Canadian Criminal Law, (1976) 34 U. of Toronto Fac. L.R. 159-179.

WRIGHT, Charles Alan, Must The Criminal Go Free if the Constable Blunders? (1971-72) 50 Texas L.R. 736-745.

IV Reports of Commissions, Committees, etc.

The American Law Institute, Model Penal Code, (Proposed Official Draft), Philadelphia, 1962, 346 p.

Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police (McDonald Commission), Second Report, Freedom and Security Under the Law, Vol. 1 and 2, Ottawa, Canadian Government Publishing Centre, 1981, 1257 p.

Final Report of the National Commission on Reform of Federal Criminal Laws, A Proposed New Federal Criminal Code (1971), (Brown Commission Proposal); Washington, D.C., U.S. Government Printing Office, 1971, 364 p.

Law Reform Commission of Canada, Control of the Process, Criminal Procedure, Working Paper 15, Ottawa, Information Canada, 1976, 60 p.

Law Reform Commission of Canada, Criminal Law, the General Part: Liability and Defences, Working Paper 29, Ottawa, Minister of Supply and Services Canada, 1982, 204 p.

Law Reform Commission of Canada, The Exclusion of Illegally Obtained Evidence, Study Paper 1974, Ottawa, Information Canada, 1974, 36 p.

Law Reform Commission of Canada, Report on Evidence, Ottawa, Information Canada, 1975, 114 p.

Law Reform Commission of Canada, Towards a Codification of Canadian Criminal Law, Study Paper, Ottawa, Information Canada, 1976, 56 p.

Report of the Canadian Committee on Corrections: Towards Unity: Criminal Justice and Corrections (Quimet Committee), Ottawa, The Queen's Printer, 1969, 505 p.

Report of the Royal Commission Appointed to Consider the Law Relating to Indictable Offences (Draft Code of 1879), London, England, printed by George Edward Eyre and William Spottiswoode, 1879, 209 p.

Uniform Law Conference of Canada, The Uniform Evidence Act 1981: A Basis for Uniform Evidence Legislation, Report No. 37A, Edmonton, Institute of Law Research and Reform, 1982, 109 p.