



**SUPREME COURT OF CANADA**

**CITATION:** R. v. Ahmad, 2020 SCC 11

**APPEALS HEARD:** October 11, 2019

**JUDGMENT RENDERED:** May 29, 2020

**DOCKETS:** 38165, 38304

**BETWEEN:**

**Javid Ahmad**  
Appellant

and

**Her Majesty The Queen**  
Respondent

- and -

**British Columbia Civil Liberties Association, Criminal Lawyers' Association of  
Ontario and Canadian Association of Chiefs of Police**  
Interveners

**AND BETWEEN:**

**Landon Williams**  
Appellant

and

**Her Majesty The Queen**  
Respondent

- and -

**British Columbia Civil Liberties Association and Independent Criminal Defence  
Advocacy Society**  
Interveners

**CORAM:** Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ.

**JOINT REASONS FOR JUDGMENT:** Karakatsanis, Brown and Martin JJ. (Abella and Kasirer JJ. (paras. 1 to 85) concurring)

**REASONS DISSENTING IN PART:** Moldaver J. (Wagner C.J. and Côté and Rowe JJ. (paras. 86 to 188) concurring)

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R. v. AHMAD

**Javid Ahmad**

*Appellant*

v.

**Her Majesty The Queen**

*Respondent*

and

**British Columbia Civil Liberties Association,  
Criminal Lawyers' Association of Ontario and  
Canadian Association of Chiefs of Police**

*Intervenors*

- and -

**Landon Williams**

*Appellant*

v.

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**Indexed as: R. v. Ahmad**

**2020 SCC 11**

File Nos.: 38165, 38304.

2019: October 11; 2020: May 29.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

*Criminal law — Abuse of process — Entrapment — Dial-a-dope operations — Police receiving tips of unknown reliability that phone numbers of two accused associated with drug trafficking — Undercover officers phoning each accused and arranging for drug transactions — Accused arrested and charged with drug-related offences — Accused seeking stays of proceedings on basis of entrapment — Whether police had reasonable suspicion that accused or phone numbers were engaged in drug trafficking at time police provided opportunity to commit offences — Application of entrapment framework to dial-a-dope investigations.*

In each appeal, the police received an unsubstantiated tip that a phone number was associated with a suspected dial-a-dope operation. In these operations, drug traffickers use cell phones to connect with their customers and sell them illicit

drugs. Officers called the numbers and, in brief conversations with the men who answered, requested drugs and arranged meetings to complete the transactions. A and W were subsequently arrested and charged with drug-related offences. At trial, each accused claimed that the proceedings should be stayed on the basis of entrapment. In A's case, the trial judge entered convictions, concluding that the accused was not entrapped because the police had not offered him an opportunity to traffic drugs until they had sufficiently corroborated the tip in the course of the conversation. In W's case, the trial judge found that the accused was entrapped because the police provided him an opportunity to sell cocaine before forming a reasonable suspicion that he was engaged in drug trafficking. The Court of Appeal held that entrapment was not made out for either A or W. A majority of the court concluded that where reasonable suspicion relates to the phone number itself, the police can provide opportunities to commit offences to a person associated with that phone number, even if they do not also have a reasonable suspicion about the person who answers the phone. Accordingly, the Court of Appeal dismissed A's appeal but allowed the Crown's appeal in W's case, entering convictions.

*Held:* The appeal by A should be dismissed.

*Held* (Wagner C.J. and Moldaver, Côté and Rowe JJ. dissenting): The appeal by W should be allowed, the convictions set aside, and the stay of proceedings reinstated.

*Per* Abella, **Karakatsanis, Brown, Martin** and Kasirer JJ.: The entrapment framework set out in *R. v. Mack*, [1988] 2 S.C.R. 903, and *R. v. Barnes*, [1991] 1 S.C.R. 449, has proved workable for decades in a variety of contexts. It has stood the test of time, furnishing a principled, stable and generally applicable doctrine that is fully capable of adapting to a variety of circumstances and responding to the evolution of crime and police tactics. There is no reason to alter the carefully calibrated balance struck in these cases in investigations of suspected dial-a-dope operations. Applying the Court's entrapment framework and in particular its reasonable suspicion standard, the decision of each trial judge should be affirmed. While A was not entrapped, W was.

The Court's decision in *Mack* settled the law of entrapment in Canada. It set out two alternative branches, either of which is sufficient to ground an accused's claim of entrapment and justify a stay of proceedings. On the first branch, at issue in these appeals, the police may present an opportunity to commit a crime only upon forming reasonable suspicion that either a specific person is engaged in criminal activity or people are carrying out criminal activity at a specific location, sometimes referred to as a *bona fide* inquiry. The offer of an opportunity to commit a crime must always be based upon a reasonable suspicion of particular criminal activity, whether by a person, in a place defined with sufficient precision, or a combination of both. In every context, the reasonable suspicion standard ensures courts can conduct meaningful judicial review of what the police knew at the time the opportunity was provided. This standard requires the police to disclose the basis for their belief and to

show they had legitimate reasons related to criminality for targeting an individual or the people associated with a location.

An individual phone number can qualify as a place over which police may form reasonable suspicion. However, a phone number is not the same as a public physical location. A phone is a means of private communication between persons, and calling a number, or exchanging text messages, is an inherently private activity. Accordingly, state surveillance over virtual spaces is of an entirely different qualitative order than surveillance over a public space. Technology and remote communication significantly increase the number of people to whom police investigators can provide opportunities, thereby heightening the risk that innocent people will be targeted. It is therefore important to carefully delineate and tightly circumscribe virtual locations in which police can provide the opportunity to commit a crime. The virtual space must be defined with sufficient precision in order to ground reasonable suspicion. Reviewing courts must scrutinize the evidence that prompted the inquiry to ensure the police have narrowed their scope so that the purview of their inquiry is no broader than the evidence allows.

Police cannot offer a person who answers the phone the opportunity to commit an offence without having formed reasonable suspicion that the person using that phone, or that phone number, is engaged in criminal activity. Whether the police are targeting a person, place or phone number, the legal standard for entrapment is a uniform one, requiring reasonable suspicion in all cases where police provide an

opportunity to commit a criminal offence. Reasonable suspicion is a familiar legal standard that provides courts with the necessary objective basis on which to determine whether the police have justified their actions. It protects individuals' interests and preserves the rule of law by ensuring courts can meaningfully review police conduct. It requires that a constellation of objectively discernible facts give the officer reasonable cause to suspect that a certain kind of crime was being committed by a particular person or in a particular place. Reasonable suspicion is also individualized, in the sense that it picks an individual target — whether a person, an intersection or a phone number — out of a group of persons or places. When an objectively grounded suspicion attaches to a sufficiently particularized constellation of factors, like those relating to an individual phone number, concerns about the police intruding on the protected interests of all persons in broadly or poorly defined locations fall away.

A bare tip from an unverified source that someone is dealing drugs from a phone number cannot ground reasonable suspicion. However, it can be sufficiently corroborated such that the standard is met. Police practice itself shows that, whether the police are investigating an individual or a phone number, various steps can be taken upon receiving a tip associating a phone number with dial-a-dope activity before acting on it by calling the number. Although it would be prudent for police officers to investigate the reliability of the tip before placing the call where they are able to do so, it is also possible for the police to form reasonable suspicion in the course of a conversation with the target, but prior to presenting the opportunity to



commit a crime. The target's responsiveness to details in the tip, along with other factors, may tend to confirm the tip's reliability. The target's use of or response to language particular to the drug subculture properly forms part of the constellation of factors supporting reasonable suspicion. Whether or not responding to such terminology is neutral or adds to the weight of other factors will depend on the circumstances. There is no requirement that the police rule out innocent explanations for these responses.

Unless the police had formed reasonable suspicion before a phone call was made, review of the words spoken during the call is unavoidable in order for the court to determine whether an accused was entrapped. Reviewing conversations between undercover officers and their targets in the dial-a-dope context is the inevitable consequence of accepting that the police must have reasonable suspicion before offering an opportunity to commit an offence. Reasonable suspicion is not formed retroactively, but applied prospectively. Reasonable suspicion can justify an action only on the basis of information already known to police. A court must examine all of the circumstances, and not merely the language used during the call, in order to determine whether police had formed reasonable suspicion by the time the opportunity was provided.

The determination of whether a police action constitutes an opportunity to commit an offence is informed both by the definition of the offence and the context in which the action occurred. The definition of drug trafficking includes not only

selling, transporting and administering illegal drugs, but also making an offer to do so. In the dial-a-dope context, in which the initial interaction between the police and target occurs entirely over the phone, the exercise centres on determining whether words spoken by the police officer constitute an opportunity to commit drug trafficking. The inquiry is properly directed to how close the police conduct is to the commission of the offence. To allow the police sufficient flexibility to investigate crime, an officer's action — to constitute an offer of an opportunity to commit a crime — must be sufficiently proximate to conduct that would satisfy the elements of the offence. In the particular context of drug trafficking, an opportunity to commit an offence is offered when the officer says something to which the accused can commit an offence by simply answering “yes.”

The facts of each of the two appeals lead to different conclusions. In A's case, the police had a reasonable suspicion of drug trafficking before providing the opportunity to commit an offence and therefore A was not entrapped. The officer had asked A if he went by the name provided in the tip, which he did not deny. When the officer asked A, “You can help me out?”, A responded positively to this use of language particular to the drug subculture, asking the officer, “what do you need?”. Having connected the tip to the person on the phone, the aspect of the tip that asserted illegality was corroborated by A's understanding of drug-trafficking slang and willingness to engage in it. In this context, these markers of reliability together sufficiently corroborated the initial tip to give rise to an objective possibility that A was involved in drug trafficking. Unlike in A's case, there was nothing in W's

responses to suggest that the phone number was being used to sell drugs before the officer provided the opportunity to traffic. Therefore, W was entrapped. The police officer did not wait to see how W would respond to an investigative question that could have corroborated that W was engaged in criminal activity prior to providing the opportunity to commit the crime. Although W confirmed that he went by the name provided in the tip, he did not respond positively to slang particular to the drug subculture until after the opportunity had been provided. The corroboration of the name did not strengthen the reliability of the tip in its assertion of illegality. The police had no more than a bare tip that someone using a particular phone number was selling drugs and this did not ground reasonable suspicion.

*Per* Wagner C.J. and **Moldaver**, Côté and Rowe JJ. (dissenting in part):

Both appeals should be dismissed. Attempting to apply the doctrine of entrapment as formulated in *R. v. Mack*, [1988] 2 S.C.R. 903, and *R. v. Barnes*, [1991] 1 S.C.R. 449, to present-day dial-a-dope operations has revealed both doctrinal and policy concerns with how the first branch of the doctrine is currently formulated. Both the individualized suspicion and the *bona fide* inquiry prongs of this branch have failed to remain faithful to the balance struck in *Mack* and *Barnes* between protecting an individual's legitimate interest in being left alone by the state and effective law enforcement. The *bona fide* inquiry prong must be revised to preserve this fundamental balance, to rectify doctrinal issues within the prong itself, and to address policy concerns that have arisen with respect to the prong's application. The revised framework will ensure that only the clearest of cases of intolerable state conduct are

captured by the doctrine of entrapment by refocusing the doctrine on its principled origin: abuse of process. Applying the revised framework, the police were engaged in a *bona fide* inquiry when they offered each A and W an opportunity to commit the offence of drug trafficking.

The individualized suspicion prong of the doctrine of entrapment has come under fire for leading to anomalous results, particularly in dial-a-dope cases where police call alleged drug dealers based on minimal information. This prong permits the police to provide an individual with an opportunity to commit an offence if they reasonably suspect that the targeted individual is already engaged in criminal activity of the same type. The concern expressed is that even though the investigating officer may not possess individualized reasonable suspicion at the time they offer an opportunity, the police conduct in a typical dial-a-dope case cannot be said to rise to the level of an abuse of process warranting a stay of proceedings. In an attempt to both adhere to the formal requirement of reasonable suspicion and preserve the substantive abuse of process character of entrapment in dial-a-dope cases, some courts have drawn a distinction between taking an investigative step (which does not require reasonable suspicion) and presenting an opportunity to commit an offence (which does). The problem with the fine line distinction this approach draws is that it requires courts to closely parse undercover calls to determine whether an accused was entrapped. This approach creates artificial distinctions based on the specific words used by the undercover officer rather than focusing on whether society would view the officer's conduct, considered in context, as simply intolerable. These distinctions

are often difficult to draw, and promote an approach that is akin to dancing on the head of a pin.

The manner in which the majority proposes to dispose of the appeals provides a clear example of the dubious distinctions that flow from an application of the parsing approach. In both cases, an undercover officer made a call based on information from an anonymous or a confidential source. Each call was answered by a then-unknown man. Seemingly without surprise, each man confirmed or did not deny that he went by a name that, based on the officer's information, belonged to a drug dealer operating out of the phone line. The only distinction between the cases is that the undercover officer in W's case used a drop name before asking for a specific quantity of cocaine, whereas the undercover officer in A's case used a drop name and waited for A to say "what do you need?" before asking for a specific quantity of cocaine. The conduct of either undercover officer in these cases cannot be described as intolerable — the officers were doing precisely what society would expect them to do upon receiving information about an alleged dial-a-dope operation. A reasonably informed observer in our society would be utterly bewildered by the majority's conclusion that the conduct of the undercover officer in W's case rises to the level of an abuse of process while the conduct of the undercover officer in A's case is acceptable.

The problem in applying the *bona fide* prong as defined in *Mack* and *Barnes* to present-day dial-a-dope investigations is that the reasonable suspicion

standard has evolved since those cases were decided. The *bona fide* inquiry prong permits the police to randomly approach citizens and offer them opportunities to commit offences, so long as the area within which they are operating is defined with sufficient precision and they reasonably suspect that that type of crime is occurring in the area. The incorporation of this type of generalized location-based reasonable suspicion into the *bona fide* inquiry prong reflects the view that requiring the police to meet a more stringent standard, such as individualized reasonable suspicion, would unduly hinder law enforcement efforts and thereby fail to strike an appropriate balance between individual liberties and legitimate law enforcement. However, in *R. v. Chehil*, 2013 SCC 49, [2013] 3 S.C.R. 220, the notice that reasonable suspicion includes generalized suspicion that attaches to a particular activity or location rather than to a specific person was rejected. Put differently, since *Mack* and *Barnes* were decided, individualization has come to define the reasonable suspicion standard. In this way, the more restrictive meaning ascribed to reasonable suspicion in *Chehil* has rendered it incompatible with the balance between individual liberties and legitimate law enforcement struck by the *bona fide* inquiry prong in *Barnes*.

The solution to the doctrinal incoherence and policy concerns revealed by the dial-a-dope entrapment jurisprudence is to revise the *bona fide* inquiry prong. The revised framework will refocus the *bona fide* inquiry prong on its principled origin: abuse of process. Under the revised framework, the police should be found to be acting pursuant to a *bona fide* inquiry where they meet three requirements. First, their investigation must have been motivated by genuine law enforcement purposes.

Second, they must have had a factually-grounded basis for their investigation. They need to be able to point to a specific reason for their investigation beyond a mere hunch. Third, their investigation must have been directed at investigating a specific type of crime within a tightly circumscribed location (whether physical or virtual). Whether the precision of the location meets this threshold should be determined by reference to the overarching question entrapment poses, that is, whether, in all the circumstances, society would view the inquiry as abusive. Inevitably, whether a particular type of location is sufficiently circumscribed for the purposes of a particular type of investigation will need to be considered on a location-by-location basis, until a jurisprudence develops. Some considerations may include: the nature and seriousness of the type of crime under investigation; the number of citizens that may be impacted by the investigation technique used by the police; the nature of the location under investigation; and the intrusiveness of the technique.

The revised framework offers significant improvements to the *bona fide* inquiry prong by bringing it in line with recent doctrinal developments, and by placing limitations on the scope of the location under investigation. These limitations mitigate the risk that police may be able to indiscriminately offer opportunities within an expansive area (i.e., to conduct large-scale random virtue testing) and effectively address the risk of police targeting the vulnerable and marginalized and engaging in racial profiling. If the police deliberately target the marginalized and vulnerable, it will amount to impermissible bad faith conduct. In addition, by considering the nature of the location under investigation and the number of citizens potentially impacted,

together with other relevant factors, reviewing courts will be able to discern whether the risk of ensnaring the marginalized and vulnerable was so high in a given case that society would not tolerate that risk, notwithstanding the legitimate law enforcement interests at stake.

Neither A nor W were entrapped. The police in both cases were acting in the course of *bona fide* inquiries into the cell phone numbers in issue at the time they extended the respective opportunities to traffic in narcotics. Applying the new framework, there is no suggestion that the police were not motivated by genuine law enforcement purposes, nor is there any evidence of bad faith. Further, the police had a factually-grounded basis for their investigations, having received information containing the names and phone number of alleged drug dealers. Finally, their inquiry was sufficiently tightly circumscribed. Drug trafficking is a serious crime and the number of individuals potentially impacted by the police conduct here is extremely low. The locations under investigation were phone numbers and, as a result, any concerns that racial profiling or other unconscious biases may have played a role in the investigations are highly attenuated. Notably, the investigatory technique did not involve accessing any of the information on either A's or W's cell phone. On this point, there is disagreement with the majority that a call to a potential dial-a-dope line engages the informational privacy interest protected by s. 8 of *Canadian Charter of Rights and Freedoms* and accordingly does not demand the imposition of a standard as robust as the individualized reasonable suspicion standard developed in s. 8 jurisprudence. Dial-a-dope investigations do not involve search or seizure of the



person's phone, or any of the information it contains. All that dial-a-dope investigations involve is a conversation between an undercover officer and the person on the other end of the line. The majority's acceptance that the police may phone an individual and engage them in potentially extensive conversation without first holding reasonable suspicion belies its contention that a typical dial-a-dope investigation engages the privacy interest that s. 8 of the *Charter* protects. The nature of the individual privacy interests at play here are limited to individuals' interest in being left alone by the state. It is difficult to imagine a less intrusive technique than those used in typical dial-a-dope cases like these ones. In sum, the police conduct here cannot be said to be conduct that society would find intolerable.

### **Cases Cited**

By Karakatsanis, Brown and Martin JJ.

**Applied:** *R. v. Mack*, [1988] 2 S.C.R. 903; *R. v. Barnes*, [1991] 1 S.C.R. 449; **referred to:** *R. v. Jewitt*, [1985] 2 S.C.R. 128; *Amato v. The Queen*, [1982] 2 S.C.R. 418; *R. v. Campbell*, [1999] 1 S.C.R. 565; *R. v. Nuttall*, 2018 BCCA 479, 368 C.C.C. (3d) 1; *R. v. Bayat*, 2011 ONCA 778, 280 C.C.C. (3d) 36; *R. v. Chehil*, 2013 SCC 49, [2013] 3 S.C.R. 220; *R. v. MacKenzie*, 2013 SCC 50, [2013] 3 S.C.R. 250; *R. v. Simpson* (1993), 79 C.C.C. (3d) 482; *R. v. Kang-Brown*, 2008 SCC 18, [2008] 1 S.C.R. 456; *R. v. Faqi (A.M.)*, 2010 ABPC 157, 491 A.R. 194; *R. v. Looseley*, [2001] UKHL 53, [2001] 4 All E.R. 897; *Beck v. State of Ohio*, 85 S.Ct. 223 (1964); *R. v. Swan*, 2009 BCCA 142, 244 C.C.C. (3d) 108; *R. v. McMahon*, 2018 SKCA 26, 361

C.C.C. (3d) 429; *R. v. Jir*, 2010 BCCA 497, 264 C.C.C. (3d) 64; *R. v. Whyte*, 2011 ONCA 24, 266 C.C.C. (3d) 5, *aff'd* 2011 SCC 49, [2011] 3 S.C.R. 364; *R. v. Marakah*, 2017 SCC 59, [2017] 2 S.C.R. 608; *R. v. Edwards*, [1996] 1 S.C.R. 128; *R. v. Wong*, [1990] 3 S.C.R. 36; *R. v. Dymont*, [1988] 2 S.C.R. 417; *R. v. Fearon*, 2014 SCC 77, [2014] 3 S.C.R. 621; *R. v. Mills*, 2019 SCC 22; *R. v. Wilson*, [1990] 1 S.C.R. 1291; *R. v. Jacques*, [1996] 3 S.C.R. 312; *United States v. Gooding*, 695 F.2d 78 (1982); *Florida v. J. L.*, 529 U.S. 266 (2000); *R. v. Olazo*, 2012 BCCA 59, 287 C.C.C. (3d) 379; *R. v. Lal* (1998), 130 C.C.C. (3d) 413; *R. v. Townsend*, [1997] O.J. No. 6516 (QL); *R. v. Williams*, 2010 ONSC 1698; *R. v. Sawh*, 2016 ONSC 2776; *R. v. Pucci*, 2018 ABCA 149, 359 C.C.C. (3d) 343; *R. v. Clarke*, 2018 ONCJ 263; *R. v. Li*, 2019 BCCA 344, 381 C.C.C. (3d) 363; *R. v. Arriagada*, [2008] O.J. No. 5791 (QL); *R. v. Debot*, [1989] 2 S.C.R. 1140; *R. v. Saeed*, 2016 SCC 24, [2016] 1 S.C.R. 518; *R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 59; *R. v. MacDonald*, 2014 SCC 3, [2014] 1 S.C.R. 37; *R. v. Vezina (A.)*, 2014 CMAC 3, 461 N.R. 286; *R. v. Murdock* (2003), 176 C.C.C. (3d) 232; *R. v. Ralph (A.)*, 2014 ONCA 3, 313 O.A.C. 384; *R. v. Imoro*, 2010 ONCA 122, 251 C.C.C. (3d) 131, *aff'd* 2010 SCC 50, [2010] 3 S.C.R. 62; *R. v. Gould*, 2016 ONSC 4069; *R. v. Marino-Montero*, [2012] O.J. No. 1287 (QL); *R. v. Izzard*, [2012] O.J. No. 2516 (QL); *R. v. Gladue*, 2012 ABCA 143, 285 C.C.C. (3d) 154; *R. v. Stubbs*, 2012 ONSC 1882; *R. v. Gladue*, 2011 ABQB 194, 54 Alta. L.R. (5th) 84; *R. v. Coutre*, 2013 ABQB 258, 557 A.R. 144.

By Moldaver J. (dissenting in part)

*R. v. Mack*, [1988] 2 S.C.R. 903; *R. v. Barnes*, [1991] 1 S.C.R. 449; *R. v. Campbell*, [1999] 1 S.C.R. 565; *R. v. Ahluwalia* (2000), 149 C.C.C. (3d) 193; *R. v. Babos*, 2014 SCC 16, [2014] 1 S.C.R. 309; *R. v. Le*, 2016 BCCA 155, 28 C.R. (7th) 187; *R. v. Chehil*, 2013 SCC 49, [2013] 3 S.C.R. 220; *R. v. Kang-Brown*, 2008 SCC 18, [2008] 1 S.C.R. 456; *R. v. Henneh*, 2017 ONSC 4835, [2017] O.J. No. 7173; *R. v. MacKenzie*, 2013 SCC 50, [2013] 3 S.C.R. 250; *R. v. A.M.*, 2008 SCC 19, [2008] 1 S.C.R. 569; *R. v. Looseley*, [2001] UKHL 53, [2001] 4 All E.R. 897; *R. v. Dudhi*, 2019 ONCA 665, 147 O.R. (3d) 546; *Peart v. Peel Regional Police Services Board* (2006), 43 C.R. (6th) 175; *R. v. Marakah*, 2017 SCC 59, [2017] 2 S.C.R. 608; *R. v. Fearon*, 2014 SCC 77, [2014] 3 S.C.R. 621; *R. v. Spencer*, 2014 SCC 43, [2014] 2 S.C.R. 212; *R. v. Plant*, [1993] 3 S.C.R. 281.

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APPEAL by Javid Ahmad from a judgment of the Ontario Court of Appeal (Hourigan and Brown JJ.A. and Himel J. (*ad hoc*)), 2018 ONCA 534, 141 O.R. (3d) 241, 362 C.C.C. (3d) 36, [2018] O.J. No. 3091 (QL), 2018 CarswellOnt 9268 (WL Can.), affirming the conviction entered by Allen J., 2014 ONSC 3818, [2014] O.J. No. 3152 (QL), 2014 CarswellOnt 9012 (WL Can.), and the dismissal of

the application for a stay of proceedings, 2015 ONSC 652, [2015] O.J. No. 1519 (QL), 2015 CarswellOnt 4286 (WL Can.). Appeal dismissed.

APPEAL by Landon Williams from a judgment of the Ontario Court of Appeal (Hourigan and Brown JJ.A. and Himel J. (*ad hoc*)), 2018 ONCA 534, 141 O.R. (3d) 241, 362 C.C.C. (3d) 36, [2018] O.J. No. 3091 (QL), 2018 CarswellOnt 9268 (WL Can.), setting aside the stay of proceedings entered by Trotter J., 2014 ONSC 2370, 11 C.R. (7th) 110, [2014] O.J. No. 1840 (QL), 2014 CarswellOnt 5005 (WL Can.). Appeal allowed, Wagner C.J. and Moldaver, Côté and Rowe JJ. dissenting.

*Michael W. Lacy and Bryan Badali*, for the appellant Javid Ahmad.

*Owen Goddard and Janani Shanmuganathan*, for the appellant Landon Williams.

*Chris Greenwood and David Quayat*, for the respondent.

*Marilyn E. Sandford, Q.C., Michael Sobkin and Kate Oja*, for the intervener the British Columbia Civil Liberties Association.

*Ingrid Grant and Daniel Goldbloom*, for the intervener the Criminal Lawyers' Association of Ontario.

*Martine Sallaberry* and *Norm Lipinski*, for the intervener the Canadian Association of Chiefs of Police.

*Alison M. Latimer*, for the intervener the Independent Criminal Defence Advocacy Society.

The judgment of Abella, Karakatsanis, Brown, Martin and Kasirer JJ. was delivered by

KARAKATSANIS, BROWN AND MARTIN JJ. —

I. Introduction

[1] As state actors, police must respect the rights and freedoms of all Canadians and be accountable to the public they serve and protect. At the same time, police require various investigative techniques to enforce the criminal law. While giving wide latitude to police to investigate crime in the public interest, the law also imposes constraints on certain police methods.

[2] For that reason, this Court in *R. v. Mack*, [1988] 2 S.C.R. 903, sanctioned, but narrowly confined, the power of police to step beyond their normal investigative role and tempt people into committing criminal offences. Where they do so without reasonable suspicion, or where they go further and induce the commission of a criminal offence, they commit entrapment. Without a requirement of reasonable

suspicion, the police could target individuals at random, thereby invading people's privacy, exposing them to temptation and generating crimes that would not otherwise have occurred. Such conduct threatens the rule of law, undermines society's sense of decency, justice and fair play, and amounts to an abuse of the legal process of such significance that, where it is shown to have occurred, a stay of proceedings is required.

[3] These appeals concern the application of this settled doctrine to investigations of suspected dial-a-dope operations, in which drug traffickers use cell phones to connect with their customers and sell them illicit drugs. Specifically, we are asked to determine when and how reasonable suspicion is established when an officer receives a tip or information that a phone number may be used for drug dealing.

[4] We say our jurisprudence affirms that police cannot offer a person who answers a cell phone the opportunity to commit an offence without having formed reasonable suspicion that the person using that phone, or that phone number, is engaged in criminal activity. Whether the police are targeting a person, place or phone number, the legal standard for entrapment is a uniform one, requiring reasonable suspicion in *all* cases where police provide an opportunity to commit a criminal offence. Reasonable suspicion is a familiar legal standard that provides courts with the necessary objective basis on which to determine whether the police have justified their actions. A bare tip from an unverified source that someone is dealing drugs from a phone number cannot ground reasonable suspicion.

[5] In each of these two appeals, the police received an unsubstantiated tip that a phone number was associated with drug dealing. An officer called the number and, after a brief conversation, requested drugs. In Javid Ahmad's case, the trial judge, Allen J., concluded that Ahmad was not entrapped because the police did not offer him an opportunity to traffic drugs until they had sufficiently corroborated the tip in the course of the conversation (2015 ONSC 652). In Landon Williams' case, Trotter J. found that Williams was entrapped because the police provided him an opportunity to sell cocaine before forming a reasonable suspicion that he was engaged in drug trafficking (2014 ONSC 2370, 11 C.R. (7th) 2010). The Court of Appeal dismissed Ahmad's appeal and allowed the Crown appeal in Williams' case (2018 ONCA 534, 141 O.R. (3d) 241).

[6] Applying *Mack*, we agree with both trial judges. Ahmad was not entrapped, but Williams was. We would therefore dismiss Ahmad's appeal but allow Williams' appeal.

## II. Background

### A. *Ahmad*

[7] Detective Constable Michael Limsiaco received information from another officer that a person named "Romeo" was selling drugs using a specified phone number. D.C. Limsiaco called the number without investigating the reliability of the



information or how the other officer had procured it. D.C. Limsiaco's understanding was that the other officer had received the tip from a confidential source.

[8] After a brief conversation, the officer asked for "2 soft," meaning two grams of powder cocaine. The man on the line subsequently agreed to meet to effect the sale. The officer went to the meeting place, called the number again, met the man who answered the phone, and exchanged \$140 for two small plastic bags of cocaine. Police arrested and searched the man, later revealed to be Ahmad. On his person, police found an envelope with the handwritten word "Romeo" on it containing cash, the \$140, the cell phone that had been used to set up the transaction, and two small bags of powder cocaine. In Ahmad's backpack, the police found a large quantity of cocaine and three envelopes containing cash.

[9] Allen J. concluded that Ahmad was not entrapped. Ahmad was convicted of one count of possession of cocaine for the purpose of trafficking, and two counts of possession of the proceeds of crime.

B. *Williams*

[10] Detective Constable Brooke Hewson, a member of the drug squad, received an information package from another officer about "Jay," who was alleged to be selling cocaine in a certain area in Toronto. The package identified "Jay" as Landon Williams and included a collection of information about him, including that, according to a tip, he was a "cocaine dealer" who worked in a certain area. The record

discloses that the tip was from a confidential source of unknown reliability but not what the tip actually said, how Williams was connected to the name “Jay,” or the currency of the information.

[11] D.C. Hewson did not ask about the reliability of the source or the currency of the information. She had been involved in Williams’ arrest 20 months earlier for trafficking cocaine, although Williams ultimately pleaded guilty to simple possession. She had not known him to use the name “Jay.”

[12] Detective Constable Tony Canepa was given some of this information and called the number. The man who answered the phone confirmed his name was “Jay.” The officer said that he needed “80 . . . [h]ard,” meaning \$80 worth of crack cocaine, and the man replied that they should meet at a particular intersection. The officer met the man, later revealed to be Williams, and exchanged \$80 for the crack cocaine. Eleven days later, he arranged a second transaction and made the same purchase. The next month, police arrested Williams.

[13] At the end of the Crown’s case, Williams acknowledged that the evidence established his guilt on two counts of trafficking cocaine and two counts of possession of the proceeds of crime. Trotter J. found there was no reasonable suspicion before the officer provided the opportunity to commit a crime and entered a stay.

### C. *Court of Appeal Decision*

[14] The Crown appeal from the stay in Williams' case and the defence appeal from the conviction in Ahmad's case were heard together. Hourigan J.A., writing for himself and Brown J.A., held that entrapment was not made out for either Ahmad or Williams. He concluded that where reasonable suspicion relates to the phone number itself, the police can provide opportunities to commit offences to a person associated with that phone number, even if they do not also have a reasonable suspicion about the person who answers the phone. Himel J. (*ad hoc*) concurred in the result, but disagreed with the majority's differentiation between reasonable suspicion over a phone number and reasonable suspicion over the individual who answers that phone.

### III. The Entrapment Doctrine

#### A. *The Principles of the Entrapment Doctrine in Mack and Barnes*

[15] Over 30 years ago, this Court's decision in *Mack* settled the law of entrapment in Canada. It set out two alternative branches, either of which is sufficient to ground an accused's claim of entrapment and justify a stay of proceedings:

There is, therefore, entrapment when: (a) the authorities provide an opportunity to persons to commit an offence without reasonable suspicion or acting *mala fides* . . . or, (b) having a reasonable suspicion or acting in the course of a *bona fide* inquiry, they go beyond providing an opportunity and induce the commission of an offence. [p. 959]

[16] At the most general level, the doctrine exists because "[i]t is a deeply ingrained value in our democratic system that the ends do not justify the means" (*Mack*,

at p. 938). Some of those means are unacceptable in a free society with strong notions of fairness, decency, and privacy. Although police must be afforded latitude, entrapment is a species of abuse of process because police involvement in the commission of a crime can bring the administration of justice into disrepute.

[17] *Mack* determined that the purpose and rationale of the entrapment doctrine lies in a court's inherent jurisdiction to prevent an abuse of its own processes. Entrapment is not a substantive defence leading to an acquittal, because in most cases the essential elements of the offence will be satisfied, even where entrapment occurred. Rather, the appropriate remedy is a stay of proceedings because "while on the merits the accused may not deserve an acquittal, the Crown by its abuse of process is disentitled to a conviction" and a conviction would therefore bring the administration of justice into disrepute (*Mack*, at p. 944 (emphasis deleted), citing *R. v. Jewitt*, [1985] 2 S.C.R. 128, at p. 148). Such a remedy also affirms the primacy of personal freedom: the state simply has no business unjustifiably intruding into individuals' private lives, randomly testing their virtue, and manufacturing crime (*Mack*, at p. 941).

[18] Some crimes, however, are particularly difficult to investigate because they are "consensual" (such as drug trafficking), victimize those who are reluctant or unable to report them (such as child luring), or lead to such great harm that they must be actively prevented (such as terrorism) (*Mack*, at p. 916; *Amato v. The Queen*, [1982] 2 S.C.R. 418, at p. 457, per Estey J., dissenting; A. Ashworth, "What is Wrong

with Entrapment?”, [1999] *Sing. J.L.S.* 293, at pp. 293-94). It is therefore in the public interest to allow police the flexibility to develop effective, proactive law-enforcement measures to suppress crime.

[19] To reconcile these competing imperatives, the Court imposed a safeguard against opportunity-based entrapment. On the first branch in *Mack*, at issue in these appeals, police may present an opportunity to commit a crime only upon forming reasonable suspicion that either: (1) a specific person is engaged in criminal activity; or (2) people are carrying out criminal activity at a specific location, sometimes referred to as a *bona fide* inquiry (*Mack*, at pp. 956 and 959; confirmed in *R. v. Barnes*, [1991] 1 S.C.R. 449, at p. 463).

[20] The reasons in *Mack* make clear that a *bona fide* inquiry into a location is premised upon and tethered to reasonable suspicion. An investigation is “*bona fide*” where the police have a reasonable suspicion over a location or area, as well as a genuine purpose of investigating and repressing crime. A *bona fide* investigation is not a separate and freestanding way for police to entrap an individual, but a means of expressing the threshold of reasonable suspicion in a location. The offer of an opportunity to commit a crime must always be based upon a reasonable suspicion of particular criminal activity, whether by a person, in a place defined with sufficient precision, or a combination of both.

[21] The Court affirmed these principles in *Barnes*. There, the Court found the police had engaged in a *bona fide* inquiry by providing people within an area of the

Granville Mall in Vancouver the opportunity to sell drugs. Their reasonable suspicion, the Court held, was grounded on objective extrinsic evidence that showed significant drug dealing activity in the area (*Barnes*, at pp. 460-62). This provided an explanation, which a court could meaningfully review, for why people were being targeted in that area.

[22] This framework balances and reconciles important public interests. The rule of law, and the need to protect privacy interests and personal freedom from state overreach are balanced against the state's legitimate interest in investigating and prosecuting crime by permitting *but also constraining* entrapment techniques (*Mack*, at pp. 941-42).

[23] We see no reason to alter this carefully calibrated balance struck in *Mack* and affirmed in *Barnes*. The entrapment framework has proved workable for decades in a variety of contexts, including drug trafficking (*R. v. Campbell*, [1999] 1 S.C.R. 565, at para. 21), terrorism (*R. v. Nuttall*, 2018 BCCA 479, 368 C.C.C. (3d) 1, at paras. 417-43), and child luring (*R. v. Bayat*, 2011 ONCA 778, 280 C.C.C. (3d) 36, at paras. 15-23). It has stood the test of time, furnishing a principled, stable and generally applicable doctrine that is fully capable of adapting to a variety of circumstances and responding to the evolution of crime and police tactics. No principled reason supports departing from it.

B. *Objective Reasonable Suspicion Ensures Judicial Oversight Over Police Conduct*

[24] In every context, the reasonable suspicion standard ensures courts can conduct *meaningful* judicial review of what the police knew at the time the opportunity was provided (*R. v. Chehil*, 2013 SCC 49, [2013] 3 S.C.R. 220, at paras. 26 and 58; *R. v. MacKenzie*, 2013 SCC 50, [2013] 3 S.C.R. 250, at para. 41). This standard requires the police to disclose the basis for their belief and to show that they had legitimate reasons related to criminality for targeting an individual or the people associated with a location (K. Roach, “Entrapment and Equality in Terrorism Prosecutions: A Comparative Examination of North American and European Approaches” (2011), 80 *Miss. L.J.* 1455, at pp. 1472-73; Ashworth, at pp. 304-5). An objective standard like reasonable suspicion allows for exacting curial scrutiny of police conduct for conformance to the *Canadian Charter of Rights and Freedoms* and society’s sense of decency, justice, and fair play because it requires objectively discernible facts. As is the case with warrantless searches, “the trial judge [must be] . . . in a position to ascertain [these objective facts], and not bound by the personal conclusions of the officer who conducted the [investigation]” (P. Sankoff and S. Perrault, “Suspicious Searches: What’s so Reasonable About Them?” (1999), 24 C.R. (5th) 123, at p. 126 (emphasis added)). This is essential to upholding the rule of law and preventing the state from arbitrarily infringing individuals’ privacy interests and personal freedoms (*Chehil*, at para. 45).

[25] Doherty J.A., in *R. v. Simpson* (1993), 79 C.C.C. (3d) 482 (Ont. C.A.), at pp. 502-3, makes the point compellingly: a reasonable suspicion standard is necessary where there is the fundamental need to balance society’s interest in the detection and

punishment of crime with its interest in maintaining individual freedoms. A careful balancing of interests is as relevant in entrapment as it is in warrantless searches and detention. In each case, the reasonable suspicion standard is uniquely “designed to avoid indiscriminate and discriminatory” police conduct (*Chehil*, at para. 30; see also paras. 3, 26 and 47; *R. v. Kang-Brown*, 2008 SCC 18, [2008] 1 S.C.R. 456, at paras. 75-77 and 165; *Simpson*, at p. 502). This is particularly critical in cases of entrapment, since entrapment is a “breeding ground for racial profiling” (D. M. Tanovich, “Rethinking the *Bona Fides* of Entrapment” (2011), 43 *U.B.C.L. Rev.* 417, at p. 432), and has “a disproportionate impact on poor and racialized communities” (pp. 417-18). Courts must be able to assess the extent to which the police, in seeking to form reasonable suspicion over a person or a place, rely upon overtly discriminatory or stereotypical thinking, or upon “intuition” or “hunches” that easily disguise unconscious racism and stereotyping (T. Quigley, Annotation to *R. v. Sterling* (2004), 23 C.R. (6th) 54, at p. 55; *R. v. Faqi (A.M.)*, 2010 ABPC 157, 491 A.R. 194, at para. 14; Tanovich, at pp. 437-38; *MacKenzie*, at paras. 64-65).

[26] Requiring reasonable suspicion before tempting individuals into committing crimes also reflects Canadian law’s cautious approach to the expansion of police powers. As a significant instance of that approach, our law does not consider whether the targeted accused was predisposed to commit the crime (*Mack*, at pp. 924 and 951-56). Allowing objectively improper police conduct to be justified by reference to the predisposition of the accused would “permit unequal treatment” (*Mack*, at p. 955), and risks imprisoning people even when their fundamental rights



and procedural guarantees have been disregarded. There is a “fundamental inequality inherent in an approach that measures the permissibility of entrapment by reference to the predisposition of the accused” (*Mack*, at p. 955).

[27] People are not protected against random virtue testing if we assume that entrapment occurs only when virtuous people would be tempted to commit crimes. The opportunity-based branch of the *Mack* test therefore establishes that police cannot subject *anyone* to random virtue testing — virtuous or non-virtuous, predisposed or non-predisposed — without reasonable suspicion. Many commentators support the test established in *Mack* for this very reason — that is, because its objective threshold protects *everyone* from random testing (Ashworth, at p. 305; D. Ormerod and A. Roberts, “The trouble with *Teixeira*: Developing a principled approach to entrapment” (2002), 6 *Int’l J. of Evidence & Proof* 38, at pp. 46-48; S. Bronitt, “The Law in Undercover Policing: A Comparative Study of Entrapment and Covert Interviewing in Australia, Canada and Europe” (2004), 33 *Comm. L. World Rev.* 35, at p. 78; Roach, at p. 1462; D. Stuart, *Canadian Criminal Law: A Treatise* (7th ed. 2014), at p. 653).

[28] Providing individuals the opportunity to commit offences without the foundation of a reasonable suspicion also unacceptably increases the likelihood that people will commit crimes when they otherwise would not have. The risk is at its highest when the person given the opportunity is comparatively vulnerable or otherwise marginalized. Random virtue testing therefore violates the principle that it

is wrong for the police to manufacture crime because it “prey[s] on the weakness of human nature” to entice individuals into offending (*R. v. Looseley*, [2001] UKHL 53, [2001] 4 All E.R. 897, at para. 58, per Lord Hoffmann). Marginalized people, with the limited resources they possess, will rarely, if ever, be able to meet the high burden of proving bad faith. There will rarely be evidence of intentional racial profiling or targeting of the vulnerable. Conversely, the test in *Mack* — grounded in reasonable suspicion — is attainable for everyone, designed as it is to accommodate the “qualities of humanness which all of us share” (*Mack*, at p. 940). It seeks to protect the justice system and preserve the rule of law by ensuring that *all* individuals, predisposed or not, are protected from improper police conduct (*Mack*, at p. 961).

[29] A standard of “bad faith” police conduct in this branch of the entrapment doctrine is no substitute for the objective standard of reasonable suspicion, which is reviewable by an independent assessor. A test of “bad faith” cedes primacy to the police’s own assertions. Reasonable suspicion insists on an objective assessment of the information the police actually had. Reasonable suspicion thus shifts the protection of the public against unreasonable intrusions from the shadows of police discretion to the light of curial scrutiny. As described in the context of warrantless arrests by the Supreme Court of the United States in *Beck v. State of Ohio*, 85 S. Ct. 223 (1964), at p. 229:

We may assume that the officers acted in good faith in arresting the petitioner. But “good faith on the part of the arresting officers is not enough.” If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be

“secure in their persons, houses, papers, and effects,” only in the discretion of the police. [Citation omitted.]

[30] Further, and unlike reasonable suspicion, a standard of bad faith fails to give meaningful guidance to police officers called upon to determine whether they can offer an opportunity to commit a crime. Reasonable suspicion is an *ex ante* standard that has stood the test of time, is “readily applicable in practice,” and is familiar and “meaningful to the police and trial judges” (*Kang-Brown*, at para. 164, per Deschamps J., dissenting but not on this point). It fosters in police officers a sense of the importance of obtaining objective evidence of criminal activity *before* offering an opportunity to commit a crime, and of being alive to indicators that suggest that their intuitions or hunches may be wrong (*Chehil*, at paras. 33-34). And it compels police to disclose objective evidence that is amenable to exacting review, precluding them from relying on peremptory assertions of suspicion.

[31] Any lower bar — and certainly any bar that would allow the police to respond to bare tips by immediately offering an opportunity to commit a crime — would effectively be no bar at all.

[32] That this is so is made plain by asking the following question: if a name and number were sufficient to allow police to intrude on protected interests, what *less* could *possibly* be required? The police need *at least* a number to make the phone call. Such a low bar would do nothing to protect people from random virtue testing: being called by police and invited to commit an offence based on malice, rumour or

gossip. The reasonably informed observer would be dismayed to learn that police are permitted to act on this information in this way simply by virtue of having received it. Just as the hunch or “mere suspicion” of one police officer cannot become something more simply because it was shared with other officers (*R. v. Swan*, 2009 BCCA 142, 244 C.C.C. (3d) 108, at para. 23), a source’s hunch does not transform into something more once placed into the hands of the police (*R. v. McMahon*, 2018 SKCA 26, 361 C.C.C. (3d) 429, at paras. 60 and 62; *R. v. Jir*, 2010 BCCA 497, 264 C.C.C. (3d) 64, at para. 46, per Groberman J.A., concurring; *R. v. Whyte*, 2011 ONCA 24, 266 C.C.C. (3d) 5, at para. 17, aff’d 2011 SCC 49, [2011] 3 S.C.R. 364). We see no basis — in this Court’s jurisprudence or elsewhere — for abandoning the reasonable suspicion standard and granting police unrestricted licence to offer people the opportunity to commit crimes, free from independent and meaningful judicial oversight.

#### IV. Issues

[33] Several issues arise when entrapment is examined in the dial-a-dope context:

- A. Can a phone number — a virtual place — qualify as a location for the purposes of entrapment?
  
- B. What circumstances can give rise to reasonable suspicion in the dial-a-dope context?

C. How should courts review the conversation between police and the accused in deciding whether reasonable suspicion has been established and when the opportunity to offend was offered?

D. What constitutes provision of an opportunity to traffic in drugs during a phone call?

The answers to these questions must be determined in light of the purposes of the doctrine of entrapment.

V. Analysis

A. *Can a Phone Number Qualify as a “Place” Over Which Police May Form Reasonable Suspicion?*

[34] These appeals require us to consider how the reasonable suspicion standard applies when police are investigating a phone number, or another virtual means of communication between people, like a message board on a website. The parties agree that a phone number can qualify as a “place” for the purposes of the entrapment doctrine. The intervener the Independent Criminal Defence Advocacy Society disagrees, submitting that there is an enhanced privacy interest in virtual places as compared to physical places. Alternatively, it says a multi-factored analysis should inform the consideration of whether a place has been adequately defined. The British Columbia Civil Liberties Association adds that it is concerned that places,

both physical and virtual, may be defined too broadly to allow the entrapment doctrine to be sufficiently protective.

[35] The difficulty, of course, is that technology aids in the commission of crime. And in order to investigate and detect those crimes, police must also make use of technology. Further, while some virtual spaces may be too broad to support a sufficiently particularized reasonable suspicion, that concern does not arise where the space is a single phone number. As we will explain, reasonable suspicion can attach to a phone number, because it is precisely and narrowly defined.

[36] Of course, a phone number is not the same thing as a public physical location. A phone is a means of private communication between persons, and calling a number, or exchanging text messages, is an inherently private activity (unlike conversing on a busy downtown Vancouver street, as in *Barnes*, where we might expect chance encounters with the state). A phone number provides access to an intensely private virtual space. We cultivate personal, work and family relationships through our phones; they are a portal of immediate access reserved for the select few closest to us. We carefully guard access to that space by choosing to whom we disclose our phone number and with whom we converse. Similarly, this Court has held that a person reasonably expects privacy in most digital communications, precisely because conversations over text message, social media messaging, or email, are not analogous to a “public post” (*R. v. Marakah*, 2017 SCC 59, [2017] 2 S.C.R. 608, at paras. 28 and 34-36, per McLachlin C.J., and at paras. 106 and 116, per

Moldaver J., dissenting). Virtual spaces raise unique concerns for the intrusion of the state into individuals' private lives, because of the breadth of some virtual places (for example, social media websites), the ease of remote access to a potentially large number of targets that technology provides law enforcement, and the increasing prominence of technology as a means by which individuals conduct their personal lives.

[37] It follows that state surveillance over virtual spaces is of an entirely different qualitative order than surveillance over a public space. Technology and remote communication significantly increase the number of people to whom police investigators can provide opportunities, thereby heightening the risk that innocent people will be targeted. Online anonymity allows police to increasingly fabricate identities and "pose" as others to a degree that would not be possible in a public space like the Granville Mall. And they can do so anytime and anywhere, since cell phones are a 24/7 gateway into a person's private life. Individuals must be able to enjoy that privacy free from state intrusion, subject only to the police meeting an objective and reviewable standard allowing them to intrude (see *Barnes*, at p. 481, per McLachlin J., dissenting but not on this point).

[38] Section 8 jurisprudence recognizes that at the "heart of liberty in a modern state" is the need to "set a premium" on the ability of its citizens to carve out spaces in their lives, sanctuaries where they may interact freely, unhindered by the possibility of encounters with the state (*R. v. Edwards*, [1996] 1 S.C.R. 128, at

para. 67; *R. v. Wong*, [1990] 3 S.C.R. 36, at p. 53; see also *R. v. Dyment*, [1988] 2 S.C.R. 417, at pp. 427-28; *R. v. Fearon*, 2014 SCC 77, [2014] 3 S.C.R. 621, at para. 114, per Karakatsanis J., dissenting). In the words of McLachlin C.J. (writing extra-judicially), “The right ‘to be let alone’ and to define a protected sphere of individual autonomy within which neither one’s neighbours nor the state can intrude without permission, is an important aspect of fundamental human dignity” (Hon. B. McLachlin, “Courts, Transparency and Public Confidence — To the Better Administration of Justice” (2003), 8 *Deakin L. Rev.* 1, at p. 3, citing S. D. Warren and L. D. Brandeis, “The Right to Privacy” (1890), 4 *Harv. L. Rev.* 193, at p. 195). The human condition flourishes as the fear of state intrusion fades.

[39] Relatedly, the entrapment doctrine ensures Canadians can “go about their daily lives without courting the risk that they will be subjected to the clandestine investigatory techniques of agents of the state” (*Barnes*, at p. 480, per McLachlin J., dissenting). It is therefore important to carefully delineate and tightly circumscribe virtual locations in which police can provide the opportunity to commit a crime. As Lamer C.J. noted in *Barnes*, at pp. 462-63, a reasonable suspicion can attach to a place only if it is defined with sufficient precision and “in many cases, the size of the area itself may indicate that the investigation is not *bona fide*.” Given that such an inquiry hinges on the presence of reasonable suspicion, the location must be “sufficiently particularized” (*Chehil*, at para. 30; see also S. Penney, “Standards of Suspicion” (2018), 65 *Crim. L.Q.* 23, at pp. 24 and 26).



[40] The Crown stresses that we now find ourselves in a virtual age; while drugs used to be bought and sold in specific locations, they are now delivered into the hands of the buyer in a transaction that involves modern technology. We accept that communicating in a virtual space adds “a layer of unpredictability” (*R. v. Mills*, 2019 SCC 22, at para. 23, per Brown J.). But it is this very unpredictability that necessitates applying the doctrine of entrapment in a way that ensures the freedoms protected in a physical space are also protected in our virtual communications. Drug dealing over the phone may well be difficult to detect, but individuals also have considerable privacy interests in their phones that must be protected from arbitrary state intrusion. The risks posed to individual interests, although different, are not ameliorated where police investigate virtual communications as opposed to a physical space. We say, to properly protect these interests, police must have reasonable suspicion over an individual or a well-defined virtual space, like a phone number, before providing an opportunity to commit a crime.

[41] We emphasize that the virtual space in question must be defined with sufficient precision in order to ground reasonable suspicion. Reviewing courts must scrutinize the evidence that prompted the inquiry to ensure the police have narrowed their scope so that the purview of their inquiry is no broader than the evidence allows. To ensure that random virtue testing is avoided, factors such as (but not limited to) the following may be helpful: the seriousness of the crime in question; the time of day and the number of activities and persons who might be affected; whether racial profiling, stereotyping or reliance on vulnerabilities played a part in the selection of

the location; the level of privacy expected in the area or space; the importance of the virtual space to freedom of expression; and the availability of other, less intrusive investigative techniques.

[42] As previously explained, an individual phone number is sufficiently precise and narrow to qualify as a place for the purposes of the first branch of the entrapment doctrine. We agree with Himel J.: “. . . phones are increasingly personal” and, in most cases, there will be “little real difference between information that the police obtain about the phone line and information that they obtain about the person who answers it” (C.A. reasons, at para. 109). Typically, and as Himel J. noted, it will be a distinction without a difference, since reasonable suspicion over one grounds reasonable suspicion over the other. We therefore ought not to force categorical distinctions based upon the form such information takes — that is, information about people and information about their location (or phone numbers). Ultimately, it is *a person* before the court as an accused. And the question will always be the same: are there objective factors supporting a reasonable suspicion of drug trafficking by the individual answering the cell phone when police provide the opportunity to commit such a crime? Those factors may relate in part to reasonable suspicion of the individual, or of the phone number itself, or to both.

[43] Finally, we note that lower courts have already found that police can conduct *bona fide* inquiries into virtual spaces other than phone numbers. We repeat, however, that the serious risk of random virtue testing in such inquiries requires that

the virtual space be defined narrowly and with precision (*Barnes*, at p. 463). In our view, entire websites or social media platforms will rarely, if ever, be sufficiently particularized to support reasonable suspicion. To permit police to target wide virtual spaces is inconsistent with *Mack* and its threshold of reasonable suspicion, and disregards that legitimate communities exist as much online as they do in the physical world.

B. *How Does Reasonable Suspicion Apply to Dial-a-Dope Investigations?*

[44] As we have explained, reasonable suspicion plays a central role in the first branch of the entrapment doctrine. Police may provide an opportunity to commit a crime only upon forming reasonable suspicion. But what does reasonable suspicion mean? The appellants say it is an objective and rigorous standard that cannot be grounded in a bald tip. The Crown, however, describes a lower standard, capable of being satisfied by a single tip about a responsive target who appears to understand slang particular to the drug subculture.

[45] Reasonable suspicion is, by definition, an *objective* standard that protects individuals' interests and preserves the rule of law by ensuring courts can meaningfully review police conduct. For this reason, it is fundamental to restraining the power of police to provide opportunities to commit crimes. That said, reasonable suspicion is not "unduly onerous" (*Mack*, at p. 958). As a lower standard than reasonable grounds, it allows police additional flexibility in enforcing the law and preventing crime. In the entrapment doctrine, reasonable suspicion emerges from the

first branch's concern with police behaviour that falls short of actually inducing an offence, yet nonetheless constitutes police involvement in the commission of a crime.

[46] While the reasonable suspicion standard requires only the possibility, rather than probability, of criminal activity (*Chehil*, at para. 27), it must also be remembered that it provides police officers with justification to engage in otherwise impermissible, intrusive conduct such as searches and detentions. It is therefore subject to "rigorous," "independent" and "exacting" judicial scrutiny (*Chehil*, at paras. 3 and 26). The suspicion must be focused, precise, reasonable, and based in "objective facts that stand up to independent scrutiny" (*MacKenzie*, at para. 74). In *Simpson*, at pp. 500-3, the Court of Appeal for Ontario, drawing from U.S. jurisprudence, this Court's application of reasonable suspicion in *Mack*, and the articulable cause doctrine in *R. v. Wilson*, [1990] 1 S.C.R. 1291, summarized reasonable suspicion as requiring a "constellation of objectively discernible facts" giving the officer "reasonable cause to suspect" that a certain kind of crime was being committed by a particular person or in a particular place. This definition continues to be applied by this Court (see, e.g., *R. v. Jacques*, [1996] 3 S.C.R. 312, at paras. 24-25; *Kang-Brown*, at para. 76; *Chehil*, at para. 3). Ultimately, the evidence said to satisfy reasonable suspicion must be carefully examined.

[47] Although innocent explanations and exculpatory information remain relevant to an assessment of reasonable suspicion, the police are not required to undertake further investigation to rule out those explanations (*Chehil*, at paras. 33-

34). Nevertheless, the facts must indicate the possibility of *criminal* behaviour: characteristics that apply broadly to innocent people are not markers of criminal activity (*Chehil*, at para. 35). Mere hunches and intuition will not suffice (*Barnes*, at p. 460). However, an officer’s training or experience can make otherwise equivocal information probative of the presence of criminal activity (*Chehil*, at para. 47).

[48] Reasonable suspicion is also *individualized*, in the sense that it picks an individual target — whether a person, an intersection or a phone number — out of a group of persons or places. As noted above, the criminal law’s objections to “generalized suspicion” hinge on its embrace of “such a number of presumably innocent persons as to approach a subjectively administered, random basis” (*Chehil*, at para. 30, quoting *United States v. Gooding*, 695 F.2d 78 (1982), at p. 83). When an objectively grounded suspicion instead attaches to a “sufficiently particularized constellation of factors” (*Chehil*, at para. 30), like those relating to an individual phone number, the objection falls away. In other words, the ill sought to be remedied by individualization is police intruding on the protected interests of all persons in broadly or poorly defined locations, especially on the basis of generalized evidence (*Kang-Brown*, at para. 73, per Binnie J.). This is a complete answer to our colleague’s concern about dissonance between the entrapment framework set out in *Mack* and *Barnes* and the reasonable suspicion standard required by *Chehil*.

[49] The target to which reasonable suspicion must attach varies with the context. It must be borne in mind that in cases such as *Chehil* and *Kang-Brown*, this

Court was concerned with ensuring that reasonable suspicion for a sniffer-dog search *of an individual* is sufficiently targeted. In that particular context — the physical search of a person by a police dog — reasonable suspicion cannot attach to a location, but only to a specific person or, at most, to a number of closely linked people (*Kang-Brown*, at para. 73). Indeed, the reasonable suspicion standard was selected in *Mack* because, as later emphasized in *Chehil*, while it is a uniform “common standard that arises in a number of contexts,” it can be adapted to suit a variety of circumstances (*Chehil*, at para. 21).

[50] Each of these appeals originated with a single tip of unknown reliability. Although a sole tip devoid of predictive information cannot meet the reasonable suspicion standard, such a tip can be sufficiently corroborated such that the standard is met (see *Florida v. J. L.*, 529 U.S. 266 (2000), at pp. 270-71). Such corroboration must suggest that the “tip [is] reliable in its assertion of illegality, [and] not just in its tendency to identify a determinate person” (*J. L.*, at p. 272).

[51] Police practice *itself* shows that, whether the police are investigating an individual or a phone number, various steps can be taken upon receiving a tip associating a phone number with dial-a-dope activity *before* acting on it by calling the number. Police may wait to see if more tips are received about the same person or phone number. Police may cross-reference the person’s name or phone number to find other connections between it and criminal activity. Police may also consider any details contained in the tip or, if known, the reliability of the informant. For example,

does the source have a criminal record? How long have the police used the source? Has the source provided credible tips in the past? Is there a possible motivation for giving a false tip (as in *R. v. Olazo*, 2012 BCCA 59, 287 C.C.C. (3d) 379, at para. 7, where the informant gave the tip to avoid a traffic ticket)? Is the source's information first-hand? (See *R. v. Lal* (1998), 130 C.C.C. (3d) 413 (B.C.C.A.), at paras. 11 and 27; *R. v. Townsend*, [1997] O.J. No. 6516 (QL) (C.J. (Gen. Div.)), at para. 5; *R. v. Williams*, 2010 ONSC 1698 (*Williams* (2010)), at para. 12 (CanLII); *R. v. Sawh*, 2016 ONSC 2776, at para. 8 (CanLII).) As in *Mack*, whether a tip can generate reasonable suspicion will also be connected to the currency of the information (p. 958).

[52] In short, there are various ways in which the police may seek to establish reasonable suspicion before the call is made (see, e.g., *R. v. Pucci*, 2018 ABCA 149, 359 C.C.C. (3d) 343, at para. 11; *R. v. Clarke*, 2018 ONCJ 263, at paras. 40 and 56-57 (CanLII)). In British Columbia, police officers are required to record on a “*Swan sheet*” the steps they took to establish reasonable suspicion before making the call — which belies any suggestion that *Mack* is impractical to apply in a digital age, or that reasonable suspicion in the virtual world should represent a lower threshold than in the physical world (*R. v. Li*, 2019 BCCA 344, 381 C.C.C. (3d) 363, at paras. 3-4; B. A. MacFarlane, R. J. Frater and C. Michaelson, *Drug Offences in Canada* (4th ed. (loose-leaf)), vol. 2, at pp. 26-4 to 26-7). This practice was adopted after the Court of Appeal for British Columbia criticized the police for making hundreds of random phone calls on the basis of bare, uncorroborated tips in *Swan*, at para. 43.

[53] Of course, it is for the police to determine how to proceed with their investigations. But to be clear, reasonable suspicion cannot be grounded on a bald tip alone (*Simpson*, at p. 50; *J. L.*, at pp. 270-71; see also *R. v. Arriagada*, [2008] O.J. No. 5791 (QL) (S.C.J.), at para. 25; *Clarke*, at para. 44). As this Court held in *R. v. Debot*, [1989] 2 S.C.R. 1140, when the police use a tip from a confidential or anonymous source to justify an intrusion on someone’s liberty, courts must scrutinize the tip.<sup>1</sup> It should be examined to see whether its detail is compelling, the informant is credible, and its information is corroborated in any way (*Debot*, at p. 1168).

[54] Although it would be prudent for police officers to investigate the reliability of the tip before placing the call where they are able to do so, it is also possible for the police to form reasonable suspicion in the course of a conversation with the target, but prior to presenting the opportunity to commit a crime (see, e.g., *Townsend*, at para. 50). While this is a necessary part of the “leeway” *Mack* requires (at p. 978), police must be aware that in placing the call without reasonable suspicion, they are walking on thin ice, having already intruded upon the private life of their interlocutor.

[55] That said, the target’s responsiveness to details in the tip, along with other factors, may tend to confirm the tip’s reliability. For example, the target’s use of or response to language particular to the drug subculture properly forms part of the constellation of factors supporting reasonable suspicion (see *Olazo*, at para. 26). Even

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<sup>1</sup> While that case addressed the standard of “reasonable and probable grounds,” it is still helpful “in screening for objective markers when applying the reasonable suspicion standard” (*Williams* stay decision, at para. 12), even if those markers are to be assessed more leniently in the latter context.



so, the understanding of “coded” drug language by a target is not, on its own, necessarily a reliable ground for reasonable suspicion. Some phrases admit of innocent interpretation. And some people — especially vulnerable people — are simply familiar with the coded language of drug trafficking, a point made convincingly by Pringle J., writing in *Clarke*:

Respectfully, I think it dangerous to place too much emphasis on whether the target’s mind is innocent and his history blameless. For example, in *Mack*, the appellant was a reformed drug dealer. While I appreciate that he was induced, the fact remained that because of his prior life experience, he understood drug trafficking transactions and retained drug contacts that could secure him \$27 000 worth of cocaine.

A reformed drug dealer could get a call from police asking for drugs, based entirely on a stale tip, and fall off the rehabilitative wagon because he struggles to pay rent that month. The little brother of a drug dealer could pick up his phone, understand the street language, and decide that what he hears is an easy way to make \$100. This kid can intend to sell the caller baking soda, even, but once he says “yes” on the phone, he has committed a criminal offence.

...

The emphasis, in my opinion, is not on what the “innocent” person would do, but what information police relied upon when they provided someone with the opportunity to commit a crime. . . . [W]hen police do this without a proper basis, meaning without reasonable suspicion, this will *always* carry the risk of ensnaring the innocent. [Underlining added; paras. 20-21 and 23.]

[56] Whether or not responding to such terminology is neutral or adds to the weight of other factors will depend on the circumstances. There is no requirement that the police rule out innocent explanations for these responses. But by the same token, the more general the language used, the more the need for specific evidence regarding

police experience and training (*Chehil*, at para. 47). In particular, where a police officer testifies that a generic or everyday phrase is indicative of involvement in the drug trade, a trial judge must carefully consider whether this is a reasonable connection to make, based on rigorous scrutiny of all the evidence, including any other factors said to establish reasonable suspicion. Moreover, if the target seems confused by the officer's use of such language, such exculpatory information must be taken into account as part of the "entirety of the circumstances" (*Chehil*, at para. 6). Courts must keep in mind that relevant factors are not to be parsed separately and assessed individually to determine whether they support reasonable suspicion. Rather, they are assessed together and in light of each other.

[57] To conclude, an objective assessment rigorously safeguards several rights that are engaged in the entrapment context: to liberty, to privacy, to be left alone, and to equality (*Mack*, at pp. 941 and 955; *Barnes*, at pp. 479-83, per McLachlin J., dissenting). Reasonable suspicion is the *minimum* objective standard the Court has chosen to protect these essential rights. At the same time, it also allows police the flexibility necessary to enforce the criminal law against crimes that are difficult to investigate (*Mack*, at pp. 916 and 958).

C. *How Should Courts Review the Words Spoken During a Police Call to the Target?*

[58] In both of these appeals, the police engaged in transcribed phone conversations with the appellants as part of their investigations. Both trial judges

reviewed those conversations to determine whether the appellants were entrapped. The Crown says they were wrong to do so. Instead, the Crown argues that the “totality of the exchange” between undercover operators and their targets should be examined in determining whether entrapment has been made out, including looking at the circumstances *that follow* the request to purchase the drugs.

[59] We disagree. Unless the police had formed reasonable suspicion before a phone call was made, reviewing the words spoken during the call is unavoidable. Reviewing conversations between undercover officers and their targets in the dial-a-dope context is the inevitable consequence of accepting that the police must have reasonable suspicion before offering an opportunity to commit an offence. While we agree that the conversation must be considered contextually, that is in order to determine whether the undercover officer made a specific request to purchase drugs, and whether reasonable suspicion existed *before* the opportunity to commit a crime was offered.

[60] Our point about timing is fundamental. Reasonable suspicion is not formed retroactively. Rather, it is applied prospectively. From its inception, the entrapment doctrine has required that police officers have reasonable suspicion of criminal activity *before* providing an opportunity to commit an offence. Reasonable suspicion — like any level of investigative justification — can justify an action only on the basis of information *already known* to police (see, e.g., *Swan*, at para. 27; *R. v. Saeed*, 2016 SCC 24, [2016] 1 S.C.R. 518, at para. 64; Ormerod and Roberts, at p. 46,

fn. 31). It follows that the decision to intrude into an individual's private life and offer them the opportunity to commit a crime is justified only if the grounds predate the measure. This is no different than the rule that applies to every context in which this standard (or indeed any standard) is used to justify state actions that interfere with individuals' protected interests. Police may not detain an individual for investigative purposes unless they *already* have reasonable suspicion the individual is connected to a particular crime (*R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 591, at para. 34). Nor may police undertake a safety search unless they *already* have reasonable grounds to believe that their safety or the safety of others is at risk (*R. v. MacDonald*, 2014 SCC 3, [2014] 1 S.C.R. 37, at para. 41). This Court has also been clear that reasonable suspicion must be assessed at the time of a sniff search and *not after* (*Chehil*, at para. 68).

[61] We acknowledge that there has been criticism of an approach sometimes described as narrowly "parsing" conversations between police officers and the individuals they are investigating. The term "parsing" however, captures neither the purpose of the exercise nor the way it is carried out. A court must examine *all* of the circumstances, and not merely the language used during the call, in order to determine whether police had formed reasonable suspicion by the time the opportunity was provided. In dial-a-dope cases, conversations are a means of forming a reasonable suspicion *and* the means of committing the offence itself. Given that police cannot verify the identities of their interlocutors when operating in a virtual world, determining when a target is provided with an opportunity to make an offer to

traffic unavoidably requires that courts scrutinize the language used. This is a common basis upon which police make professional judgment calls about what actions are legally permitted. It is also the basis upon which courts review the legality of those actions. Examining the language used may reveal, as it does in the cases at bar, the difference between an officer who is investigating whether there is reasonable suspicion of criminal activity through careful attention to the answers received, and an officer who makes no serious attempt to verify a tip of unknown reliability and immediately asks for drugs.

[62] In sum, if police have not been able to establish reasonable suspicion prior to making the call, then inevitably courts will have to scrutinize the precise wording of the call. Of course, the preferable course of action — and the most sure way to avoid curial “parsing” — is for police to form reasonable suspicion prior to making the call. In our view, these two avenues strike an appropriate balance: they afford police sufficient latitude, while also protecting Canadians from unwarranted invitations to commit an offence. In other words, this approach recognizes that “[t]he reasonable suspicion requirement . . . is not a heavy price to pay to uphold . . . the rule of law” (*Pucci*, at para. 12).

D. *What Constitutes Provision of an Opportunity to Traffic in Drugs?*

[63] The determination of whether a police action constitutes an opportunity to commit an offence is informed both by the definition of the offence and the context in which the action occurred. Like other aspects of the entrapment doctrine, it reflects

the balance struck between the state's interest in investigating crime and the law's constraint against unwarranted intrusion into individuals' personal lives. In a conversation, an opportunity will be established when an affirmative response to the question posed by the officer could satisfy the material elements of an offence. In the dial-a-dope context, in which the initial interaction between the police and target occurs entirely over the phone, the exercise centres on determining whether words spoken by the police officer constitute an opportunity to commit drug trafficking.

[64] The inquiry, then, is properly directed to how close the police conduct is to the commission of an offence. To allow the police sufficient flexibility to investigate crime, an officer's action — to constitute an offer of an opportunity to commit a crime — must therefore be *sufficiently proximate* to conduct that would satisfy the elements of the offence. For example, in *Bayat*, Rosenberg J.A. concluded that beginning an online conversation with a target was not an opportunity to commit the offence of child luring. He likened the first contact to a “knock on a door” (para. 19). In his view, that initial contact was too remote from the commission of the offence to constitute the provision of an opportunity to commit an offence (see also *R. v. Vezina (A.)*, 2014 CMAC 3, 461 N.R. 286, at paras. 5-6; *Williams* (2010), at paras. 45-47). In the particular context of drug trafficking, we would adopt the conclusion reached by Trotter J. at para. 27 of the *Williams* stay decision: an opportunity to commit an offence is offered when the officer says something to which the accused can commit an offence by simply answering “yes.”

[65] The definition of drug trafficking in the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19 (*CDSA*), is broad. It includes not only selling, transporting and administering illegal drugs, but also making an offer to do so (*CDSA*, ss. 2(1), “traffic” and 5(1); *R. v. Murdock* (2003), 176 C.C.C. (3d) 232 (Ont. C.A.), at para. 14; MacFarlane, Frater and Michaelson, vol. 1, at pp. 5-18.1 to 5-21). The definition of “traffic” is limited to activity “in respect of a substance included in any of Schedules I to V.” A general agreement to sell “drugs” or “product” will not suffice unless there are contextual markers that narrow what is intended to a particular drug listed in those schedules.

[66] For these reasons, police can make exploratory requests of the target, including asking whether they sell drugs, without providing an opportunity to traffic in illegal drugs (see, e.g., *R. v. Ralph (A.)*, 2014 ONCA 3, 313 O.A.C. 384, at para. 32). An opportunity has been provided only when the terms of the deal have narrowed to the point that the request is for a specific type of drug and, therefore, the target can commit an offence by simply agreeing to provide what the officer has requested. In some cases, a request to purchase a specific quantity of drugs will suffice. For example, in Williams’ case, where the police were working from a tip that the individual was a *cocaine* dealer, a request for a particular quantity of that drug (i.e., “I need 80”) constituted an opportunity (stay decision, at para. 9). Indeed, courts have consistently recognized that a request to purchase a specific type of drug during the conversation will amount to an opportunity to commit a crime (*Ralph*, at paras. 29 and 31-32; *R. v. Imoro*, 2010 ONCA 122, 251 C.C.C. (3d) 131, at paras. 3

and 15-16, aff'd 2010 SCC 50, [2010] 3 S.C.R. 62; *Townsend*, at paras. 42 and 47; *R. v. Gould*, 2016 ONSC 4069, at paras. 18 and 30 (CanLII). Statements such as “I need 40,” “I need six greens,” “I want a 60 piece,” “four for a hundred,” “a ball,” and “half a B” have all been found to present opportunities (*R. v. Marino-Montero*, [2012] O.J. No. 1287 (QL) (Sup. Ct.), at para. 15; *R. v. Izzard*, [2012] O.J. No. 2516 (QL) (Sup. Ct.), at para. 22; *Williams* (2010), at para. 19, see also para. 54; *R. v. Gladue*, 2012 ABCA 143, 285 C.C.C. (3d) 154, at paras. 4 and 11; *R. v. Stubbs*, 2012 ONSC 1882, at para. 12 (CanLII); *Arriagada*, at para. 26; *Clarke*, at para. 37).<sup>2</sup>

[67] Before this Court, the Crown submitted that the opportunity to commit the offence — within the meaning of the doctrine of entrapment — arises *not* when the agreement to sell drugs is secured during the call, but only *afterwards*, when the police officer meets the suspect in person, and the in-person transaction is made. This argument lacks merit. Drug-related entrapment cases have implicitly rejected such an approach by considering whether the accused was entrapped during the initial conversation, even though the in-person transaction occurred later. In *Swan*, for example, although the accused eventually met up with the undercover officer and sold \$40 worth of cocaine (at para. 7), Prowse J.A.’s analysis focused on the call itself (paras. 27-29). In *Olazo*, the accused eventually met up with the undercover officer (at para. 10), but Donald J.A. focused on the call (para. 26). In *Ralph*, the accused sold the officer drugs six times after their initial phone call (at para. 2), but Rosenberg J.A. still focused on the words spoken in that phone call (para. 32).

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<sup>2</sup> In each case, the meaning of the specific slang term at issue will have to be established.



[68] It follows that, to ensure the fairness of state conduct, proceedings must be stayed in respect of charges that are related to the conduct targeted by abusive police conduct — that is, to the offence of trafficking by offer *and* to the in-person trafficking or possession for the purpose of trafficking offences to which the offer directly relates. Concluding otherwise would ignore the entrapment that occurs during the phone call and its direct relationship to the offences that were eventually charged. The police conduct in dial-a-dope investigations is directed at drug trafficking. The very reason that police interact with their targets in person is to carry out the opportunities offered over the phone. To follow the Crown's reasoning and stay charges arising from the offer while entering convictions for drug trafficking to which the offer related would be highly technical and, indeed, artificial, thereby defeating the purposes of the entrapment doctrine and ignoring its underlying rationale of preventing intrusion into people's lives to test their virtue.

[69] In conclusion, given the principles governing our entrapment doctrine, police investigating a dial-a-dope operation by calling a phone number they suspect is being used to traffic illegal drugs must form reasonable suspicion before offering an opportunity to traffic drugs. If they cannot form reasonable suspicion before making the call, they must in the course of their conversation form reasonable suspicion before making the offer. A determination of whether this requirement is satisfied must be the product of strict judicial scrutiny, taking into account the constellation of factors that indicate involvement in drug trafficking. And, if it is determined that the

offer was presented before reasonable suspicion was formed, entrapment is established and the proceedings must be stayed.

## VI. Application

[70] The facts of each of these two appeals lead us to different conclusions. Specifically, applying this Court's entrapment framework and in particular its reasonable suspicion standard, we would affirm the decision of each trial judge. While Ahmad was not entrapped, Williams was.

[71] The only question to be answered in deciding each appeal is whether, based on the constellation of factors known to police, they had a reasonable suspicion that the target or the phone number was engaged in drug trafficking at the time the officer provided an opportunity to commit a crime.

[72] In Ahmad's case, D.C. Limsiaco received a tip that "Romeo" was selling drugs using a particular phone number. He called the number and engaged in the following conversation:

Male: Hello

Officer: Hey, It's Mike, Matt said I can give you a call, this is Romeo?

Male: He did, did he?

Officer: Yeah, said you can help me out?

Male: What do you need?

Officer: 2 soft

Male: Hold on, I'll get back to you.

Officer: Alright.

(*Ahmad* stay decision, at para. 21)

[73] D.C. Limsiaco provided an opportunity for Ahmad to commit drug trafficking when he asked for “2 soft” in response to the question, “What do you need?” In context, given the meaning of “2 soft,” this amounted to asking Ahmad whether he would sell him two grams of cocaine. Since the *CDSA* allows trafficking to be committed by a simple offer to sell drugs, saying “yes” to the officer’s question would have constituted trafficking. Of course, asking whether Ahmad could “help [him] out,” as the officer did earlier, was *not* an opportunity to traffic. Responding “yes” to that question would not have been trafficking, because the inquiry had not been narrowed to a particular substance listed in a schedule of the *CDSA*.

[74] Given the point at which the opportunity was provided, the constellation of factors that existed at that time consisted of the tip and the nature of Ahmad’s responses to D.C. Limsiaco’s questions.

[75] Allen J. concluded that reasonable suspicion crystallized when Ahmad asked D.C. Limsiaco, “What do you need?” By that point, the officer had asked Ahmad if he went by the name “Romeo,” which he did not deny. When the officer asked Ahmad, “[Y]ou can help me out?”, Ahmad responded positively to this use of

language particular to the drug subculture: “What do you need?” Having connected the tip to the person on the phone, the aspect of the tip that asserted illegality was corroborated by Ahmad’s understanding of drug-trafficking slang and willingness to engage in it. Allen J. found that, in this context, these markers of reliability together sufficiently corroborated the initial tip to give rise to an objective possibility that Ahmad was involved in drug trafficking before the officer asked for “2 soft.”

[76] While this is an extremely close call, we are satisfied that Allen J. did not err in her conclusion that the police had a reasonable suspicion of drug trafficking before providing the opportunity to commit an offence. We acknowledge that the answer “What do you need?” to the question “[Y]ou can help me out?” can admit of innocent responses, but the reasonable suspicion standard did not require the police to direct the conversation to rule out innocent explanations for Ahmad’s positive response. Nor can the question and answer be assessed in isolation. It came after the officer’s references to both Romeo and the police’s concocted “drop name” Matt, and after Ahmad evinced no surprise and did not deny he was Romeo or ask who Matt was. Significantly, he betrayed no surprise that a stranger, on another person’s recommendation, would be reaching out to him for “help”; in fact, he did the opposite, continuing to engage the caller to ascertain what he wanted. The officer was entitled to rely on what he knew of illicit drug transactions and all of the circumstances, as well as the response “What do you need?” in response to a request that he “help . . . out” a stranger, in forming reasonable suspicion that the individual with whom he was speaking was engaged in drug trafficking. Perhaps no one of these

factors, on its own, was sufficient to establish reasonable suspicion. But we share Allen J.'s conclusion that, taken together, they disclosed a reasonable possibility that this individual was involved in drug trafficking.

[77] In Williams' case, police received a tip that "Jay" was selling drugs using a phone number. Police prepared a package relating the phone number and the name "Jay" to Williams, who had previously been arrested for drug trafficking. The package included information about Williams, including an address at which he had allegedly been trafficking drugs, a description of his physical appearance, a note that he was a "cocaine dealer" who worked in a certain area, and a home address.

[78] Having been provided the phone number, the name "Jay," the nature of the drug, and a picture of Williams, D.C. Canepa called the number and had the following conversation:

Male: Hello.

Canepa: Jay?

Male: Yeah.

Canepa: You around?

Male: Who is this?

Canepa: It's Vinny.

Male: Vinny who?

Canepa: Vinny. Jesse from Queen and Jarvis gave me your name . . . your number. Said you could help me out. I need 80.

Male: Okay. You have to come to me.

Canepa: Okay. Where?

Male: Queen and Dufferin.

Canepa: Okay. It'll take me a few because I'm at Yonge & Bloor.

Male: Okay, hurry up.

Canepa: I'll call you when I get there.

Male: Okay. What you want, soft or hard.

Canepa: Hard. Hard buddy.

Male: Okay.

(*Williams* stay decision, at para. 9)

[79] As soon as the person who answered confirmed that he was Jay, D.C. Canepa provided an opportunity to traffic drugs when he presented Williams with the specific request to sell him “80,” slang for a dollar amount of cocaine. Once Williams responded, “Okay,” the offence of trafficking by offer was complete.

[80] Unlike in Ahmad's case, there was nothing in Williams' responses — *before* D.C. Canepa provided the opportunity to traffic — to suggest that the phone number was being used to sell drugs. D.C. Canepa did not wait to see how Williams would respond to an investigative question that could have corroborated that Williams was engaged in criminal activity prior to providing the opportunity to commit the crime. This means Williams did not respond positively to slang particular to the drug subculture until *after* the opportunity had been provided. That one aspect

of a tip has been corroborated — here, “Jay’s” name — does not allow that tip to ground a reasonable suspicion. The corroboration of the name does not strengthen the reliability of the tip “in its assertion of illegality” (*J. L.*, at p. 272).

[81] The Crown relies on the police brief that identified “Jay” as Williams and included his home address, an address where he trafficked drugs, and his criminal record. However, there was no evidence of the basis upon which the officer preparing the brief made the connection between Williams and the name “Jay.” Trotter J. reasoned that he could not conclude that the name “Jay” was sufficiently linked to Williams, and therefore he could not rely on the information in that package as part of a constellation of factors supporting reasonable suspicion. Given the lack of evidence on the reliability of the source or the information provided, Trotter J. concluded that neither the officers nor he could determine the reliability or currency of the information.

[82] We agree. The court can consider all the objective factors known to members of the investigative team at the relevant time in determining whether the decision was made with reasonable suspicion. Obviously, police officers must be able to rely on the investigative work of other officers and it is not necessary for the particular officer making the call to personally have all the information that supports reasonable suspicion (see, e.g., *Debot*, at p. 1166). Police work often relies on multiple officers conducting individual parts of an investigation. In the context of dial-a-dope investigations, several lower courts have also taken this approach (see *R.*

*v. Gladue*, 2011 ABQB 194, 54 Alta. L.R. (5th) 84, at para. 60, aff'd 2012 ABCA 143, 285 C.C.C. (3d) 154; *R. v. Coutre*, 2013 ABQB 258, 557 A.R. 144, at para. 14; *Sawh*, at para. 112).

[83] However, the facts relied upon to ground reasonable suspicion must be put before the court for independent review. As we have emphasized, the primary purpose of the reasonable suspicion standard is to allow for meaningful judicial review of police conduct (see paras. 24 and 45-46, above). Requiring the police to disclose their reasons for targeting an accused does not alter the onus on the accused to prove entrapment; it merely recognizes that only the police can point to the circumstances known to them that give rise to reasonable suspicion. To free the police from the requirement of having to provide objectively reviewable evidence — in this case, evidence of the connection between “Jay” and Williams — would be to engage in the very same “good faith” reasoning that has been soundly rejected in the reasonable suspicion jurisprudence.

[84] In this case, police appear to have proceeded on the assumption that the tip — that Jay was trafficking in cocaine using the phone number provided — was about Williams. But there was no evidence to establish that the source connected Jay with Williams. Nor did the evidence establish any other basis upon which to conclude they were the same person. Indeed, the officer who had previously dealt with Williams said she had not known him to use the name “Jay.” While the report itself asserted a connection between the two, there was no evidence to show whether such a



connection was warranted or reasonable. In the absence of such evidence, this Court cannot simply presume that a bald tip that Jay was using a particular phone number to traffic in cocaine was reliable and current. Confirmation that the speaker was Jay confirmed only that aspect of the tip — that Jay was using that phone. There was no confirmation that he was using the phone to sell cocaine until after the police officer provided him with the opportunity to do so. The only conclusion that can be safely drawn from the record as it stands is the one Trotter J. drew: the police had no more than a bare tip that someone using a particular phone number was selling drugs and this did not ground reasonable suspicion.

## VII. Conclusion

[85] For these reasons, we would dismiss Ahmad’s appeal and allow Williams’ appeal, setting aside the convictions entered by the Court of Appeal and reinstating the stay of proceedings entered by Trotter J.

The reasons of Wagner C.J. and Moldaver, Côté and Rowe JJ. were delivered by

MOLDAVER J. —

### I. Overview

[86] The criminal landscape has changed dramatically since the seminal entrapment cases of *R. v. Mack*, [1988] 2 S.C.R. 903, and *R. v. Barnes*, [1991] 1 S.C.R. 449, were decided. The days when drug dealers, particularly low-level dealers, would associate themselves with a fixed location are largely gone. Now, these dealers regularly associate themselves with a phone number and run their businesses through so-called “dial-a-dope” operations. The proliferation of mobile phones and other forms of instant communication has allowed modern day drug dealers to traffic from any number of different locations as a means of evading police detection. As these appeals demonstrate, attempting to apply the doctrine of entrapment as formulated in *Mack* and *Barnes* to present-day dial-a-dope operations has revealed both doctrinal and policy concerns that this Court, in my view, should address.

[87] The doctrine of entrapment, as a species of abuse of process, “draws on the notion that the state is limited in the way it may deal with its citizens” (*Mack*, at p. 939). The state may not engage in conduct that “violates our notions of ‘fair play’ and ‘decency’ and which shows blatant disregard for the qualities of humanness which all of us share” (p. 940). A claim that the police entrapped the individual before the court is “a very serious allegation against the state”, and a finding of entrapment is accordingly reserved for the “clearest of cases” of intolerable state conduct (pp. 976-77).

[88] In Canadian law, entrapment has two branches. Under the first branch, entrapment is made out where the police offer an individual the opportunity to

commit an offence without reasonably suspecting that the individual is already engaged in that type of criminal activity (the “individualized suspicion prong”), or without acting pursuant to a *bona fide* inquiry (the “*bona fide* inquiry prong”). Under the second branch, entrapment is made out where the police go beyond providing an individual with the opportunity to commit an offence and instead induce the commission of the offence.

[89] The dial-a-dope jurisprudence has revealed problems with how the first branch of entrapment is currently formulated. Attempting to apply the individualized suspicion prong in dial-a-dope cases has resulted in some courts closely parsing undercover calls to determine whether an individual was entrapped. This parsing approach has been justifiably criticized as both unprincipled and impractical. Further, as I will explain, the *bona fide* inquiry prong has been rendered incoherent by judicial development of the reasonable suspicion standard in the context of s. 8 of the *Canadian Charter of Rights and Freedoms*. In the end, both prongs have failed to remain faithful to the balance this Court struck in *Mack* and *Barnes* between protecting an individual’s legitimate interest in being left alone by the state and effective law enforcement. To maintain an appropriate balance between these competing values, the Court in *Mack* and *Barnes* recognized that the police must be given “substantial leeway” in investigating crimes like drug trafficking, which may be difficult to detect through traditional means (*Mack*, at pp. 977-78). In sum, the fundamental balance struck in those cases was aimed at ensuring that law

enforcement techniques that society would not view as intolerable, and which may be necessary to combat certain types of crime, are not labelled as entrapment.

[90] I am of the view that the *bona fide* inquiry prong must be revised to preserve this fundamental balance, to rectify doctrinal issues within the prong itself, and to address policy concerns that have arisen with respect to the prong's application. This revision will ensure that only the clearest of cases of intolerable state conduct are captured by the doctrine of entrapment by refocusing the doctrine on its principled origin: abuse of process. Moving forward, a *bona fide* inquiry should be defined as a factually-grounded investigation into a tightly circumscribed area, whether physical or virtual, that is motivated by genuine law enforcement purposes.

[91] In the end, while I would adopt a different analytical approach, I agree with the Court of Appeal that the police were engaged in *bona fide* inquiries when they offered each of the appellants an opportunity to commit the offence of drug trafficking. Accordingly, I would dismiss both of the appeals.

## II. Background Facts and Proceedings in the Ontario Superior Court of Justice

### A. *Mr. Williams's Case*

#### (1) Facts

[92] The investigation that led to the charges against Mr. Williams began when Police Constable Fitkin of the Toronto Police Service (the “TPS”) received information from a confidential source that someone who went by the name of “Jay” was selling drugs in the Queen and Church area of downtown Toronto. On January 31, 2011, P.C. Fitkin emailed Detective Constable Hewson asking her to place a “cold call” in relation to the information he had received. He attached a Person of Interest package that he had prepared, which included a phone number and identified Mr. Williams as “Jay”, though it is not clear how the link between Mr. Williams and “Jay” was made. The Person of Interest package also included biographical information about Mr. Williams, and stated that he dealt cocaine in the 389 Church Street and Yonge-Dundas areas of Toronto. It also stated that he was arrested for trafficking in 2009 and pleaded guilty to possession of cocaine in early 2010. In the body of the email, P.C. Fitkin indicated that he had not been able to get a “drop name” from his source yet, but that he would continue to try.<sup>3</sup>

[93] D.C. Hewson had some familiarity with Mr. Williams, having been involved in his 2009 arrest. However, she did not ask P.C. Fitkin about the reliability

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<sup>3</sup> A “drop name” is a name that the would-be buyer “drops” into the conversation to put the seller at ease.

of his source, the currency of the information, or how the link was made between Mr. Williams and “Jay”. She did run the phone number provided through TPS databases, but derived no information from this search. P.C. Fitkin was not called as a witness and was therefore not able to shed light on any of these unknowns.

[94] On February 11, 2011, the Drug Squad held a briefing about the case. They determined that D.C. Canepa would make a cold call to the number provided for Mr. Williams. D.C. Canepa was provided with some basic information, including the name “Jay”, the phone number provided for Mr. Williams, and the nature of the drug. He did not know whether any checks had been performed to verify the information because, as he explained in his testimony, he preferred to know as little as possible.

[95] That evening, D.C. Canepa made the cold call and the following conversation took place:

Male: Hello.

Canepa: Jay?

Male: Yeah.

Canepa: You around?

Male: Who is this?

Canepa: It's Vinny.

Male: Vinny who?

Canepa: Vinny. Jesse from Queen and Jarvis gave me your name . . . your number. Said you could help me out. I need 80.

Male: Okay. You have to come to me.

Canepa: Okay. Where?

Male: Queen and Dufferin.

Canepa: Okay. It'll take me a few because I'm at Yonge & Bloor.

Male: Okay, hurry up.

Canepa: I'll call you when I get there.

Male: Okay. What you want, soft or hard.

Canepa: Hard. Hard buddy.

Male: Okay.

[96] A few more phone calls were made to arrange the transaction. Later that night, the men met and D.C. Canepa purchased \$80 of crack cocaine from Mr. Williams. On February 22, 2011, D.C. Canepa arranged another \$80 transaction. The Drug Squad tried to arrange a third transaction, but Mr. Williams did not respond to D.C. Canepa's calls. Accordingly, they decided to conclude the investigation and arrest Mr. Williams based on the previous transactions.

[97] A few weeks later, a TPS officer who was aware that the Drug Squad was attempting to locate Mr. Williams saw him walking down the street. The officer arrested Mr. Williams and searched his person. The search uncovered a handgun, a box of ammunition, a small amount of marijuana, and two cellphones.

[98] Mr. Williams was subsequently charged with two counts of trafficking in cocaine, two counts of possession of the proceeds of crime, and various firearm,

ammunition, and breach of recognizance offences. The charges for trafficking and possession of the proceeds of crime stemmed from the drug transactions with D.C. Canepa, while the other offences, which were charged on a separate indictment, stemmed from the search subsequent to Mr. Williams's arrest.

(2) Proceedings in the Ontario Superior Court of Justice (Trotter J.)

[99] In the proceedings on the first indictment, Mr. Williams admitted that the evidence established his guilt for trafficking and possession of the proceeds of crime. He argued, however, that the charges should be stayed on the basis of entrapment. The trial judge agreed, finding that there was no reason to suspect that Mr. Williams was involved in selling drugs when D.C. Canepa gave him the opportunity to traffic in cocaine. He held that the words "I need 80", referring to \$80 of cocaine, constituted an opportunity to traffic because it involved a request for a specific amount of a specific type of drug (2014 ONSC 2370, 11 C.R. (7th) 110, at para. 9 ("Williams First Stay Application reasons")). Further, the trial judge was of the view that the police, having only unconfirmed information obtained from a confidential source, did not have reasonable suspicion that Mr. Williams was dealing drugs.

[100] Mr. Williams also argued that the firearm, ammunition, and breach of recognizance charges should be stayed because they were "inextricably linked" to the conduct that formed the basis for the finding of entrapment (2014 ONSC 3005, 11 C.R. (7th) 124, at para. 6 ("Williams Second Stay Application reasons")). The trial judge disagreed and entered convictions on those charges. In his view, Mr. Williams



was acting independently when he decided, a few weeks after the last transaction with D.C. Canepa, to walk around armed with a gun and ammunition — the police did nothing to encourage or facilitate that decision.

B. *Mr. Ahmad's Case*

(1) Facts

[101] On April 19, 2012, D.C. Wallace provided D.C. Limsiaco with a phone number and told him that, if he called that number, a person who went by the name of “Romeo” would sell him drugs. That information was not investigated any further before D.C. Limsiaco called the number and had the following conversation with the person who answered:

Male: Hello

Officer: Hey, It's Mike, Matt said I can give you a call, this is Romeo?

Male: He did, did he?

Officer: Yeah, said you can help me out?

Male: What do you need?

Officer: 2 soft

Male: Hold on, I'll get back to you.

Officer: Alright.

[102] The male then called D.C. Limsiaco back later the same day, and they had the following conversation:

Officer: Hello

Male: So what do you need again?

Officer: 2 soft, where you at?

Male: Can meet you at Yorkdale.

Officer: Sure, \$160 good an hour?

Male: \$140, hours good, go by theatres

Officer: Cool

[103] The male who answered the phone, later found to have been Mr. Ahmad, went along with the conversation without hesitation and without questioning the identity of “Matt,” a made up name. At no point did Mr. Ahmad question being called “Romeo”, though he neither confirmed nor denied that was his name. He also did not question the meaning of “2 soft”, which was a coded reference to two grams of powder cocaine.

[104] Later that day, according to the police officers who testified at Mr. Ahmad’s trial, D.C. Limsiaco met Mr. Ahmad at the Yorkdale Shopping Centre. D.C. Limsiaco completed the undercover buy just outside the mall, where he gave Mr. Ahmad \$140 of buy money in exchange for two small bags of cocaine. The Drug Squad team then arrested Mr. Ahmad. He was subsequently charged with trafficking cocaine, possession of cocaine for the purpose of trafficking, and possession of the

proceeds of crime. The Crown withdrew the trafficking charge at the preliminary hearing.

(2) Proceedings in the Ontario Superior Court of Justice (Allen J.)

[105] Mr. Ahmad proceeded to trial, where he pleaded not guilty to the possession charges. He testified that on the day of his arrest, he met his friend “Mikey” at the mall, and suggested that it was Mikey, not him, who had sold D.C. Limsiaco the drugs. However, the trial judge rejected Mr. Ahmad’s evidence and ultimately found him guilty of one count of possession of cocaine for the purpose of trafficking and two counts of possession of the proceeds of crime (2014 ONSC 3818, at para. 60 (CanLII)).

[106] After the convictions were entered, Mr. Ahmad applied for a stay of proceedings on the basis of entrapment. The trial judge dismissed the application (2015 ONSC 652). She acknowledged that the officer did not have reason to suspect the person on the other end of the line was trafficking in drugs before placing the call. However, in her view, D.C. Limsiaco had built reasonable suspicion that “Romeo” was trafficking in drugs during the call before offering him an opportunity to commit an offence by requesting a specific quantity of powder cocaine. Accordingly, the trial judge held that Mr. Ahmad had not been entrapped.

III. Appeals to the Ontario Court of Appeal (Hourigan and Brown JJ.A. and Himel J. (ad hoc))

[107] The appeals in Mr. Williams's and Mr. Ahmad's cases were heard together. The Crown appealed from the stay of Mr. Williams's convictions for trafficking and possession of the proceeds of crime. Mr. Williams cross-appealed the dismissal of his entrapment application with respect to the firearm, ammunition, and breach of recognizance convictions. For his part, Mr. Ahmad appealed from, among other things, the dismissal of his stay application.

[108] The Court of Appeal allowed the Crown's appeal in Mr. Williams's case, dismissed Mr. Williams's cross-appeal, and dismissed Mr. Ahmad's appeal (2018 ONCA 534, 141 O.R. (3d) 241). The court was unanimous in holding that there was no entrapment in either case. It divided, however, in its reasons.

[109] Hourigan J.A., writing for the majority, reasoned that there was no entrapment because the police in both cases were acting pursuant to a *bona fide* inquiry. Specifically, the police reasonably suspected that each of the phone numbers was being used in a dial-a-dope scheme. While *Mack* and *Barnes* contemplated the offering of opportunities at physical spaces over which the police held reasonable suspicion, the majority was of the view that the law must keep up with the modern realities of crime and analogized the specific virtual space of a suspected dial-a-dope line to a specific physical space. The majority concluded that, on the facts of both Mr. Williams's and Mr. Ahmad's respective cases, the police had the necessary reasonable suspicion before they extended an opportunity to traffic.

[110] Himel J. concurred in the result but took a different analytical approach. In her view, the police reasonably suspected both Mr. Williams and Mr. Ahmad as individuals at the time they extended the respective opportunities. There was accordingly no need to resort to the *bona fide* inquiry prong.

#### IV. Analysis

[111] These appeals call upon this Court to clarify the proper scope and application of the first branch of entrapment.

##### A. *Entrapment in Canadian Law*

[112] The doctrine of entrapment is “simply an application of the abuse of process doctrine” (*R. v. Campbell*, [1999] 1 S.C.R. 565, at para. 21; see also *Mack*, at pp. 938-42). It shields individuals from state conduct that society regards as intolerable — conduct that “violates our notions of ‘fair play’ and ‘decency’ and which shows blatant disregard for the qualities of humanness which all of us share” (*Mack*, at p. 940). In essence, the doctrine of entrapment sends the message from the court to the state that, notwithstanding the state’s ability to prove an accused’s guilt beyond a reasonable doubt, the court will not allow the state to avail itself of the judicial process because the state’s conduct in bringing the accused before the court was intolerable (*Mack*, at p. 942; *R. v. Ahluwalia* (2000), 149 C.C.C. (3d) 193 (Ont. C.A.), at para. 30).

[113] This high threshold justifies restricting the remedy for entrapment to a stay of proceedings, which “permanently halts the prosecution of an accused” and is “the most drastic remedy a criminal court can order” (*R. v. Babos*, 2014 SCC 16, [2014] 1 S.C.R. 309, at para. 30). As Doherty J.A. recognized in *Ahluwalia*, the doctrine of entrapment is not “a vague licence to stay proceedings whenever police conduct offends a particular judge’s sensitivities or his or her perception of how the police should go about doing their business” (para. 31). Indeed, entrapment should only be recognized in the “clearest of cases” (*Mack*, at p. 977).

[114] The doctrine of entrapment reflects the notions that the police should be limited to investigating and preventing — as opposed to creating — crime, and that the state should not randomly test the virtue of its citizens. More specifically, the Court in *Mack* articulated several rationales for recognizing the doctrine of entrapment in Canadian law, including that: (1) there must be limits on the state’s power to intrude on individuals’ personal lives and engage in random virtue testing; (2) “entrapment techniques may result in the commission of crimes by people who would not otherwise have become involved in criminal conduct”; and (3) police powers should not be used to manufacture crime for the purpose of obtaining convictions (p. 941).

[115] Entrapment can be made out in two ways, that is, when:

(a) the authorities provide a person with an opportunity to commit an offence without acting on a reasonable suspicion that this person is

already engaged in criminal activity or pursuant to a *bona fide* inquiry [(“opportunity-based entrapment”)];

(b) although having such a reasonable suspicion or acting in the course of a *bona fide* inquiry, [the authorities] go beyond providing an opportunity and induce the commission of an offence [(“inducement-based entrapment”)].

(*Mack*, at pp. 964-65; see also *Barnes*, at p. 460.)

[116] These appeals are only concerned with the first branch of entrapment, which has two prongs. First, the police may provide an individual with an opportunity to commit an offence if they reasonably suspect that the targeted individual is already engaged in criminal activity of the same type (the individualized suspicion prong). Second, even if the police do not reasonably suspect that a particular individual is involved in criminal activity, the police may nonetheless provide that individual with an opportunity to commit a criminal offence if they are acting “in the course of a *bona fide* inquiry” (the *bona fide* inquiry prong) (*Barnes*, at p. 460 (emphasis deleted)).

[117] The *bona fide* inquiry prong requires some elaboration. While it was first mentioned in *Mack*, that case involved the second branch of entrapment (i.e., inducement-based entrapment). The Court had the opportunity to develop, clarify, and apply the *bona fide* inquiry prong in *Barnes*, which remains this Court’s authoritative statement on the first branch (i.e., opportunity-based entrapment). The *bona fide* inquiry prong was said to refer to an investigation that is “motivated by the genuine purpose of investigating and repressing criminal activity” (*Barnes*, at p. 460),

and targets persons associated with “a particular location or area where it is reasonably suspected that certain criminal activity is occurring” (*Mack*, at p. 956 (emphasis added)). Within an area that is “defined with sufficient precision”, the *bona fide* inquiry prong of entrapment gives law enforcement significant latitude to investigate “any person associated with the area” (*Barnes*, p. 463 (emphasis in original)). Indeed, as Lamer C.J. put it in *Barnes*, “[s]uch randomness is permissible within the scope of a *bona fide* inquiry” (p. 463). Notably, the location in *Barnes*, which the Court found to be defined with sufficient precision, consisted of a busy six-block area in downtown Vancouver. Practically speaking, based on evidence that drug trafficking was prevalent in that six-block area, *Barnes* enabled the police to target thousands of unknown persons and provide them with an opportunity to traffic in drugs.

B. *The Dial-a-Dope Jurisprudence Reveals Problems With the First Branch of Entrapment*

(1) The Individualized Suspicion Prong Leads to Anomalous Results in the Dial-a-Dope Context

[118] In the context of entrapment, the individualized suspicion prong has come under fire for leading to anomalous results, particularly in dial-a-dope cases where police call alleged drug dealers based on minimal information (see, e.g., S. Penney, “Entrapment Minimalism: Shedding the ‘No Reasonable Suspicion or Bona Fide Inquiry’ Test” (2019), 44 *Queen’s L.J.* 356, at pp. 357-58; *R. v. Le*, 2016 BCCA 155, 28 C.R. (7th) 187; C.A. reasons, at para. 128, per Himel J., concurring; Williams



Second Stay Application reasons, at paras. 22-23). The concern expressed is that even though the investigating officer may not possess individualized reasonable suspicion at the time he or she offers an opportunity, the police conduct in a typical dial-a-dope case cannot be said to rise to the level of an abuse of process warranting a stay of proceedings. Further, as these appeals demonstrate, the individualized suspicion prong has been interpreted to require a minute parsing of the language used by the undercover officer, which has led to artificial distinctions between cases where a stay is granted and cases where the convictions are upheld. These distinctions are often picayune, difficult to draw, and promote an approach that, in my view, is akin to dancing on the head of a pin. Moreover, of fundamental concern, these distinctions are completely untethered from the abuse of process doctrine that is the cornerstone of entrapment.

[119] In order to avoid a finding of entrapment under the individualized suspicion prong, *Mack* and *Barnes* instruct that an officer must have reasonable suspicion before he or she can provide an individual with an opportunity to commit an offence. Post-*Mack* and *Barnes*, this Court has defined reasonable suspicion as “something more than a mere suspicion and something less than a belief based upon reasonable and probable grounds” (*R. v. Chehil*, 2013 SCC 49, [2013] 3 S.C.R. 220, at para. 26, quoting *R. v. Kang-Brown*, 2008 SCC 18, [2008] 1 S.C.R. 456, at para. 75). It is a “robust standard” that “derives its rigour from the requirement that it be based on objectively discernible facts, which can then be subjected to independent [and exacting] judicial scrutiny” (*Chehil*, at paras. 3 and 26).

[120] In an attempt to both adhere to the formal requirement of reasonable suspicion and preserve the substantive abuse of process character of entrapment in dial-a-dope cases, some courts have developed an approach that, with respect and unlike my colleagues, I cannot endorse. Presently, the jurisprudence in some jurisdictions, including Ontario, draws a distinction between taking an “investigative step” (which does not require reasonable suspicion) and presenting an “opportunity” to commit an offence (which does). Investigative steps can furnish the reasonable suspicion necessary to present an opportunity. On its face, this distinction appears unproblematic — clearly, there is a difference between taking a step in the investigation and offering an opportunity.

[121] The issue, however, is how the courts have drawn the line. A review of the jurisprudence reveals that “investigative steps” have been held to involve engaging a potential drug dealer over the phone and asking general questions, such as “can you hook me up” or “are you rolling”. An opportunity, on the other hand, has been defined as a request to purchase a specific quantity of drugs. For example, an officer could provide an opportunity by stating “I need 80” (referring to \$80 worth of cocaine) (see C.A. reasons, at para. 42; Williams First Stay Application reasons, at paras. 20-27; C. De Sa, “Entrapment: Clearly Misunderstood in the Dial-a-Dope Context” (2015), 62 *Crim. L.Q.* 200, at pp. 202-3). This distinction is the reason why, at first instance, Mr. Williams’s entrapment application was allowed while Mr. Ahmad’s was dismissed.

[122] The problem with the “fine line” distinction this approach draws is that it requires courts to closely parse undercover calls to determine whether an accused was entrapped. Judges and academics, as well as interveners in the cases at bar,<sup>4</sup> have criticized this as being unprincipled and impractical. Professor Penney, echoing the comments of Ducharme J. in *R. v. Henneh*, 2017 ONSC 4835, [2017] O.J. No. 7173, at para. 24 (QL), has observed that “‘asking someone if he is dealing drugs’ (which courts have typically characterized as a mere investigative step) is ‘no different from asking if he will sell you a specific kind and amount of drugs’ (which is undoubtedly opportunistic)” ((2019), at pp. 374-75 (footnote omitted)). He states that “[w]hile the impetus to avoid finding entrapment in these circumstances is understandable, the plausibility of the distinction is dubious” (p. 374 (footnote omitted); see also D. M. Tanovich, “Rethinking the *Bona Fides* of Entrapment” (2011), 43 *U.B.C.L. Rev.* 417, at p. 437; Criminal Lawyers’ Association of Ontario’s factum, at para. 12).

[123] I agree that parsing conversations with a view to distinguishing between taking investigative steps and offering opportunities is often artificial, perhaps even arbitrary. Moreover, by getting caught up in the precise language used by undercover officers in dial-a-dope cold calls, courts have lost sight of the fundamental relationship between entrapment and abuse of process. I note that Bennett J.A. raised a similar concern in *Le*, at para. 93:

Defence counsel argued that there is a meaningful distinction between veiled statements asking if the other party is a drug dealer and more

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<sup>4</sup> The Criminal Lawyers’ Association of Ontario and the Canadian Association of Chiefs of Police.

specific requests for types, quantities, or values of drugs. It was argued that the former statement is an investigatory step while the latter is an offer to commit an offence. Parsing the language of undercover drug calls in dial-a-dope investigations in this way takes an unnecessarily narrow approach. It ignores the surrounding circumstances, but more importantly, it strays far from the core principle underlying *Mack*. [Emphasis added.]

[124] Justice Himel, concurring in the court below, commented in a similar vein:

A number of cases have narrowly focused on the minute language choices of the investigating officer to find entrapment despite the fact that the police conduct does not risk causing an innocent person to sell drugs. The court must never lose sight of the core question: is the police's conduct really offensive? As the Supreme Court identified in *Mack*, at p. 942 S.C.R., "[i]n the entrapment context, the court's sense of justice is offended by the spectacle of an accused's being convicted of an offence which is the work of the state". Staying cases in which there is no actual offensive police conduct is harmful to the integrity of the administration of justice. It is crucial "that the police be allowed to carry out their duties without undue scepticism or the requirement that their every move be placed under a scanning electron microscope": *MacKenzie*, at para. 65.

...

Neither Mr. Williams' case nor Mr. Ahmad's case is one of those "clearest of cases" warranting a stay based on entrapment: see *Mack*, at pp. 976-77 S.C.R. The police conduct in these cases did not carry the risk that innocent persons would commit a crime that they would have not otherwise committed. Neither was this conduct that the citizenry cannot tolerate. On the contrary, the police relied on legitimate investigative techniques that are responsive to the modern realities of the drug trade and its reliance on virtual spaces to evade police scrutiny. [Emphasis added; paras. 126-28.]

[125] These concerns with the individualized suspicion prong and the parsing approach it has spawned are well-founded. The doctrine of entrapment was never

intended to interfere with law enforcement techniques that society would not find intolerable and which may be necessary to investigate certain types of crime (*Mack*, at pp. 977-78). And yet, the development of the dial-a-dope jurisprudence under the individualized suspicion prong has produced precisely that result.

[126] The manner in which my colleagues propose to dispose of these appeals provides a clear example of the dubious distinctions that flow from an application of the parsing approach. In Mr. Williams’s case, my colleagues would order a stay of proceedings — “the most drastic remedy a criminal court can order” (*Babos*, at para. 30). In Mr. Ahmad’s case, however, they would allow the convictions to stand. In both cases, an undercover officer made a call based on information from an anonymous or a confidential source. Each call was answered by a then-unknown man. Seemingly without surprise, each man confirmed or did not deny that he went by a name that, based on the officer’s information, belonged to a drug dealer operating out of the phone line (in Mr. Ahmad’s case, “Romeo”; in Mr. Williams’s case, “Jay”). The only distinction between these cases is that the undercover officer in Mr. Ahmad’s case waited for the man to say “What do you need?” in response to a request for “help” before asking for a specific quantity of cocaine:

<b>Relevant Portion of the Conversation between D.C. Limsiaco and Mr. Ahmad</b>	<b>Relevant Portion of the Conversation between D.C. Canepa and Mr. Williams</b>
<p><b>[Limsiaco]:</b> Hey, It’s Mike, Matt said I can give you a call, this is Romeo?  <b>Male:</b> He did, did he?  <b>[Limsiaco]:</b> Yeah, <u>said you can help me out?</u></p>	<p><b>Male:</b> Hello.  <b>Canepa:</b> Jay?  <b>Male:</b> Yeah.  <b>Canepa:</b> You around?  <b>Male:</b> Who is this?</p>

<p><b>Male:</b> <u>What do you need?</u>  <b>[Limsiaco]:</b> <u>2 soft</u>  <b>Man:</b> Hold on, I'll get back to you.  <b>[Limsiaco]:</b> Alright.</p>	<p><b>Canepa:</b> It's Vinny.  <b>Male:</b> Vinny who?  <b>Canepa:</b> Vinny. Jesse from Queen and Jarvis gave me your name. . .your number. <u>Said you could help me out. I need 80.</u>  <b>Male:</b> Okay. You have to come to me.</p>
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[127] It bears repeating at this point that the doctrine of entrapment is only intended to catch state conduct that society would view as intolerable (*Mack*, at p. 942; *Ahluwalia*, at para. 30). With respect to the contrary view, I struggle to see how the conduct of either undercover officer in the cases at bar could be viewed as intolerable — indeed, it seems to me the officers were doing precisely what society would expect them to do upon receiving information about an alleged dial-a-dope operation, i.e., investigate whether it is true. More significantly, I am at a loss to see how the conduct of the undercover officer in Mr. Williams's case can be said to rise to the level of an abuse of process — conduct which society will simply not tolerate — while the conduct of the undercover officer in Mr. Ahmad's case is found to be acceptable. With respect, I believe that the reasonably informed observer in our society would be utterly bewildered by this distinction. That the jurisprudence of this Court has been interpreted to demand results that do not make sense when considered through an abuse of process lens is a sign that something has gone wrong, either in the interpretation or the formulation of the entrapment doctrine.

(2) Judicial Development of the Reasonable Suspicion Standard Has Produced Doctrinal Incoherence Within the *Bona Fide* Inquiry Prong

[128] In the wake of the anomalous results produced under the individualized suspicion prong, some courts have turned to the *bona fide* inquiry prong to analyze police conduct in dial-a-dope cases (see e.g. C.A. reasons, at paras. 49-68; *Le*, at para. 96). This approach has intuitive appeal in this context. The *bona fide* inquiry prong was intended to give law enforcement a measure of flexibility in investigating crimes, particularly crimes that are “consensual” in nature or otherwise difficult to detect through traditional modes of investigation. Although the entire first branch of entrapment is animated by the notion that the state should not be permitted to randomly test the virtue of its citizens, the Court in *Mack* and *Barnes* nonetheless recognized that it is acceptable for the police to randomly approach citizens and offer them opportunities to commit offences, so long as the area within which they are operating is “defined with sufficient precision” and they “reasonably suspec[t]” that that type of crime is occurring in the area (*Barnes*, at p. 463). Fundamentally, the Court in those cases confirmed that maintaining an appropriate balance between individual liberty and legitimate law enforcement requires affording the police “substantial leeway” to investigate certain types of crime (*Mack*, at pp. 977-78). Indeed, when one examines the police conduct that was considered acceptable by this Court in the leading *bona fide* inquiry case of *Barnes* — i.e., randomly approaching any person, amongst potentially thousands of people, within a bustling six-block area of downtown Vancouver and giving them an opportunity to commit an offence — it becomes abundantly clear that the Court intended to give the police a wide measure of deference in investigating criminal activity. In light of that result, it follows that the

conduct at issue in these appeals was never intended to fall within the ambit of the doctrine of entrapment.

[129] The problem in applying the *bona fide* inquiry prong as defined in *Mack* and *Barnes* to present-day dial-a-dope investigations is that the reasonable suspicion standard has evolved since those cases were decided. As I elaborate below, the development of the reasonable suspicion standard in the context of s. 8 of the *Charter* has given rise to doctrinal issues within the *bona fide* inquiry prong. Briefly, in *Chehil*, this Court rejected the notion that reasonable suspicion includes generalized suspicion that “attaches to a particular activity or location rather than to a specific person” (para. 28 (emphasis added); see also S. Penney, “Standards of Suspicion” (2018), 65 *Crim. L.Q.* 23, at pp. 40-41). And yet, that is precisely the kind of generalized “reasonable suspicion” which the Court in *Mack* and *Barnes* incorporated into the *bona fide* inquiry prong. This deliberate choice reflects the Court’s view that requiring the police to meet a more stringent standard, such as individualized reasonable suspicion, would unduly hinder law enforcement efforts and thereby fail to strike an appropriate balance between individual liberties and legitimate law enforcement.

[130] Since *Mack* and *Barnes* were decided, individualization has come to define the reasonable suspicion standard. *Chehil* is now the leading decision on the meaning of reasonable suspicion. In that case, Karakatsanis J., writing on behalf of a unanimous Court, described reasonable suspicion as “a robust standard determined on



the totality of the circumstances, based on objectively discernible facts, and subject to independent and rigorous judicial scrutiny” (para. 3). While *Chehil* and the companion case of *R. v. MacKenzie*, 2013 SCC 50, [2013] 3 S.C.R. 250, were concerned with the constitutionality of sniffer dog searches, the Court — recognizing that reasonable suspicion “is a common standard that arises in a number of contexts” — took the opportunity to provide guidance on the general principles that lie at the core of the reasonable suspicion standard (*Chehil*, at para. 21).

[131] In the entrapment context, the notion of “reasonable suspicion” was invoked by the Court under both the individualized suspicion prong, as described in the previous section, and the *bona fide* inquiry prong. *Mack* and *Barnes* both indicate that the *bona fide* inquiry prong permits police to conduct genuine investigations that target persons associated with “a particular location or area where it is reasonably suspected that certain criminal activity is occurring”.

[132] However, in *Chehil*, this Court rejected the possibility of the kind of generalized location-based suspicion that *Barnes* incorporated into the *bona fide* inquiry prong. Under *Barnes*, *bona fide* inquiries only require a kind of generalized suspicion that, when cast over an area that is defined with sufficient precision, justifies randomly presenting individuals with opportunities to commit crime (p. 463). In that case, Lamer C.J. spoke of the police having “reasonable suspicion” over a six-block area in downtown Vancouver. In *Chehil*, this Court identified that type of

suspicion as “generalized suspicion”, and held that however flexible the reasonable suspicion standard may be, it does not include generalized suspicion:

The fact that reasonable suspicion deals with possibilities, rather than probabilities, necessarily means that in some cases the police will reasonably suspect that innocent people are involved in crime. In spite of this reality, properly conducted sniff searches that are based on reasonable suspicion are *Charter*-compliant in light of their minimally intrusive, narrowly targeted, and highly accurate nature: see *Kang-Brown*, at para. 60, *per* Binnie J., and *A.M.*, at paras. 81-84, *per* Binnie J. However, the suspicion held by the police cannot be so broad that it descends to the level of generalized suspicion, which was described by Bastarache J., at para. 151 of *A.M.*, as suspicion “that attaches to a particular activity or location rather than to a specific person”. [Emphasis added; para. 28.]

[133] To place this paragraph of *Chehil* in context, it is necessary to appreciate that in carving “generalized suspicion” out of “reasonable suspicion”, the Court was rejecting the view that Bastarache J. had advanced in his dissenting reasons in the companion cases of *Kang-Brown* and *R. v. A.M.*, 2008 SCC 19, [2008] 1 S.C.R. 569. In those cases, this Court considered whether the police had a common law power to use sniffer dogs to detect drugs. A five-judge majority of the Court held that sniffer dog searches were permissible on a *Charter*-compliant standard of “reasonable suspicion”. According to Binnie J., whose view on this point was later adopted in *Chehil*, reasonable suspicion means individualized suspicion (*Kang-Brown*, at para. 75). Justice Bastarache, dissenting in the result, agreed that police only needed reasonable suspicion to conduct a sniffer dog search. However, his definition of “reasonable suspicion” *included* generalized suspicion (paras. 213-15).

[134] Justice Bastarache neatly summarized his conception of reasonable suspicion in *A.M.*:

In *Kang-Brown*, I emphasized the important role sniffer dogs can play in the prevention and deterrence of crime and found that the use of these dogs is appropriate, under certain conditions, where police have a reasonable suspicion about the presence of illicit substances. In some instances, this suspicion will attach to a particular individual, as was demonstrated in *Kang-Brown* itself. In other situations, however, police will have a reasonable suspicion that attaches to a particular activity or location rather than to a specific person. This generalized suspicion will form a sufficient basis to justify random searches of bags or luggage in some circumstances. [Emphasis added; para. 151.]

[135] Professor Tanovich has observed the incongruity between this Court’s rejection of generalized reasonable suspicion and the suspicion contemplated by the *bona fide* inquiry prong in his article, at p. 433:

In *Kang-Brown*, Justice Bastarache, in dissent and alone on this point, was of the view that the ancillary powers doctrine authorized a dog-sniffer search on the basis of either individualized reasonable suspicion or, in cases where the search occurs at a place of public transportation where “the police had a reasonable suspicion that drug activity might be occurring at the terminal, and reasonably informed passengers were aware of the fact that their baggage may be subject to a sniffer-dog search.” This is, in general terms, the *bona fide* test for entrapment . . . . What is significant about *Kang-Brown* is that Justice [Bastarache] was alone in extending reasonable suspicion to the location. [Emphasis added; footnote omitted.]

[136] Indeed, the type of “reasonable suspicion” described by Bastarache J. (i.e., generalized reasonable suspicion) is the very type of “reasonable suspicion” that Lamer C.J. had in mind in *Barnes* — this Court’s seminal case on the *bona fide*

inquiry prong. Justice Bastarache suggested that, in the s. 8 context, the reasonable possibility of crime at a place like a bus depot or a high school could justify the otherwise random searching of individuals in those areas using a sniffer dog. Chief Justice Lamer, writing in the entrapment context, held that the reasonable possibility of a certain type of crime in an even wider area than those considered by Bastarache J. could justify the otherwise random offering of opportunities to individuals associated with that area. In sum, both Bastarache J. and Lamer C.J. defined “reasonable suspicion” in the same way — that is, to include “generalized suspicion”. However, this Court explicitly carved generalized suspicion out of the definition of reasonable suspicion in *Chehil*, which made it clear that “reasonable suspicion” means “individualized suspicion”.

[137] Accordingly, on a faithful reading of *Chehil*, the police could never hold “reasonable suspicion” — as that standard has now been defined — over the area at issue in *Barnes*. The use of generalized suspicion in *Barnes* is the only reason why the result in that case was possible. The facts on which the undercover officer’s “reasonable suspicion” in *Barnes* were based were not at all individualized. The six-block area was simply “known as an area of considerable drug activity”, and the statistical evidence before the Court was limited to raw data regarding the number of arrests made in the area and the proportion of charged drug offences that arose from that area (*Barnes*, at pp. 461-62). No doubt similar statistics could be marshalled for the various locations to which Bastarache J. would have held “reasonable suspicion” could apply, such as airports and bus terminals (see *Kang-Brown*, at para. 214).

Nonetheless, the Court in *Chehil* rejected the concept of “reasonable suspicion” advanced by Bastarache J. — not because there was insufficient evidence of drug crime at Vancouver International Airport in that case — but on the principled conclusion that reasonable suspicion must be individualized.

[138] This exposes the fundamental dissonance between *Barnes* and *Chehil*: the Court in *Barnes* did not require any degree of individualization, but post-*Chehil*, individualization now defines the reasonable suspicion standard (see Penney (2018); Tanovich, at p. 433). This dissonance has significant implications for the doctrine of entrapment. In particular, the more restrictive meaning this Court ascribed to “reasonable suspicion” in *Chehil* has rendered it incompatible with the balance between individual liberties and legitimate law enforcement struck by the *bona fide* inquiry prong in *Barnes*.

[139] Contrary to their assertion that they have provided a “complete answer” to the foregoing, my colleagues fail to explain how the result in *Barnes* could possibly be justified on a *Chehil*-compliant standard of reasonable suspicion (para. 48). They accept that individualization is now essential to the reasonable suspicion standard, and state that “the ill sought to be remedied by individualization is police intruding on the protected interests of all persons in broadly or poorly defined locations, especially on the basis of generalized evidence” (para. 48). On these points of law, I substantially agree. However, this requirement of individualization was neither imposed nor met in *Barnes* — as I have explained, the police relied

exclusively on generalized evidence to ground their “reasonable suspicion”. Here, it also bears noting that the Court rejected Mr. Barnes’s argument that the police should have focused their investigation on the “specific” areas of the Granville Mall where the evidence indicated drug trafficking was prevalent. Indeed, the Court took the view that “[i]t would be unrealistic for the police to focus their investigation on one specific part of the Mall” (p. 461, per Lamer C.J.; *contra*: p. 486, per McLachlin J., dissenting). In light of this, I have great difficulty accepting the conclusion — which necessarily underpins my colleagues’ reasons — that the suspicion held by the police in *Barnes* was somehow sufficiently individualized so as to be consistent with the reasonable suspicion standard set out in *Chehil*.

[140] Ultimately, I understand the dispute between myself and my colleagues in this case to come down to this: should the Court continue to invoke the words “reasonable suspicion” when applying the *bona fide* inquiry prong, which, in light of *Chehil*, would preclude the type of investigation undertaken in *Barnes*; or, should the Court revise the *bona fide* inquiry prong so as to remain true to the fundamental balance between legitimate law enforcement and individual liberties struck in *Mack* and *Barnes*? With respect to the contrary view, I am of the opinion that, while the *bona fide* inquiry prong must be revised to address the doctrinal issues outlined above and the policy concerns that have arisen since its creation, the revised approach that I would adopt is more consistent with the holdings and underlying principles of this Court’s entrapment jurisprudence than the solution offered by my colleagues.

C. *The Solution Is to Revise the Bona Fide Inquiry Prong*

[141] As indicated, I take the view that the solution to the doctrinal incoherence and policy concerns revealed by the dial-a-dope entrapment jurisprudence is to revise the *bona fide* inquiry prong. However, before turning to what I believe is the best way to move forward in the law of entrapment, I will consider three potential solutions to the problems outlined above and explain why I do not believe that any of those solutions are appropriate.

[142] First, and with respect to my colleagues who would adopt this approach, I do not believe that this Court should bring the blurry line some courts have drawn between an “investigative step” and an “opportunity” into sharper relief. I have reviewed the principled concerns with this parsing approach earlier in these reasons. In sum, it creates an artificial distinction based on the specific words used by the undercover officer rather than focusing on whether society would view the officer’s conduct, considered in context, as simply intolerable. Indeed, the parsing approach strays so far from the abuse of process foundation that underlies the doctrine of entrapment as to appear entirely divorced from it. A “solution” that involves dancing on the head of a pin in this way is surely no solution at all.

[143] Second, I do not believe that the answer is to adjust the robust individualized reasonable suspicion standard set out in *Chehil* to the specific context of dial-a-dope investigations, or to water down the standard across the board. The Crown’s position in these appeals is that, at least in the dial-a-dope context,

reasonable suspicion is made out on the basis of uncorroborated information obtained from an anonymous source. In my view, this would be an unwelcome development of the law. In *Chehil*, this Court acknowledged that the reasonable suspicion standard applies across a variety of contexts (para. 21). To avoid uncertainty in the law of reasonable suspicion, the standard should remain consistent across those contexts.

[144] Further, under the individualized reasonable suspicion standard described in *Chehil*, it cannot be said that the investigating officers in either of the cases at bar reasonably suspected that Mr. Williams or Mr. Ahmad — or either phone line — was engaged in or associated with drug trafficking. My colleagues make a point of stressing that reasonable suspicion is not “unduly onerous” (para. 45, quoting from *Mack*, at p. 958, which pre-dated *Chehil*). While they note the “rigorous” nature of the judicial scrutiny that the reasonable suspicion standard attracts at the time of judicial review (at para. 46), neither their review of the law nor the result that they reach acknowledges or gives effect to the “robust” threshold the standard imposes on the police in conducting their investigation (*Chehil*, at para. 3). My colleagues go on to conclude that the undercover officer built reasonable suspicion in the course of his phone call with Mr. Ahmad because Mr. Ahmad failed to deny that he was “Romeo”, did not ask who “Matt”<sup>5</sup> was, and gave the ambiguous answer of “What do you need?” in response to the officer’s request for “help” — an answer that my colleagues acknowledge admits of an innocent explanation (para. 76). In other words, the police did not obtain confirmation of any of the information they received from the

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<sup>5</sup> “Matt” was the name the undercover officer invented in the place of a “drop name”.



confidential source or obtain any independent evidence of criminality before extending an opportunity to Mr. Ahmad to commit a crime by asking for “2 soft”. Nonetheless, my colleagues say this surpasses the threshold of reasonable suspicion. With respect, I see this result as constituting an erosion of the present individualized reasonable suspicion standard. Such an erosion is concerning, since it risks insulating police interference with individual liberties from judicial review across the various contexts where reasonable suspicion applies, including police-citizen interactions like investigative detentions, which are more intrusive and susceptible to abuse.

[145] Third and finally, I would not undermine the balance struck by the *bona fide* inquiry prong by requiring *Chehil*-compliant individualized reasonable suspicion before the police can offer an opportunity. By creating the *bona fide* inquiry prong in the first place, this Court acknowledged that individualized reasonable suspicion is not required in order for police to offer an opportunity to commit an offence:

. . . in certain situations the police may not know the identity of specific individuals, but they do know certain other facts, such as a particular location or area where it is reasonably suspected that certain criminal activity is occurring. In those cases it is clearly permissible to provide opportunities to people associated with the location under suspicion, even if these people are not themselves under suspicion. [Emphasis added.]

(*Mack*, at p. 956).

[146] The Court in *Mack* and *Barnes* did not require individualized reasonable suspicion because to do so would unduly hinder law enforcement efforts to combat

crimes like drug trafficking, which may be difficult to detect through traditional means. Indeed, the Court recognized that the police must be given “substantial leeway” in investigating crimes of this nature in order to maintain an appropriate balance between the competing values of individual liberty and legitimate law enforcement (*Mack*, at pp. 977-78).

[147] There is no reason to believe that this fundamental balance has shifted such that individualized reasonable suspicion should now be required in all cases to avoid a finding of entrapment. If anything, the need to afford substantial leeway to law enforcement has been made all the more pressing in the digital age. Crimes that were already difficult to detect at the time of *Mack* can now be committed more covertly than ever before. Even then, Lamer J. recognized that “[i]f the struggle against crime is to be won, the ingenuity of criminals must be matched by that of the police; as crimes become more sophisticated so too must be the methods employed to detect their commission” (at p. 916), and that “[t]he state must be given substantial room to develop techniques which assist it in its fight against crime in society” (p. 976). The law of entrapment must not unduly stifle law enforcement in developing and employing those techniques.

[148] That said, there will be cases where the police conduct an investigation into the information received, potentially forming individualized reasonable suspicion, before calling the suspected dial-a-dope line. Nothing in these reasons should be taken as discouraging the police from doing so. However, I am of the view

that the police should not be required to conduct such an investigation or build individualized reasonable suspicion before making a call and offering an opportunity in order to avoid a finding of entrapment.

[149] It is worth noting here that no comparable jurisdictions that recognize the doctrine of entrapment require individualized reasonable suspicion in order to extend a mere opportunity to commit an offence (see K. Roach, “Entrapment and Equality in Terrorism Prosecutions: A Comparative Examination of North American and European Approaches” (2011), 80 *Miss. L.J.* 1455; Penney (2019), at pp. 366-67, fn. 64).

[150] The House of Lords has held that in determining whether the police conduct was unacceptable, the courts must take a holistic approach to ascertain “whether the conduct of the police or other law enforcement agency was so seriously improper as to bring the administration of justice into disrepute” (*R. v. Looseley*, [2001] UKHL 53, [2001] 4 All E.R. 897, at para. 25). This involves considering, among other things: the nature of the offence; the intrusiveness of the technique; the extent of the police involvement in the offence; whether the technique was “applied in a random fashion, and used for wholesale ‘virtue-testing’, without good reason”; and whether the police were acting in good faith (at paras. 23-28). Notably, on the requirement for good faith, Lord Nicholls of Birkenhead stated, at para. 27:

It goes without saying that the police must act in good faith and not, for example, as part of a malicious vendetta against an individual or group of individuals. Having reasonable grounds for suspicion is one way good

faith may be established, but having grounds for suspicion of a particular individual is not always essential. Sometimes suspicion may be centred on a particular place, such as a particular public house. Sometimes random testing may be the only practicable way of policing a particular trading activity. [Emphasis added.]

(see also para. 65, per Lord Hoffmann, concurring).

[151] Indeed, Lord Nicholls took the position that the provision of an unexceptional opportunity to commit an offence — i.e., where an undercover officer in the course of a drug offence investigation behaves in the same manner as a typical individual seeking to buy drugs — will typically not amount to entrapment in English law (paras. 23 and 28; see also paras. 77-78, per Lord Hoffmann; S. Bronitt, “Sang is Dead, Loosely Speaking”, [2002] *Sing. J.L.S.* 374, at p. 381). However, Lord Nicholls stressed that all of the circumstances must be considered in answering the overarching question of whether the state conduct was abusive (*Looseley*, at paras. 24-25). Lord Hoffmann’s and Lord Hutton’s respective concurring reasons are to similar effect (paras. 50-59 and 69-71, per Lord Hoffmann; paras. 100-102 and 112, per Lord Hutton).

[152] In the United States, the federal courts have held that merely providing an individual with an opportunity to commit a crime is unobjectionable; entrapment will only be found if the police induce the commission of an offence by an individual who was not already predisposed to commit that type of offence (see *Roach*, at pp. 1467-68). This derives from the American federal courts’ understanding of

entrapment as a substantive defence that impacts on individual culpability rather than as an aspect of abuse of process that focuses on the conduct of the state.

[153] In Australia, entrapment does not operate as a substantive defence or lead inevitably to a stay of proceedings for abuse of process, but it may be a relevant consideration in determining the admissibility of evidence or operate as a mitigating factor on sentence (see B. Murphy and J. Anderson, “‘Mates, Mr Big and the Unwary’: Ongoing Supply and its Relationship to Entrapment” (2007), 19 *C.I.C.J.* 5, at p. 12; B. Murphy and J. Anderson, “After the Serpent Beguiled Me: Entrapment and Sentencing in Australia and Canada” (2014), 39 *Queen’s L.J.* 621, at pp. 629-30, 634 and 649). While the Australian courts have not offered a comprehensive definition of entrapment, instead preferring a discretionary case-by-case approach, it is notable that they equate entrapment with inducement — the provision of a mere opportunity does not amount to entrapment (Murphy and Anderson (2007), at pp. 12-13; Murphy and Anderson (2014), at pp. 628-29). It therefore goes without saying that individualized reasonable suspicion is not required for an officer to provide an individual with an opportunity to commit an offence.

[154] Having rejected these three alternative approaches — (1) endorsing the “investigative step” versus “opportunity” approach; (2) adopting a watered down version of reasonable suspicion; or (3) requiring individualized reasonable suspicion in all circumstances in order to provide an opportunity — I am of the view that the *bona fide* inquiry prong should be revised to bring coherence to this area of the law

and preserve the balance between individual liberties and legitimate law enforcement that this Court struck in *Mack* and *Barnes*. As I explain below, this would also permit the Court to effectively address other criticisms of the *bona fide* inquiry prong, including how its current formulation creates the potential for large-scale random virtue testing, racial profiling, and targeting the marginalized and vulnerable.

D. *How a Bona Fide Inquiry Should Be Defined*

(1) The Revised Framework

[155] In my view, the police should be found to be acting pursuant to a *bona fide* inquiry where:

- (a) Their investigation was motivated by genuine law enforcement purposes;
- (b) They had a factually-grounded basis for their investigation; and
- (c) Their investigation was directed at investigating a specific type of crime within a tightly circumscribed location (whether physical or virtual).

[156] Lest there be any doubt, this test places important restraints on the police; it does not give them “unrestricted licence to offer people the opportunity to commit crimes” (Karakatsanis, Brown and Martin JJ.’s reasons, at para. 32). The end- game

of the *bona fide* inquiry prong remains ensuring that the police are not allowed to randomly test the virtue of citizens, and that their conduct is subject to independent and objective review by the courts. Consistent with the doctrine of entrapment generally, the test I propose is grounded in abuse of process. Although this test differs from an analysis of whether the police met the reasonable suspicion standard, the judicial scrutiny it demands is no less meaningful.

[157] First, the police officers' investigation must be motivated by genuine law enforcement purposes. This was an integral component of the test set out in *Mack* and *Barnes* and it remains integral under this revised framework. It bears noting here that an investigation that is pursued in bad faith will not be one that is motivated by genuine law enforcement purposes (see *Mack*, at pp. 956-57 and 959). Examples of bad faith in this context include pursuing an investigation that is motivated by racial profiling or based on information from a source that they know or have reason to believe is unreliable. Intentionally targeting marginalized or vulnerable individuals — for example, individuals who were previously involved in the drug trade or addicted to drugs, but whom the police know or have reason to believe are making efforts to reform or stay sober — is another example of bad faith conduct that cannot be accepted.

[158] Second, the police must have a factually-grounded basis for their investigation. The police must be able to point to a specific reason for their investigation beyond a mere hunch, though this need not rise to the level of

reasonable suspicion as that standard is presently defined. For instance, the police may have a factually-grounded basis for their investigation into a suspected dial-a-dope line where they receive information from an anonymous source, such as Crime Stoppers, that a specific phone number is a dial-a-dope line and, consistent with the requirement that their investigation be motivated by genuine law enforcement purposes, they have no reason to believe that the information received is unreliable. Acting on information received from an anonymous source is not the same as acting on a hunch.

[159] By requiring the police to have a factually-grounded basis for their investigation, the revised approach imposes a meaningful limit on the police. To answer the question, posed by my colleagues, of “what less could possibly be required” (at para. 32 (emphasis deleted)) if an undercover officer is permitted to make a phone call where they have received anonymous information consisting of a name, a phone number, and an allegation of criminal activity, I wish to make clear that the police will not have a factually-grounded basis for their investigation if they flip through the phone book or use a random number generator and call numbers at random, hoping to find a dial-a-dope line. That is the type of random virtue testing about which this Court was concerned in *Mack* and *Barnes* (*Mack*, at p. 957; see also *Le*, at para. 84).

[160] Significantly, this requirement also provides an objective basis for judicial review. As explained earlier in these reasons, the type of “reasonable



suspicion” that the Court incorporated into the *bona fide* inquiry prong in *Mack* and *Barnes* — namely generalized suspicion — did not survive *Chehil*. Post-*Chehil*, in which this Court determined that “reasonable suspicion” must be individualized, I am of the view that the requirement that the police have a “factually-grounded basis” for their investigation most accurately captures the type of objective requirement the Court in *Mack* and *Barnes* incorporated into the *bona fide* inquiry prong.

[161] Third, the location of the inquiry must be tightly circumscribed. Whether the precision of the location meets this threshold should be determined by reference to the overarching question entrapment poses, that is, whether, in all the circumstances, society would view the inquiry as abusive. This requirement is in line with Lamer C.J.’s acknowledgment that the location of a *bona fide* inquiry must be “defined with sufficient precision” (*Barnes*, at p. 463). Inevitably, whether a particular type of location is sufficiently circumscribed for the purposes of a particular type of investigation will need to be considered on a location-by-location basis, until a body of jurisprudence develops. As that happens, courts must ensure sensitivity to the problems of racial profiling and random virtue testing that have raised concerns about the current approach under the *bona fide* inquiry prong, which I will describe further below. That said, the following non-exhaustive list of factors may assist in making this determination:

- The nature and seriousness of the type of crime under investigation (e.g., a wider investigative net may be necessary to effectively capture certain types of criminal activity);
- The number of citizens that may be impacted by the investigation technique used by the police (e.g., a technique that sweeps in too many citizens, even in a relatively small geographic area, may not be sufficiently circumscribed);
- The nature of the location under investigation (e.g., society may be more accepting of police opportuning in a shopping mall versus a residential neighbourhood or housing complex, even if the same number of people are potentially implicated in each case); and
- The intrusiveness of the technique (e.g., if the police are employing a more intrusive technique, such as a face-to-face technique, they may need to restrict the area in which they are opportuning more than if they were engaged in a less intrusive technique).

[162] These factors apply equally to virtual and physical locations. As I will explain in applying this revised approach, Mr. Williams's and Mr. Ahmad's cases provide examples involving a virtual location — a phone number.

(2) How the Revised Framework Improves Upon *Barnes*

[163] In my view, this revision remedies the doctrinal incongruity between *Barnes* and *Chehil*, and refocuses the *bona fide* inquiry prong on its principled origin: abuse of process. It strikes the appropriate balance by ensuring that law enforcement techniques which society would not view as intolerable and which may be necessary in combatting certain types of crime are not caught by the entrapment doctrine, while still protecting individuals' legitimate interest in being left alone by the state.

[164] Additionally, this revision addresses existing problems with the *bona fide* inquiry prong. By taking into account factors such as the number of citizens potentially impacted by the technique, the revision mitigates the risk that police may be able to indiscriminately offer opportunities within an expansive area (i.e., to conduct large-scale random virtue testing). The revision also effectively addresses the risks of police targeting the vulnerable and marginalized and engaging in racial profiling.

[165] If the police deliberately target the marginalized and vulnerable, that will amount to impermissible bad faith conduct. Society will not tolerate that type of police conduct. Additionally, by considering the nature of the location under investigation and the number of citizens potentially impacted, together with other relevant factors, reviewing courts will be able to discern whether the risk of ensnaring the marginalized and vulnerable was so high in a given case that society would not tolerate that risk, notwithstanding the legitimate law enforcement interests at stake.

[166] Before turning to those considerations, however, it must be recognized that the balance struck between individual liberties and law enforcement in *Mack* and *Barnes* contemplates that the mere risk that a particularly vulnerable individual may inadvertently be caught by a *bona fide* inquiry does not, in itself, make the police technique intolerable. Taking, for instance, the facts of the investigation in *Barnes*, there was no doubt a risk that street-involved persons within the six-block area who knew the lingo of the drug trade and who knew where to access the drugs requested by the undercover officer would find themselves unable to resist the opportunity to make some easy money. So too for an individual involved in a dial-a-dope investigation. Nonetheless, the risk associated with a dial-a-dope investigation is acceptable due to the tightly circumscribed and minimally intrusive nature of these investigations, which target a type of crime that is prevalent in our society and difficult to detect through reactive, as opposed to proactive, policing.

[167] In the event that a *bona fide* inquiry captures a particularly vulnerable individual, there are two potential pathways to relief. First, the individual may be able to establish, under the second branch of entrapment, that they were induced into committing the offence (see *Mack*, at pp. 960 and 963). In *Mack*, Lamer J. observed that in cases where a particularly vulnerable individual, such as someone suffering from an addiction, takes the opportunity offered by the police, “it is desirable for the purposes of [the inducement] analysis to consider whether the conduct was likely to induce criminal conduct in those people who share the characteristic” (p. 960). Alternatively, if the evidence falls short of establishing inducement and a conviction

is entered, the individual's circumstances may be taken into account by the sentencing judge in fashioning an appropriate sentence.

[168] This revision also improves upon the formulation set out in *Mack* and *Barnes* by explicitly instructing courts to consider whether racial profiling played a role in the police investigation. If the race of the individual who was offered an opportunity in the course of a purported *bona fide* inquiry — or the racial composition of the area said to be the subject of that inquiry — motivated the police investigation, the *bona fide* inquiry prong will have no application. Put simply, an investigation based on racial profiling is a bad faith investigation (see *R. v. Dudhi*, 2019 ONCA 665, 147 O.R. (3d) 546, at paras. 56-62; *Peart v. Peel Regional Police Services Board* (2006), 43 C.R. (6th) 175 (Ont. C.A.), at para. 91).

[169] Since the time when *Mack* and *Barnes* were decided, the courts have recognized the realities of racial profiling and the differential impact of proactive police techniques on racialized communities (see e.g. *Peart*, at para. 94 (stating that there is now “an acceptance by the courts that racial profiling occurs and is a day-to-day reality in the lives of those minorities affected by it.”)). As Professor Tanovich has observed:

. . . entrapment is a breeding ground for racial profiling, as evidenced by the number of drug cases involving racialized individuals. This social reality provides compelling justification, in addition to the doctrinal developments discussed in the next section, for reconsideration of the *Barnes* test. [Footnote omitted; p. 432.]

[170] Although these realities were not considered in the original formulation of the *bona fide* inquiry branch of entrapment, they must now be taken into account in determining whether the police conduct at issue would be viewed as intolerable by our society.

[171] Under the revised approach, a consideration of the factors outlined above may reveal a racialized dimension to the investigation that would not have been exposed under the *Barnes* framework. The nature of the location under investigation will be a particularly relevant factor to consider in this regard. To borrow an example from Professor Roach, writing in the terrorism context: if the Crown argues that a police officer was engaged in a *bona fide* inquiry into terrorist offences by offering opportunities at a mosque, this may raise a red flag signaling that the police were engaged in discriminatory targeting (pp. 1473-74). The court in such a case would need to carefully consider all the facts to determine whether the police investigation was based on discriminatory stereotypes or biases rather than legitimate investigative leads.

[172] In this way, the revised framework preserves the fundamental balance struck by this Court in *Mack* and *Barnes* by ensuring that the police are able to engage in genuinely motivated investigations that society would not find intolerable. However, it offers significant improvements to the *bona fide* inquiry prong by bringing it in line with recent doctrinal developments, and by placing limitations on the scope of the location under investigation that are responsive to, among other

things, the concerns about racial profiling that have arisen since *Mack* and *Barnes* were decided.

V. Application to Mr. Williams's and Mr. Ahmad's Appeals

[173] Turning to the facts of the cases at bar, I am of the view that neither Mr. Williams nor Mr. Ahmad were entrapped. The police in both cases were acting in the course of *bona fide* inquiries into the cell phone numbers in issue at the time they extended the respective opportunities to traffic in narcotics.

[174] Applying the new framework, there is no suggestion that the police were not motivated by genuine law enforcement purposes, nor is there any evidence of bad faith. Further, they had factually-grounded basis for their investigations, having received information containing the names and phone numbers of alleged drug dealers. Finally, their inquiry was sufficiently tightly circumscribed. As already noted, whether a location is sufficiently circumscribed for the purposes of a particular type of investigation will need to be developed in future cases. However, it is clear that no matter how the courts choose to define “tightly circumscribed”, a single phone number in a dial-a-dope investigation will be included. This is borne out when one considers the factors outlined above, at para. 161.

[175] Turning first to the nature and seriousness of the crime: drug trafficking is a serious crime. Additionally, the mobile and “consensual” nature of this type of crime makes it difficult to investigate using traditional investigative techniques. With

the proliferation of cell phones, drug dealers are able to traffic in dangerous substances without associating with a fixed physical location.

[176] Second, it is instructive to consider how many citizens may be impacted by the investigation technique used by the police. In these appeals, the information the police received from each of the sources only related to one phone number. The number of individuals potentially impacted by the police conduct is accordingly extremely low. Further, the police tactic used does not engage the “serious [and] unnecessary risk of attracting innocent and otherwise law-abiding individuals into the commission of a criminal offence” (*Mack*, at p. 957) — most citizens would not understand the “coded drug language” used on these calls or be tempted to start trafficking in drugs as a result of the call. Indeed, the risk of an innocent person being tempted to commit a crime is much lower than the street-level opportuning that *Barnes* contemplated. Since the technique in *Barnes* was held not to be entrapment, this factor militates in favour of finding that a typical dial-a-dope investigation is not one that society would view as intolerable.

[177] Third, the “location” under investigation in each of these appeals was a phone number. As a result, any concerns that racial profiling or other unconscious biases may have played a role in the investigations are highly attenuated — the opportunities were extended to whomever answered the phones and engaged in coded conversation with the undercover officers. Additionally, notwithstanding the locations at issue were phone numbers, the investigatory technique did not involve accessing



any of the information on either Mr. Ahmad's or Mr. Williams's cell phone. As examined in more detail below, an individual's privacy interest in respect of their phone number in this context is limited to their interest in being left alone by the state. The state is not accessing the biographical core of information that has led this Court to extend significant protections to the contents of cell phones in the context of s. 8 of the *Charter*.

[178] My colleagues invoke this Court's jurisprudence under s. 8 of the *Charter* to suggest that the police must have reasonable suspicion to conduct a typical dial-a-dope investigation because "[v]irtual spaces raise unique concerns for the intrusion of the state into individuals' private lives", owing in part to the reasonable expectation of privacy individuals hold in certain "digital communications" (Karakatsanis, Brown and Martin JJ.'s reasons., at para. 36). They argue that "cell phones are a 24/7 gateway into a person's private life" and that "[i]ndividuals must be able to enjoy that privacy free from state intrusion, subject only to the police meeting an objective and reviewable standard allowing them to intrude" (para. 37). While these statements are no doubt true, my colleagues' reliance on this Court's s. 8 *Charter* jurisprudence in this context is, with respect, misplaced.

[179] In its jurisprudence respecting searches of electronic devices, this Court has been concerned with protecting individuals' informational privacy interests (see e.g., *R. v. Marakah*, 2017 SCC 59, [2017] 2 S.C.R. 608, at paras. 31-34 and 37; *R. v. Fearon*, 2014 SCC 77, [2014] 3 S.C.R. 621, at paras. 51 and 63; *R. v. Spencer*, 2014

SCC 43, [2014] 2 S.C.R. 212, at para. 37). Specifically, this Court has recognized that in today's society, searching an individual's electronic device may uncover core biographical information, including "information which tends to reveal intimate details of the [individual's] lifestyle and personal choices" (*Marakah*, at para. 32, per McLachlin C.J., quoting *R. v. Plant*, [1993] 3 S.C.R. 281, at p. 293; see also para. 92, per Moldaver J., dissenting; *Spencer*, at para. 27). This is so because of the capacity modern electronic devices have to store vast quantities of information and because of the manner in which individuals engage with and through their electronic devices in today's society.

[180] However, the informational privacy interests that find protection under s. 8 of the *Charter* do not come into play in the context of dial-a-dope investigations. These investigations do not involve "state surveillance over virtual spaces", nor does the undercover officer "investigate virtual communications" (Karakatsanis, Brown and Martin JJ.'s reasons, at paras. 37 and 40). Dial-a-dope investigations do not involve a search or seizure of the person's phone, or any of the information it contains. All that dial-a-dope investigations involve is a conversation between an undercover officer and the person on the other end of the line. As such, I cannot agree with my colleagues' suggestion that merely "calling a [phone] number . . . is an inherently private activity" (para. 36).

[181] The untenability of the position taken by my colleagues on the privacy interests at stake in a typical dial-a-dope investigation is made clear by the result they

reach in Mr. Ahmad’s case and, more generally, their position that it is open to the police to cold call a phone number *without reasonable suspicion* and attempt to form reasonable suspicion over the phone. My colleagues’ acceptance that the police may phone an individual and engage them in potentially extensive conversation without first holding reasonable suspicion — indeed, as I understand it, absent any objective and verifiable basis — belies their contention that a typical dial-a-dope investigation engages the privacy interests that s. 8 of the *Charter* protects. While my colleagues suggest that “[t]he reasonably informed observer would be dismayed to learn” that the police may “intrud[e] upon [an individual’s] private life” by phoning that individual when the only information the police have at the time they make the call is a name, a phone number, and an allegation of drug dealing (at paras. 32 and 54), I see nothing in their approach prevents the police from doing precisely that.

[182] Respectfully, my colleagues do not explain why calling an individual and asking “are you working” does not engage the “considerable privacy interests” (at para. 40) they see as inherent in cell phones, while calling that same individual and stating “I need 80” does engage those interests such that the police must first hold reasonable suspicion. In my view, this dissonance flows from a failure to account for the fundamentally different considerations at play in this Court’s s. 8 jurisprudence — considerations which simply do not come into play in a typical dial-a-dope case. Both of these interactions are equally intrusive from a privacy perspective, yet my colleagues suggest that the police need reasonable suspicion to initiate the latter interaction but not the former. In truth, however, a call to a potential dial-a-dope line

does not engage the informational privacy interests protected by s. 8 and accordingly does not demand the imposition of a standard as “robust” as the individualized reasonable suspicion standard developed in this Court’s s. 8 jurisprudence. As I have already indicated, the nature of the individual privacy interests at play in this context are limited to individuals’ interest in being left alone by the state.

[183] Finally, I find it difficult to imagine a less intrusive technique than those used in typical dial-a-dope cases like these ones. The impacted individual can terminate the interaction at any time by hanging up the phone; the language used and the substance of the conversation are not threatening or offensive; and there is no face-to-face interaction.

[184] In sum, the police conduct in these cases cannot be said to be conduct that society would find intolerable. Neither of these cases are among the “clearest of cases” warranting a stay of proceedings.

## VI. Conclusion

[185] The state is limited in how it may deal with its citizens. The doctrine of entrapment restricts the police to investigating — rather than creating — crime, and ensures that the state is not permitted to randomly test the virtue of its citizens. At the same time, however, the doctrine of entrapment has always recognized that the police must be afforded substantial leeway to investigate and prevent crime.

[186] The criminal landscape has evolved significantly in the decades since this Court decided the seminal entrapment cases of *Mack* and *Barnes*. Attempting to apply the doctrine of entrapment as it was formulated in those cases to modern day dial-a-dope operations has revealed issues with the doctrine's present articulation. The revisions I would make to the *bona fide* inquiry prong of the first branch of entrapment are necessary to preserve the fundamental balance struck in *Mack* and *Barnes* between protecting individual liberties and fostering effective law enforcement while also bringing the doctrine in line with the realities of the digital age.

[187] Fundamentally, the approach I would adopt refocuses the entrapment doctrine on its principled abuse of process underpinnings, so as to ensure that stays of proceedings are only issued in the clearest of cases of intolerable state conduct. It avoids the minute parsing of conversations between the suspected drug dealer and the undercover officer, which results in dubious distinctions between cases where stays are granted and cases where the convictions are upheld. Additionally, it remedies a doctrinal inconsistency that has arisen from the manner in which the reasonable suspicion standard has developed in the Canadian jurisprudence since the time when *Mack* and *Barnes* were decided. With respect to those who see the matter differently, the approach I would adopt is, in my view, the best way to remain faithful to the holdings and underlying principles of this Court's entrapment jurisprudence.

[188] For these reasons, I would dismiss the appeals.

*Appeal of Javid Ahmad dismissed.*

*Appeal of Landon Williams allowed, WAGNER C.J. and MOLDAVER, CÔTÉ  
and ROWE JJ. dissenting.*

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