SCC File No. 38304

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

B E T W E E N:

LANDON WILLIAMS

APPELLANT
(Respondent/
Appellant in cross-appeal)

-and-

HER MAJESTY THE QUEEN

RESPONDENT
(Appellant/
Respondent in cross-appeal)

APPELLANT'S FACTUM
(LANDON WILLIAMS, APPELLANT)

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I – OVERVIEW & STATEMENT OF FACTS

A. Overview

1. This Court's landmark decision in *Mack* (1988)[1] — and the entrapment defence it recognized — is under threat. The courts in Canada are failing to consistently apply *Mack* to a police technique widely used in low-level drug investigations. The technique itself is simple — in an effort to find and arrest drug dealers, the police are calling people on their cell phones and offering to buy drugs from them. They are often doing so on the strength of anonymous or unconfirmed tips from confidential sources. The tactic has become so widespread in the last 20 years that some undercover officers have personally conducted hundreds of these "cold-calls."[2]

2. Landon Williams was entrapped by this technique. In February 2011, a member of the Toronto Police Drug Squad received information from another officer that Mr. Williams was selling drugs. The Drug Squad was provided with a phone number for Mr. Williams and a "Person of Interest" package that included his picture, a copy of his criminal record, and an assertion that a "source" claimed he was a cocaine dealer in Toronto. The Drug Squad had absolutely no information about the tip that was provided — they did not know what the source said, when the tip was provided, if the source was a reliable or trustworthy person, or if any steps had been taken to confirm the information. Instead of looking into any of this, the police phoned Mr. Williams and immediately asked him to sell them $80 of crack cocaine.

3. At trial, the sole issue was whether the police had entrapped Mr. Williams. After properly applying the test from *Mack*, the trial judge found that they had and stayed the drug charges. As this Court clarified in *Barnes* (1993),[3] *Mack* created a two-part test for determining whether the police committed entrapment:

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;

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[1] *R. v. Mack*, [1988] 2 S.C.R. 903 [*Mack*].
[2] See for example: Transcript of Proceedings at p. 51 [Appellant's Record ("A.R.") Tab 4] and *R. v. Sawh*, 2016 ONSC 2776 at para. 28 [*Sawh*].
[3] *R. v. Barnes*, [1991] 1 S.C.R. 449 [*Barnes*].

b) Although 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.[4]

4. The Crown and defence agreed that this case fell under the first branch of *Mack* — the issue was whether the drug squad had a reasonable suspicion that Mr. Williams was already engaged in selling drugs before they provided him with an opportunity to commit an offence.[5] The trial judge applied the test for assessing reasonable suspicion set out by this Court in *Chehil* (2013)[6] and the test for evaluating tips from confidential sources in *Debot* (1989).[7] He found that the police lacked reasonable suspicion when they phoned Mr. Williams because they were acting on a bald tip with no other information.[8] The police crossed the line and provided Mr. Williams with an opportunity to commit an offence because they made an offer over the phone to buy a specific drug for a specific price.[9]

5. The Crown appealed and changed its argument, asking the Ontario Court of Appeal to find that cold-call investigations are exempt from the first branch of *Mack* because they are *bona fide* inquiries.[10] The Crown's argument glossed over the fact that under *Barnes*, *bona fide* inquiries still require the police to hold reasonable suspicion — the only difference is that the suspicion is held over a specific geographic location and not a person. The Crown never argued that the police had reasonable suspicion over anything. Instead, it claimed that cold-calls are not "random virtue testing," that the police are calling people for "good reason," that there is "zero chance" the police will induce "innocent" people with this technique, and that *Mack* should not apply.[11] This argument has been made in several cases and has created conflict and confusion in trial judgments from Ontario and other provinces.

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[4] *Ibid* at p. 460.
[5] *R. v. Williams*, 2014 ONSC 2370 at para. 11 ["Judgment of the Trial Judge Re: Entrapment"] [A.R. Tab 1].
[6] *R. v. Chehil*, 2013 SCC 49 [*Chehil*].
[7] *R. v. Debot*, [1989] 2 S.C.R. 1140 [*Debot*].
[8] Judgment of the Trial Judge Re: Entrapment, *supra* note 5 at para. 19. Applying *Mack*, the trial judge concluded that Mr. Williams' criminal record alone was of little value. See paras. 16 – 17.
[9] *Ibid* at para. 27.
[10] Crown's Appellant Factum on Entrapment Ruling at para. 38 [A.R. Tab 3].
[11] *Ibid* at paras. 1 – 2, 31.

6. The majority at the Court of Appeal rejected the Crown's request for a wholesale exemption for cold-calls and a major re-writing of *Mack*.[12] Nonetheless, it allowed the Crown's appeal on the grounds that the police were conducting a *bona fide* inquiry when they phoned Mr. Williams because they had a reasonable suspicion that the phone line they called was being used to sell drugs. They based this conclusion on the finding that the tipster had provided the police with an alias for Mr. Williams ("Jay")[13] and when the police phoned Mr. Williams, he confirmed that he was Jay.

7. This Court must ensure *Mack* survives in the 21st century by reaffirming the core values that underlie the decision. The argument that cold calls are "anything but random" and create "zero chance" of inducing an "innocent" person to commit a crime ignores that there are two branches to the *Mack* test and that they serve different purposes. The second branch addresses police conduct that creates a risk of inducing innocent people into committing offences. The first branch — and the branch at issue in this case — is designed to serve as a check on police powers. It is meant to stop the police from intruding into people's lives, deceiving them, and tempting them with opportunities to commit offences unless they already have reasonable suspicion over that person or a geographic location. The first branch is explicitly not concerned with whether the person targeted is "innocent" or "pre-disposed" toward committing the offence under investigation. As Justice Lamer held in *Barnes*, the police engage in "[random] virtue testing" when they provide anyone with an opportunity to commit an offence "without reasonable suspicion" either that the person is "already engaged in the particular criminal activity" or "the physical location" the person is associated with "is a place where the particular criminal activity is likely occurring."[14]

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[12] This likely explains why the Director of Public Prosecutions Service of Canada took the unusual step of consenting to the co-Appellant Ahmad's application for leave to appeal.

[13] As will be argued below, there is actually no evidence to support the conclusion that the tipster told the police Mr. Williams' alias was "Jay". Nothing was known about what the tipster told the police.

[14] *Barnes*, *supra* note 3 at p. 463 (emphasis in original).

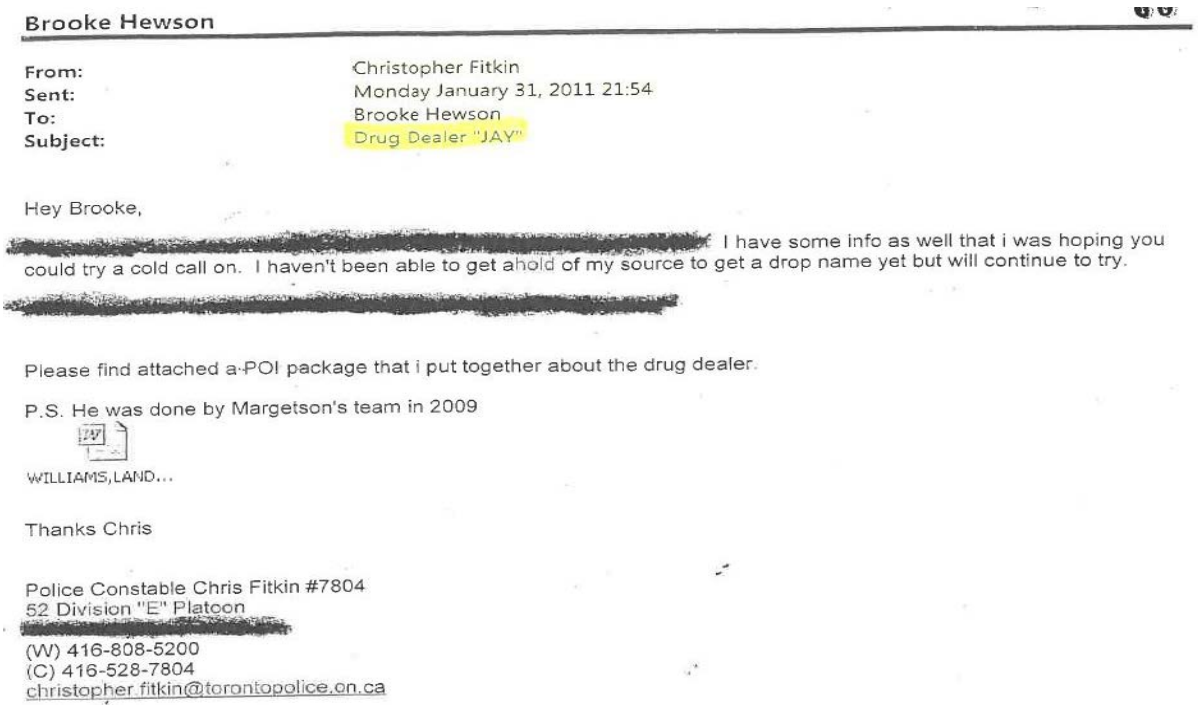
8. There is no doubt that it would be easier for the police and for Crowns if *Mack* did not apply and reasonable suspicion did not limit a police officer's ability to ask people to sell drugs, whether in person, on the phone, or over the Internet. Admittedly, they might even catch more "criminals" this way. But the war on drugs' appetite for police powers is insatiable, and it falls to the courts to jealously protect individual liberty and to strike the right balance with the need for effective law enforcement.

9. *Mack* struck the right balance 30 years ago. This Court should enforce *Mack* and not give in to fearful claims — made without any evidence to support them — that "modern technology" makes it too hard for the police to do what *Mack* requires: to have reasonable suspicion before providing people with opportunities to commit crimes.

B. The Police Investigation

10. The Toronto Police Service's Drug Squad started investigating Landon Williams in January 2011. P.C. Fitkin emailed D.C. Hewson in the drug squad and asked her to "try a cold call" on a "drug dealer" who went by the alias "Jay". P.C. Fitkin's email identified Landon Williams as the target and noted that he had been arrested in 2009. P.C. Fitkin's email made just one passing reference to an informant, explaining that he hadn't been able to get ahold of his source to get a drop name: "I haven't been able to get ahold of my source to get a drop name yet but will continue to try."[15]

[15] Exhibit 2 (Email from Christopher Fitkin) [A.R. Tab 5].



Brooke Hewson

From: Christopher Fitkin
Sent: Monday January 31, 2011 21:54
To: Brooke Hewson
Subject: Drug Dealer "JAY"

Hey Brooke,

[redacted] I have some info as well that i was hoping you could try a cold call on. I haven't been able to get ahold of my source to get a drop name yet but will continue to try.

[redacted]

Please find attached a POI package that i put together about the drug dealer.

P.S. He was done by Margetson's team in 2009

WILLIAMS,LAND...

Thanks Chris

Police Constable Chris Fitkin #7804
52 Division "E" Platoon
[redacted]
(W) 416-808-5200
(C) 416-528-7804
christopher.fitkin@torontopolice.on.ca

11. P.C. Fitkin's email attached a "POI" [person of interest] package. The package claimed Mr. Williams' alias was "Jay" and included (i) his picture; (ii) a copy of his criminal record; (iii) a phone number; and (iv) confirmation that he had been arrested in 2009 for trafficking cocaine and had ultimately pled to simple possession. Under "Source Information", the POI package simply said, "This male is a cocaine dealer in the area of 389 Church Street and Yonge & Dundas" and that the "POI" uses the phone number "647-400-4562".[16]

12. P.C. Fitkin's email was missing important information. He provided no details about the informant or the tip, including the informant's source of knowledge and motivation for providing the information. He said nothing about whether this informant had a criminal record or had provided reliable information in the past. P.C. Fitkin didn't even say how old the tip was, how much detail had been provided, or if any steps had been taken to verify the informant's claims. Nor did his email explain how the link was made between Mr. Williams and the alias "Jay."

13. The Crown chose not to call P.C. Fitkin to testify at trial to shed any light on these issues.

[16] Transcript of Proceedings at pp. 61 – 63 (emphasis added) [A.R. Tab 4].

14. After receiving P.C. Fitkin's email, D.C. Hewson admitted that she did not make "any inquiries" into the source "at all."[17] She had never received information from P.C. Fitkin before, knew nothing about his source, and did nothing to check the information he provided.[18] D.C. Hewson recognized Mr. Williams because she had arrested him in 2009 on a trafficking cocaine charge, but she had not had any dealings with him since then.[19]

15. Without making any inquiries at all, D.C. Hewson moved to set up a drug purchase with Mr. Williams. On February 11, 2011, she told D.C. Canepa that a male who went by "Jay" was selling crack cocaine in the area of Queen Street East and Church Street in Toronto.[20] She gave D.C. Canepa a description of the man and a phone number.[21] That was all she told him.

16. D.C. Canepa testified that he had no idea where D.C. Hewson got the information, he did not do any checks, and he did not know if anyone else did. He simply called the number. D.C. Canepa testified that he was not calling to investigate the information they had received – his intention was simply to set up a drug transaction.[22] The conversation started as follows:

> **Male**: Hello
>
> **Canepa**: Jay?
>
> **Male**: Yeah
>
> **Canepa**: Are you around?
>
> **Male**: Who's this?
>
> **Canepa**: It's Vinny
>
> **Male**: Vinny who?
>
> **Canepa**: Vinny. Jesse from Queen and Jarvis gave me your number. Said you could help me out. I need 80.

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[17] *Ibid* at pp. 80 – 81.
[18] *Ibid* at p. 92.
[19] *Ibid* at p. 104.
[20] *Ibid* at p. 24.
[21] *Ibid* at p. 25.
[22] *Ibid* at p. 52.

Male: Okay, you have to come to me[23]

17. D.C. Canepa explained that when he said he needed "80," this was common terminology that meant he wanted to buy $80 of crack cocaine.[24] D.C. Canepa met with Mr. Williams later that day and bought $80 of cocaine from him. D.C. Canepa arranged another sale 11 days later, on February 22, 2011, during which he bought another $80 of cocaine from Mr. Williams. Mr. Williams was arrested on March 15, 2011.

C. The Trial Judge's Reasons

18. Justice Trotter applied *Mack* and concluded that Mr. Williams had been entrapped and stayed the trafficking counts. The case at trial was argued under the first branch of *Mack*. The Crown did not argue that the police had been conducting a *bona fide* investigation. The sole issue was whether the police had reasonable suspicion that Mr. Williams was trafficking in drugs before they offered him an opportunity to commit an offence.

19. Justice Trotter carefully applied this Court's guidance in *Chehil* and found that the police did not have reasonable suspicion. Justice Trotter reasoned that the police had acted on what amounted to an unconfirmed, bald assertion from a confidential informant. The email that P.C. Fitkin sent D.C. Hewson was bereft of detail. Justice Trotter could not assess the tip to determine whether it could ground a reasonable suspicion because he had no information about the source or about the tip itself. The only verifiable information the police had was Mr. Williams' dated criminal record, which was of little value in evaluating whether the police had reasonable suspicion:

> In all of the circumstances, the lack of information concerning the tip prevents me from properly scrutinizing whether the suspicion the police had on February 11, 2011 was reasonable or not. I have no way of knowing. I am left to trust, without question or the ability to verify, the opinion of P.C. Fitkin, an officer who did not testify at this trial. As *Chehil* holds, much more is required in these circumstances. Without this information, judicial review is rendered meaningless. I am unable to find reasonable suspicion in these circumstances.[25]

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[23] *Ibid* at p. 26 – 28.
[24] *Ibid* at p. 29.
[25] Judgment of the Trial Judge Re: Entrapment at para. 18 [A.R. Tab 1].

Justice Trotter found that, acting without reasonable suspicion, the police crossed the line and provided Mr. Williams with an opportunity to commit an offence. When D.C. Canepa phoned Mr. Williams, he almost immediately made an offer to purchase $80 worth of crack cocaine.[26] By agreeing to the transaction over the phone, Mr. Williams had committed the offence of trafficking under section 2 of the *Controlled Drugs and Substances Act.*[27]

D. The Ontario Court of Appeal's Reasons

(i) The Majority Judgment

20. The Ontario Court of Appeal allowed the Crown's appeal. As a starting point, the majority agreed with Justice Trotter's conclusion that the police did not have a reasonable suspicion that Mr. Williams was engaged in drug trafficking when D.C. Canepa offered him an opportunity to commit an offence.

21. However, the majority concluded that the police were conducting a *bona fide* investigation under *Mack*. Although the majority recognized that the *bona fide* investigation branch of *Mack* had previously been limited to investigations into geographic areas, the court held that modern technology, including cell phones, had "changed the way" crime is committed and that cell phones had become an indispensable tool in the drug trade.[28] The majority held that the law should recognize that the police may be engaged in a *bona fide* inquiry when they contact a telephone line associated with a dial-a-dope scheme and provide the opportunity to sell drugs.[29]

22. However, the majority recognized that even under a *bona fide* investigation, the police needed reasonable suspicion that the phone number they targeted was being used in a dial-a-dope investigation.[30] The majority held that the "relevant considerations" in the reasonable suspicion inquiry would "vary depending on the context."[31] Certain facts could support a finding that the police had reasonable suspicion that a particular phone line was being used in a dial-a-dope

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[26] Judgment of the Ontario Court of Appeal at para. 29 [A.R. Tab 2].
[27] *Controlled Drugs and Substances Act*, S.C. 1996, c. 19 ["CDSA"].
[28] Judgment of the Ontario Court of Appeal at para. 52 [A.R. Tab 2].
[29] *Ibid* at para. 55.
[30] *Ibid* at para. 58.
[31] *Ibid* at para. 67.

investigation but not that the particular person who was using that phone line was engaged in criminal activity.[32]

23. Applied to the facts, the majority concluded that the police were engaged in a *bona fide* investigation when they provided Mr. Williams with an opportunity to commit an offence.[33] Although they did not have reasonable grounds to suspect that Mr. Williams was engaged in criminal activity, they did have grounds to suspect that the phone number was associated with criminal activity. The majority reasoned that the police had received a tip from a confidential source that a person named "Jay" was selling drugs in a particular area of Toronto and were given the phone number he was using. When D.C. Canepa phoned the number and the person confirmed he was Jay, that was enough to develop a reasonable suspicion that the *phone* was being used to sell drugs.[34]

(ii) The Concurring Judgment

24. Justice Himel disagreed with the majority's approach and rejected the finding that the police had reasonable suspicion over the phone number but not Mr. Williams. Justice Himel found that this conclusion ignored the "fundamental reality" that phones are "increasingly personal."[35] There was little difference between the information the police had obtained about the phone line and the person who answered it: "Quite often, information about the one is information about the other".[36] In addition, Justice Himel pointed out that it was incongruous to hold that the information the police had was insufficient to ground a reasonable suspicion over Mr. Williams, but was sufficient to support reasonable suspicion over his phone.[37]

25. Unlike the trial judge and the majority of the Court of Appeal, Justice Himel resolved the entrapment issue by finding that the tip from the confidential source was sufficient to ground reasonable suspicion over Mr. Williams. Justice Himel found — despite having no information about what the tipster told the police — that the source had told them a person named "Jay" was

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[32] *Ibid*.
[33] *Ibid* at para. 69.
[34] *Ibid* at paras. 71 – 72.
[35] *Ibid* at para. 109.
[36] *Ibid* at para. 110.
[37] *Ibid* at para. 111.

using a particular number to sell cocaine, and the reliability of the tip was confirmed when they phoned the number and the person who answered immediately responded to the name "Jay."[38]

26. Justice Himel also disagreed that the officer held out an opportunity to Mr. Williams when they spoke on the phone. Justice Himel found that the officer's statement that he needed "80" was a legitimate investigative step and not an opportunity to commit an offence. An innocent person would not have understood the question or would have hung up the phone.[39] Justice Himel held that the line between legitimate investigative steps and opportunities to commit offences identified in the case law was artificial.[40] The case law's focus on the minute language used by the police was unprincipled and harmful to the integrity of the administration of justice.[41]

PART II – STATEMENT OF ISSUES

1) **Do Police Officers Require Reasonable Suspicion Before Offering Opportunities to Commit Crimes Over the Phone?**

   Yes. The key requirement from *Mack* is reasonable suspicion. The police must have reasonable suspicion over a specific person or a specific location before they provide an opportunity to make a statement.

2) **What Type of "Reasonable Suspicion" Applies to Cold Calls?**

   Reasonable suspicion is an exacting standard that does not vary depending on the "object" of the suspicion.

3) **Was Landon Williams Entrapped?**

   Yes. The police offered Mr. Williams an opportunity to commit a crime based solely on an uncorroborated tip from an unknown source.

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[38] *Ibid* at para. 105.
[39] *Ibid* at para. 116.
[40] *Ibid* at para. 120.
[41] *Ibid* at para. 126.

PART III – STATEMENT OF ARGUMENT

A. Police Officers Must have Reasonable Suspicion before Providing Opportunities to Commit Offences Over the Phone

27. The Crown in the court below argued that the police did not entrap Mr. Williams because they did not engage in random virtue testing. The Crown argued that the police had targeted "a very specific location" (the phone number) and that they had "good reason" (as opposed to reasonable suspicion) to call the number. Cold-calls, in turn, represent the "modern embodiment of the *bona fide* inquiry" set out in *Mack*.[42] Random virtue testing had not occurred because the technique bore "zero chance" of inducing an innocent person to commit a crime.[43] The risk that an innocent person would be tempted or induced by the offers held out by officers during cold calls was said to be low because the officers use "coded language" that would only be "understandable and natural" to people who were "enmeshed in the drug sub-culture".[44]

28. This argument has been accepted in various forms in several lower court decisions. For example, in *Le* (2016),[45] the British Columbia Court of Appeal held that to call this tactic entrapment "strays far from the core principle underlying *Mack*" and "objectively speaking," an innocent or "otherwise law-abiding" person would not be manipulated or tempted by the police officer's offer to buy drugs.[46]

29. There are three problems with this argument:

(i) All Bona Fide Investigations <u>Require</u> Reasonable Suspicion

30. The first problem with this argument is that *Mack* requires the police to have more than a "good reason" for offering someone an opportunity to commit an offence. It requires reasonable suspicion. The first branch of *Mack* contemplates two scenarios: 1) where the police hold reasonable suspicion over a specific <u>person,</u> or 2) where the police hold reasonable suspicion

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[42] Crown's Appellant Factum on Entrapment Ruling at para. 38 [A.R. Tab 1].
[43] *Ibid* at para. 31.
[44] *Ibid* at para. 50.
[45] *R. v. Le*, 2016 BCCA 155 ["*Le*"].
[46] *Ibid* at paras. 93 – 95. See also *R. v. Henneh*, 2017 ONSC 4835 at paras. 19 – 20 ["*Henneh*"] [Book of Authorities ("BOA"), Tab 2], *R. v. Reid*, 2016 ONSC 954 at paras. 40, 44 ["*Reid*"] and *R. v. Ndahirwa*, 2018 ABCA 359 at para. 6 ["*Ndahirwa*"].

over a specific place. Where the police have reasonable suspicion that a certain crime is being committed in a specific place, they are conducting a *bona fide* investigation and do not need reasonable suspicion over the *individuals* found within that place before providing them with opportunities to commit offences.

31. This is distinct from the second branch of *Mack*, which adds a further check on police powers by limiting how far they can go *after* they have developed reasonable suspicion. The second branch of *Mack* provides that the police can only offer an opportunity to commit an offence — they cannot pressure people and "induce" the commission of crimes.

32. Admittedly, there are passages in *Mack* that when read in isolation do not make clear that *bona fide* investigations always require reasonable suspicion. For example, at page 959 of the judgment, Justice Lamer simply refers to an offer being made in the course of a *bona fide* investigation without defining the term:

> … the police must not, and it is entrapment to do so, offer people opportunities to commit crime unless they have a reasonable suspicion that such people are already engaged in criminal activity or, unless such an offer is made in the course of a *bona fide* investigation.[47]

33. But passages like these can only support the claim that *bona fide* investigations do not need reasonable suspicion if they are taken out of context. Read as a whole, *Mack* makes clear that a *bona fide* investigation is an investigation where the police hold reasonable suspicion a crime is being committed within a specific geographic location. In those circumstances, the police can provide opportunities to commit offences to people found within those places. For example, three pages earlier in the judgment, at page 956, Justice Lamer held that in situations where the police do not know the "identity of specific individuals" but do know other facts, "such as a particular location or area where it is reasonably suspected that certain criminal activity is occurring," it is permissible to provide opportunities to people associated with the location under suspicion.[48] This is only justified if the police are acting "in the course of a *bona fide* investigation" and are not engaged in "random virtue testing".[49]

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[47] *Mack*, *supra* note 1 at p. 959.
[48] *Ibid* at p. 956 (emphasis added).
[49] *Ibid*.

34. Any doubt that *bona fide* investigations also require the police to hold reasonable suspicion is put to rest by *Barnes*. In *Barnes*, Justice Lamer clarified the scope of the *bona fide* investigation exception he identified in *Mack*. He held that the "basic rule" from *Mack* is that the police may only present an opportunity to commit an offence to someone who "arouses a suspicion" that he or she is "already engaged in the particular criminal activity."[50] He recognized that there is "an exception to this rule" when the police "undertake a *bona fide* investigation directed at an area where it is reasonably suspected that criminal activity is occurring."[51] In those circumstances, the police may provide "any person associated with the area" the opportunity to commit an offence. Where the police act *without* reasonable suspicion, they engage in random virtue testing:

> Random virtue-testing, conversely, only arises when a police officer presents a person with the opportunity to commit an offence without a reasonable suspicion that:
>
> (a) the person is already engaged in the particular criminal activity, or
>
> (b) the physical location with which the person is associated is a place where the particular criminal activity is likely occurring.[52]

35. This means that all police investigations that involve providing opportunities to commit offences require reasonable suspicion. That suspicion may be directed at an individual person or — pursuant to a *bona fide* investigation — a specific *location*. Even if *bona fide* investigations extend beyond geographic locations and can include things like phone lines, reasonable suspicion is still required. When the Crown argues that cold-calls should be exempt from *Mack* because they are *bona fide* investigations and the police are acting with "good reason," it misses the point that reasonable suspicion is the key requirement under *Mack*.[53]

(ii) The First Branch of Mack Does Not Protect Only Those Who are "Truly Innocent"

36. In addition to arguing that the police are acting with "good reason" when they make cold-calls, Crowns argue that these calls do not offend the spirit of *Mack* because they create "zero chance" of inducing "truly innocent" people into committing offences.

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[50] *Barnes, supra* note 3 at p. 463.
[51] *Ibid* (emphasis added).
[52] *Ibid.*
[53] Crown's Appellant Factum on Entrapment Ruling at para. 38 [A.R. Tab 3].

37. This argument misunderstands the purpose of *Mack*'s first branch, which is to impose a *threshold limit* on police powers. Before the police can offer someone an opportunity to commit an offence, they must possess reasonable suspicion that the person is already engaged in an offence or is associated with a place where the offence is being committed. This check on police powers is necessary to discourage overreaching investigative techniques that involve holding out opportunities to commit offences where the police lack reasonable suspicion their target is already engaged in an offence.

38. Justice Lamer's decision in *Mack* is a 77-page treatise on the entrapment defence. It identified the core values that underlie society's "intuitive reaction" against entrapment. Entrapment offends society's core belief that the police exist to prevent crime and to investigate offences that have already occurred, not to break the law themselves and create new crimes just so they can be prosecuted. The technique also offends the idea that the police generally should not intrude into our personal lives. These social values only give way when the police have reasonable suspicion that the person is already committing a criminal offence:

> **It is essential to identify why we do not accept police strategy that amounts to entrapment.** There could be any number of reasons underlying what is perhaps an intuitive reaction against such law enforcement techniques but the following are, in my view, predominant. **One reason is that the state does not have unlimited power to intrude into our personal lives or to randomly test the virtue of individuals. Another is the concern that entrapment techniques may result in the commission of crimes by people who would not otherwise have become involved in criminal conduct. There is perhaps a sense that the police should not themselves commit crimes or engage in unlawful activity solely for the purpose of entrapping others, as this seems to militate against the principle of the rule of law. We may feel that the manufacture of crime is not an appropriate use of the police power. It can be argued as well that people are already subjected to sufficient pressure to turn away from temptation and conduct themselves in a manner that conforms to ideals of morality; little is to be gained by adding to these existing burdens. Ultimately, we may be saying that there are inherent limits on the power of the state to manipulate people and events for the purpose of attaining the specific objective of obtaining convictions.** These reasons and others support the view that there is a societal interest in limiting the use of entrapment techniques by the state.[54]

39. Because the first branch of *Mack* imposes a threshold limit on police powers, it is not actually concerned with whether the person the police provide the opportunity to is "truly

[54] *Mack*, *supra* note 1 at p. 941 (emphasis added).

innocent." It is focused on what the police knew at the time the opportunity was given and whether they had reasonable suspicion. Justice Lamer went to great lengths in *Mack* to stress that the Court was not adopting a "subjective" American-style test for entrapment. Under the American test, the courts ask whether the accused was "pre-disposed" toward committing an offence. If the prosecution can show that the person was not truly innocent and was "pre-disposed," any claim of entrapment is defeated.

40. Justice Lamer explained that this approach had to be rejected because it would inject "unequal treatment" and "fundamental inequality" into the law.[55] It would effectively mean that some in society have no protection against groundless entrapment techniques, which is "inconsistent with the rationale" that justifies the entrapment defence.[56] This is why Justice Lamer held that accused's subjective "pre-disposition" toward offending does not matter — "it is sufficient for the accused to demonstrate that, viewed objectively, the police conduct is improper."[57] It is also why Justice Lamer held that when courts assess whether the police had reasonable suspicion, the fact that the accused has a criminal record is "not usually sufficient" to ground reasonable suspicion.[58]

41. The truth is that the protection against arbitrary police entrapment techniques was meant to protect everyone in Canada, not merely the "truly innocent." The same is true of other protections, like the right to be free from arbitrary detentions or unreasonable searches and seizures. These rights apply to everyone — even those who are actively selling drugs. The question is not whether the police "got the right guy" — but whether they had the grounds they needed to do what they did. Reasoning after the fact that there is "zero chance" the accused was truly innocent is no different than attempting to justify an illegal search based on what the police ultimately found. The courts have clearly and consistently rejected this kind of *ex post facto* reasoning.[59]

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[55] *Ibid* at p. 955.
[56] *Ibid*.
[57] *Ibid* at pp. 954 – 955.
[58] *Ibid* at p. 959.
[59] See for example: *Hunter v.* Southam, [1984] 2 S.C.R. 145 at p. 160 ["*Hunter v. Southam*"] and *R. v. Harrison*, 2009 SCC 34 at para. 49 ["*Harrison*"].

(iii) The Crown's Argument Would Strip Away an Important Check on Police Powers and Expose Marginalized Communities to Even Greater Police Scrutiny

42. Any argument that the police should be allowed to make cold-calls and offer people opportunities to commit offences so long as they have "good reason" for doing so must be rejected. To hold otherwise would strip away an important check on police powers that has existed for over 30 years. The Crown led no evidence that the police are unable to comply with the demands of *Mack*. Nor did it provide any good reason why this seminal decision should be cast aside.

43. The reality is that entrapment techniques focus on low level "street" dealers who sell drugs to individuals in small amounts. As Professor Tanovich has argued, these sorts of techniques have "a disproportionate impact on poor and racialized communities."[60] Racial profiling exists, and it is a "day-to-day reality" in the lives of those minorities affected by it.[61] Much has been written in recent years about the fact that the police disproportionately target visible minorities — and specifically young black men — in their investigations.

44. In his report, "Independent Street Checks Review", Justice Tulloch of the Ontario Court of Appeal highlighted some of the most striking data on this issue:

- In the years 2010 and 2012, the *Toronto Star* reported that black people were approximately 17 times more likely to be "carded" by police than white people in certain parts of downtown Toronto.[62]

- The 2005 *Kingston Data Collection Project*, one of the first studies in Canada on racial profiling in policing, concluded that Black residents in Kingston were over-represented in traffic stops (2.7 times) and in pedestrian stops (3.7 times) compared to their representation in the city's general population.[63]

- The Ottawa Police Service's 2016 *Traffic Stop Race Data Collection Project* found that Black drivers were stopped 2.3 times more than expected based on the driving population. Middle Eastern drivers were stopped 3.3 times more. Young Black drivers

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[60] David M. Tanovich, "Rethinking the Bona Fides of Entrapment", 43 U.B.C. L. Rev. 417 (2011) at pp. 417 – 418, [BOA Tab 6].
[61] *Peart v. Peel Regional Police Services*, [2006] O.J. No. 4457 (C.A.) at para. 94.
[62] The Honourable Michael H. Tulloch, *Report of the Independent Street Checks Review* (Queen's Printer for Ontario, 2018) at pp. 43 – 44 (emphasis added).
[63] *Ibid* at p. 44.

(ages 16-24) were stopped 8.3 times more than expected and young Middle Eastern drivers were stopped 12 times more than expected.[64]

- According to the *Toronto Star*, in 2015, Black people in Brampton and Mississauga were three times more likely to be stopped by the police. They formed 21% of all street checks, even though they were only 9% of the population.[65]

- In Ottawa, there are reports that racialized men deal with police nearly four times more than their percentage of the population[66]; and

- The *Black Experience Project*, a 2017 survey of the Greater Toronto Area's Black community, found that 79% of young Black men reported having been stopped by the police in public spaces.[67]

45. Justice Tulloch went on conclude that the vast majority of people the police are stopping have done nothing wrong, which erodes the legitimacy of the police. In his words, "When a segment of society believes that it has been unfairly targeted by the police, it will de-legitimize the police in their eyes."[68]

46. Of course, none of these statistics were known when *Mack* was decided. The problem of racial profiling and the over-policing of visible minorities in Canada did not become known until more recent decades. But this makes the protections *Mack* provides even more important. *Mack* provides a vital check on a potentially abusive police power and it must be enforced. Reasonable suspicion is required "because it is not a proper use of the police power to simply go out and test the virtue of people on a random basis."[69] In *Simpson* (1993),[70] Justice Doherty recognized that the Court's ruling in *Mack* and its reasonable suspicion requirement address the "fundamental" societal need to strike a balance between "the detection and punishment of criminals" with "maintaining the freedom of its [citizens]."[71]

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[64] *Ibid.*
[65] *Ibid.*
[66] *Ibid.*
[67] *Ibid.*
[68] *Ibid* at p. 45.
[69] *Mack*, *supra* note 1 at p. 965.
[70] *R. v. Simpson*, [1993] O.J. No. 308 (C.A.) ["*Simpson*"].
[71] *Ibid* at para. 65.

47. The fact the police use "coded language" on these calls is not enough. Many people live in communities and neighborhoods where "street level" drug dealing is unfortunately common. Many of these communities and neighborhoods are marginalized. Some people in these neighborhoods are undoubtedly not drug traffickers but would understand what an offer to buy "80" means, would know where to get drugs, and might desperately need the money. But the police are not entitled to randomly test their virtue. This is precisely what *Mack* is designed to stop.

48. It does not take much imagination to think of examples of situations where people might understand the "coded language" employed by the police on cold-calls, but who should not be deprived of the protections afforded by *Mack.* In *Clarke* (2018),[72] Justice Pringle of the Ontario Court of Justice rejected the same "coded language" argument and provided two hypothetical cases:

> 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 the drug dealer could pick up his phone, understand the street language, and decide 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.[73]

B. The Reasonable Suspicion Requirement Must be Properly Enforced in *Bona Fide* Investigations

49. Some Courts have rejected the Crown argument that "cold-calls" are *bona fide* investigations that do not require reasonable suspicion but have nonetheless denied entrapment claims on the grounds that the police *had* reasonable suspicion at the time they presented the accused with an opportunity to commit an offence. The majority judgment in the Ontario Court of Appeal in this case is a good example of that reasoning. The majority held that although the police did not have a reasonable suspicion that Mr. Williams was engaged in drug trafficking, they were conducting a *bona fide* investigation because they held a reasonable suspicion over the phone number they called. The reasoning that the police had reasonable suspicion amounts to this: 1) the police received a tip that someone named "Jay" was selling drugs at a particular

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[72] *R. v. Clarke*, 2018 ONCJ 263 ["*Clarke*"].
[73] *Ibid* at para. 21.

phone number, 2) when the police phoned the number, the person who answered confirmed he was Jay.

50. This reasoning does serious damage to the reasonable suspicion standard. It turns reasonable suspicion into a paper-tiger and deprives the court of any meaningful ability to judicially review police conduct. It has never been the law that a bald tip coupled with confirmation of a single innocuous detail is enough to ground reasonable suspicion.

(i) Reasonable Suspicion is a Rigorous Standard

51. The criminal law recognizes just *three* standards for justifying the exercise of police powers:

1. Reasonable grounds to believe (or "reasonable and probable grounds")
2. Reasonable suspicion (sometimes called "articulable cause")
3. Mere suspicion (indistinguishable from hunches and police guess-work)

52. Reasonable grounds to believe is the standard required for the most intrusive exercises of police powers, including arrests and search warrants.[74] Reasonable suspicion is the next standard and is required for lesser interferences with liberty, including investigative detentions,[75] pat-down "officer safety" searches,[76] sniffer dog searches,[77] and police entrapment. Mere suspicion refers to an entirely subjective and unreviewable power that is based on a "hunch," "intuition," or "guesswork."

53. The reasonable suspicion standard provides important protection. It is a "rigorous" and "exacting" standard.[78] It protects people from police excess and the protection it provides rests "not only in the standard itself, but in its retrospective application."[79]

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[74] See ss. 487(1), 494(1), *Criminal Code* (R.S.C., 1985, c. C-46).
[75] *Simpson*, *supra* note 70.
[76] *R. v. Mann*, 2004 SCC 52 ["*Mann*"].
[77] *R. v. Kang-Brown*, 2008 SCC 18 ["*Kang-Brown*"]; *R. v. A.M.*, 2008 SCC 19 ["*A.M.*"].
[78] *Chehil*, *supra* note 6 at paras. 26 – 27.
[79] *Brown v. Durham Regional Police Force* [1998] O.J. No. 5274 (C.A.) ["*Brown v. Durham Regional Police Force*"].

54. The key to the reasonable suspicion standard is that it allows for an objective assessment of the grounds relied on by the police. This is what makes judicial review possible and ensures that hunches, guesswork, or racial profiling cannot be used to justify police intrusions into individual liberty. As this Court held in *Chehil*, the reasonable suspicion standard derives its rigour "from the requirement that [it] be based on objectively discernible facts" that can be subjected to "independent judicial scrutiny."[80] Reasonable suspicion is assessed against the "totality of the circumstances" and it requires consideration of the "constellation of objectively discernible facts that are said to give the investigating officer reasonable cause to suspect that an individual is involved in the type of criminality under investigation."[81]

(ii) Bald "Tips" Cannot Provide Reasonable Suspicion

55. The Court of Appeal's holding that a bald tip grounded reasonable suspicion in this case must be rejected. This Court's judgment in *Debot* held that when the police use a tip from a confidential or anonymous source to justify an intrusion on someone's liberty, the courts must scrutinize the tip. The Court held that information provided from confidential or anonymous informants must be examined to see whether the detail contained in the tip is compelling, whether the informant is credible, and whether the information provided was corroborated in any way.[82] This ensures that the police are acting on more than "mere rumour or gossip".[83] The courts have also recognized that people may "have a motive to falsely accuse" others and that this risk is "particularly significant" when a tipster is shielded by an absolute and impenetrable immunity."[84]

56. It has been clear for at least 25 years that reasonable suspicion cannot be founded on a *bald* tip from a confidential source about whom nothing is known. This was the lesson from the Ontario Court of Appeal's decision in *Simpson*.[85] In *Simpson*, a police officer received information from an "internal memorandum" that a particular residence was a suspected "crack

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[80] *Chehil*, *supra* note 6 at para. 26 (emphasis added).
[81] *Ibid*.
[82] *Debot*, *supra* 7 at p. 1168.
[83] *Ibid* at p. 1168.
[84] *R. v. Lewis*, [1998] O.J. No. 376 (C.A.) [*Lewis*].
[85] *Simpson*, *supra* note 70.

house."[86] The author of the memo stated that this information had been received from a street contact. The police officer who read the memo knew nothing about the source or when this information had been received. Nonetheless, he conducted observations on the suspected house and pulled over a car he saw leaving the driveway. The officer testified that he stopped the car to investigate whether those inside were committing a drug offence. The accused was the passenger in the car and he had cocaine in his pants, which the officer found after asking him to get out of the car and conducting a pat down search.[87]

57. Justice Doherty's judgment in *Simpson* recognized that the police have a common law power to conduct brief "investigative detentions" where they have "articulable cause" or "reasonable suspicion" that a crime is being committed.[88] However, Justice Doherty held that the police officer lacked reasonable suspicion when he detained the accused because he was working on a tip about which nothing was known. The officer "had information of an unknown age that an officer had been told that the residence was believed to be a 'crack house.'" The officer "did not know the primary source of the information" and had "no reason to believe that the source in general, or this piece of information, was reliable."[89] It was "doubtful" that this information "standing alone" could provide a reasonable suspicion that the house "was the scene of criminal activity" — and it certainly could not support a finding of reasonable suspicion over the accused, who had simply been seen leaving the driveway.[90]

58. This case can be contrasted with *Lewis* (1988), where police searched the accused's luggage at the airport and found a bottle full of cocaine.[91] In that case, a police officer received a call from a woman who wanted to remain anonymous and who told him that a "heavy set black man named Keith Lewis" would be taking a flight on Canada 3000 airlines to Edmonton at 3 p.m. the next day, that he would be travelling with a two year old boy, and that he would be carrying cocaine hidden in a bottle of wine or rum.[92]

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[86] *Ibid* at para. 4.
[87] *Ibid* at paras. 4 – 12.
[88] *Ibid* at para. 58.
[89] *Ibid* at para. 68.
[90] *Ibid*.
[91] *Lewis*, *supra* note 84.
[92] *Ibid* at para. 3.

59. This tip provided the police with reasonable suspicion. Justice Doherty held that the value of the tip depended on the nature of the information and extent to which the police were able to confirm it before an arrest or search.[93] This tipster had provided detailed information about the suspect, the time, and the place of the crime — and she told them how it was going to be committed. The detail tended to exclude the possibility of "rumour or gossip" and was enough to grant reasonable suspicion for an investigative detention.[94]

60. The differences between *Simpson* and *Lewis* are clear. In *Simpson*, nothing was known about when the tip was provided, what detail was provided, who provided it, and — aside from innocuous details like that there was a house at the address described — there was no confirmation of the tip. By contrast, in *Lewis* the police knew when the tip was received, they had spoken to the tipster (who was described as sounding "rational"), they were given a lot of detail, and all of these details were corroborated when the accused showed up at the airport the next day.

61. Prior to the Court of Appeal's decision in this case, the law made clear to trial judges that bald, unconfirmed tips were not enough to ground reasonable suspicion. For example, in a 2008 entrapment ruling from the Ontario Superior Court, Justice Frank found that a tip that provided only a name and a phone number was not enough for reasonable suspicion:

> …the fact that [the accused] responded to the name provided by the tipster is insufficient to justify more than a mere suspicion on the part of the officer.
>
> The tipster could have had ulterior motives for giving the name and number. In the absence of some corroborative information or history of reliability on the part of the tipster, the fact that the person who answered the phone answered to the name provided by the tipster is insufficient to support a reasonable suspicion the person was engaged in selling drugs.[95]

62. A similar conclusion was reached by Justice Ducharme in *Henneh* (2017), a case that involved a Crime Stopper's tip that someone named "James" was dealing drugs from a specific phone number:

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[93] *Ibid* at para. 16.
[94] *Ibid* at paras. 17, 27.
[95] *R. v. Arriagada*, [2008] O.J. No. 5791 (Sup. Ct.) at para. 25 [*Arriagada*] [BOA, Tab 1].

> The man's name, gender and the accuracy of the phone number were all confirmed once [the accused] gave an affirmative answer to Canepa's first question "James?" However, I accept that this information alone did not provide Det. Canepa with a reasonable suspicion that the individual who answered the phone call was trafficking in narcotics.[96]

63. The trial judge reached the same conclusion in this case, finding that without any additional information, he was "left to trust, without question or the ability to verify, the opinion of P.C. Fitkin, an officer who did not testify at this trial." Such a finding would render judicial review "meaningless."[97]

(iii) The Reasonable Suspicion Standard Does Not Vary Depending on the Object of the Police Suspicion

64. Although never stated explicitly in the judgment, it seems that the majority in the court below may have reached its conclusion that the police had reasonable suspicion in this case by reasoning that less information is needed to justify reasonable suspicion over a phone line than a person. The majority held that the "relevant considerations" in the reasonable suspicion inquiry "vary depending on the context"[98] and that certain facts could be used to support a finding police had reasonable suspicion over a particular phone line that was being used but not the particular person who was using the phone line.[99] Justice Himel's concurring judgment made this point explicitly, finding it was incongruous of the majority to suggest the police had reasonable suspicion over the phone line but not Mr. Williams.

65. This Court must make clear that the reasonable suspicion standard does not demand more or less depending on what the *object* of the police suspicion is. Whether the police claim to have reasonable suspicion over a *person*, a *phone line*, an Internet forum, a username, or a geographic location does not matter. The police do not offer opportunities to commit offences to telephones, IP addresses, or garbage cans — they offer them to *people*. The fundamental question must be the same no matter the object of the police suspicion: was there an objective constellation of

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[96] *Henneh*, *supra* note 46 [BOA, Tab 2]. See also *Clarke*, *supra* note 72 at para. 44.
[97] Judgment of the Trial Judge Re: Entrapment at para. 18 [A.R. Tab 1].
[98] Judgment of the Ontario Court of Appeal at para. 67 [A.R. Tab 2].
[99] *Ibid*.

factors that demonstrated a reasonable possibility that the criminal activity under investigation was being committed?

66. The idea that the reasonable suspicion standard may demand less when the police are not targeting a specific person is troubling. *Bona fide* investigations allow the police to offer opportunities to potentially large numbers of people on a *non-individualized* basis. If the police demonstrate a reasonable suspicion that drug dealers are selling cocaine in Confederation Park, *Barnes* suggests that they can offer opportunities to anyone in the park, with few apparent limits. The idea that the reasonable suspicion standard would be *less* vigorously enforced because it is a park and not a person over which the police hold their suspicion is unprincipled. Given the police may invade the liberty of far more people than in a case of individual suspicion, one would expect the courts to apply careful and exacting scrutiny when assessing whether reasonable suspicion has been demonstrated.

67. Nor does it make sense to set a lower standard for phone lines. Most people in Canada have a cell phone — and cell phones are by and large *personal*.[100] In reality, there is little difference between targeting a phone number and the person behind that phone number. Although the police may not be targeting a known person because they do not know the identity of the cell phone user, the reasonable suspicion standard still demands an objectively discernible constellation of factors that show a reasonable possibility the phone is being used to engage in crime.

(iv) The Court of Appeal's Decision Hurts the Reasonable Suspicion Standard

68. The Court of Appeal's decision does serious damage to the reasonable suspicion standard and erodes an important legal protection. Reasonable suspicion governs more than just police entrapment. It also determines when the police can detain people to investigate them, conduct "officer safety" searches, and deploy sniffer dogs.

69. The Court of Appeal's decision allows police to satisfy the standard and invoke their powers with almost no room for judicial oversight. Based on the Court of Appeal's reasoning, all

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[100] Judgment of the Ontario Court of Appeal at para. 109 [A.R. Tab 2].

the police need to ground reasonable suspicion is a tip and confirmation of one innocuous detail. This has far reaching implications beyond the law of entrapment. Consider this example:

> A police officer is forwarded an email that claims a "source" has identified Ben Smith as a cocaine dealer. The source says that Ben Smith lives at 99 Hayden Street. The officer has no idea when the source provided this information, what detail was provided, if the source has provided information in the past, has a criminal record, or has an ulterior motive. The officer, however, is able to confirm that Ben Smith lives at 99 Hayden Street by running a search in the Ministry of Transportation Ontario's database of licence holders.
>
> According to the Court of Appeal, this creates an objective constellation of factors that demonstrates a reasonable possibility that Ben Smith is a drug dealer. The police can now:
>
> i. Pull Ben Smith over as he drives to work, tell him to get out of his car (investigative detention), conduct a pat-down search (officer safety) and investigate whether or not he is a drug dealer.
>
> ii. Stop Ben Smith on the street, in public and in broad daylight, detain him to determine if he is a drug dealer, and have a German Sheppard smell his clothes and belongings to see if he is carrying drugs.
>
> iii. Phone Ben Smith in the evening, while he is eating dinner with his family, and ask him to sell cocaine.

70. The Court of Appeal's version of the reasonable suspicion standard is not and cannot be the law. It places far too much trust in confidential and anonymous sources. And it leaves courts powerless to judicially review exercises of intrusive police powers.

71. The Ontario Court of Appeal's judgment in this case has paved the way for a new era of "*bona fide*" investigations under *Mack* — investigations that include not just geographic locations but also "digital" places including phone numbers, IP addresses, chatrooms, Internet forums, and online marketplaces. It will fall to courts in future cases to carefully define how and when reasonable suspicion can be formed over such places, and what the police are empowered to do. But the starting point must be to reaffirm that reasonable suspicion is a *rigorous* and *exacting* standard — one that requires the police to act on more than a bald tip.

C. The Difference Between Opportunities to Commit Crimes and Investigative Steps

72. When the police lack reasonable suspicion, *Mack* prohibits them from offering people opportunities to commit offences. But the case law does not stop them from investigating leads

and identifying potential drug dealers. Since *Mack* was decided, courts in Ontario and across Canada have worked to define the difference between investigating a tip and offering someone an opportunity to commit an offence.

73. The law in Ontario is that if the police are investigating a possible drug dealer or a suspected phone number but have not yet developed reasonable suspicion, they are allowed to call that number and introduce drugs as a general subject *without* violating *Mack*. The law permits general discussions as an "investigative step" but provides that the police cannot go further and make specific offers to purchase drugs until they have reasonable suspicion. This distinction was first recognized in *Townsend*[101] — a case that also involved D.C. Canepa. In *Townsend*, the police got a tip from a confidential source that a man named "Desmond" was selling crack cocaine in Parkdale. The source described Desmond as a black man and told police to refer to the name "African" or "Leonard" when they spoke to him. D.C. Canepa called the number within days of receiving the tip, confirmed he was speaking to Desmond, confirmed the man knew "Lenny," and, after a series of phone calls during which the accused vetted D.C. Canepa, eventually set up a meeting to buy drugs.

74. In dismissing the accused's entrapment application, Justice Sharpe held that D.C. Canepa did not have reasonable suspicion when he made the first call.[102] If D.C. Canepa had called the accused and simply made an offer to buy drugs, the entrapment application may have succeeded. But because D.C. Canepa did *not* make an immediate offer to buy drugs —instead confirming the tip by verifying who he was speaking with, confirming that the person knew "Lenny," and waiting for the accused to call him back — he developed reasonable suspicion before providing the opportunity to commit an offence.[103]

75. The Ontario Court of Appeal adopted this reasoning in *Imoro*[104] and *Ralph*.[105] In *Imoro*, the police received an anonymous tip that there was a black man selling drugs on the 12th floor of

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[101] *R. v. Townsend*, [1997] O.J. No. 6516 (Prov. Ct.) ["*Townsend*"] [BOA, Tab 5].
[102] *Ibid* at para. 42.
[103] *Ibid* at paras. 44 – 47.
[104] *R. v. Imoro*, 2010 ONCA 122 ["*Imoro*"].
[105] *R. v. Ralph*, 2014 ONCA 3 ["*Ralph*"].

an apartment building.[106] An undercover officer went to the 12th floor of the building, got off the elevator, and asked the first black man he saw if he could "hook" him up. The accused said "Yes" and the officer proceeded into his apartment and bought cocaine from him.[107] The Ontario Court of Appeal applied *Townsend* and held that the general question of "Can you hook me up?" was a legitimate investigative step (and not an opportunity to commit an offence) that grounded reasonable suspicion and justified the transaction that took place.[108] In *Ralph*, the Court of Appeal held that the "exact words" of the conversation between the officer and the accused are important, and that saying "I need product" before setting up a transaction was similarly an investigative step and not an opportunity to commit an offence.[109]

76. This line of authority lets the police fly perilously close to the sun. There is little obvious difference between saying "I need product" and making a specific offer to buy drugs. But the courts have at least recognized that there needs be a line the police cannot cross without reasonable suspicion. The case law has developed to hold that the police cross the entrapment line from investigation into providing an opportunity when they make specific requests for drugs. For example, in *Marino-Montero* (2012),[110] Justice McMahon held that D.C. Canepa entrapped the accused when he said "I need 40" because that was a specific offer to buy $40 of crack cocaine.[111] Similarly, in *Izzard* (2012),[112] an undercover officer entrapped the accused when he said "I need six greens" because the trial judge found this was a specific offer to buy oxycontin.[113] And in *Arriagada* (2008), an officer's request for "half a b" was found to be a specific offer to buy "half an eight ball" of cocaine.[114]

77. Some courts have become critical of these fine distinctions and the general exercise of "parsing" the language used by the undercover officer on the phone call. Justice Himel in her concurring reasons in this case held that it is "inconsistent with the core principles" underlying

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[106] Judgment of the Trial Judge Re: Entrapment at para. 7 [A.R. Tab 1].
[107] *Ibid* at paras. 8 – 9.
[108] *Imoro*, *supra* note 104 at paras. 15 – 16.
[109] *Ralph*, *supra* note 105 at paras. 2, 29.
[110] *R. v. Marino-Montero*, [2012] O.J. No. 1287 (Sup. Ct.) ["*Marino-Montero*"] [BOA, Tab 4].
[111] *Ibid* at para. 15.
[112] *R. v. Izzard*, [2012] O.J. No. 2516 (Sup. Ct.) ["*Izzard*"].
[113] *Ibid* at para. 22.
[114] *Arriagada*, *supra* note 95 at para. 26 [BOA, Tab 1].

Mack to distinguish between "veiled statements" asking if someone is a drug dealer and "specific requests for quantities of drugs."[115] Justice Himel held that there is "no meaningful distinction" between asking "Can you hook me up?" and "I need 80" or "I need 'two soft'".[116] As a result, an opportunity was not provided. The British Columbia Court of Appeal endorsed similar reasoning in *Le.*[117]

78. This Court should reject this reasoning. The distinction that began in *Townsend* was intended by the courts to give the police as much leeway as possible to conduct drug investigations. But *Mack* is not endlessly flexible. There must be a line the police cannot cross, and at the very least the line must be set at *specific offers* to buy drugs. As the majority held, if a specific offer isn't across the line, "it is difficult to imagine what the police could say to a suspected drug trafficker" that would amount to an opportunity to commit an offence.[118] The police would essentially have free reign.

79. Another reason specific offers must be over the line is because the act of agreeing to them is itself a crime. Under section 2(c) of the *Controlled Drugs and Substances Act*,[119] it is actually a crime to *agree* to sell someone drugs. Agreeing to sell drugs is by definition "trafficking" under the *CDSA*. If the accused was charged with trafficking by offer, it would provide no defence at trial to claim that because "coded language" was used there was no true offer or agreement to sell. That being the case, it can't be open to the Crown to argue in response to an entrapment claim that no opportunity to commit a crime was presented because the officer used "coded language" on the call.

80. It is important to recognize that the language used by the police only becomes important when they choose to proceed with a call *without* having developed reasonable suspicion. This will generally be the case when they are acting on bald tips that lack any confirmation, or where the source is entirely unknown to police. In those situations, the police are calling someone with very little basis for doing so. There is nothing wrong with sending the message to police that in

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[115] Judgment of the Ontario Court of Appeal at para. 119 [A.R. Tab 2].
[116] *Ibid* at para. 119.
[117] *Le*, *supra* note 45 at para. 93.
[118] Judgment of the Ontario Court of Appeal at para. 38 [A.R. Tab 2].
[119] *CDSA*, *supra* note 27.

this situation, they must be careful not to provide opportunities to commit offences before getting the confirmation they need. They should proceed cautiously when they are acting in this way. The unacceptable alternative is to simply allow the police to call people without reasonable suspicion and offer them specific opportunities to commit offences. As this Court held in *Barnes*, that is random virtue testing and it cannot be allowed.

D. Landon Williams was Entrapped

81. When the law of entrapment and reasonable suspicion is properly applied to the facts of Mr. Williams' case, the conclusion that he was entrapped is unavoidable.

(i) The Police were Investigating Landon Williams – Not a Phone Line

82. As a starting point, the majority's conclusion that the police were conducting a *bona fide* investigation into a phone line completely ignores the evidence at trial and the reality of how this investigation unfolded. The record makes plain that the police believed Landon Williams was selling drugs and that they were investigating him from the moment the investigation began. P.C. Fitkin's email to D.C. Hewson, reproduced at paragraph 10, could not make that any clearer. The email does not even mention a phone number. The subject line says "Drug dealer JAY" – referring to a person. The body of the email refers to "the drug dealer" and says that "He was [arrested] by Margetson's team in 2009" [referring to Landon Williams]. The file P.C. Fitkin attached was named "Williams, Land…" and the first page is all about Landon Williams, the human being — not a telephone number:[120]

PERSON OF INTEREST

NAME: WILLIAMS, LANDON D.O.B. 1991/11/07
ALIAS: "JAY"
DES: M/B, 6'1, 150 LBS
ADDRESS: 76 LOMBARD STREET #403, Toronto
ADDRESS WHERE HE HAS DEALT DRUGS ON SEVERAL OCCASIONS:
389 CHURCH STREET

[120] Exhibit 2 (Email from Christopher Fitkin) (emphasis added) [A.R. Tab 5].

83. The "Source Information" on page three of the Person of Interest package refers first to a person and a location, not a phone number: "This male is a cocaine dealer in the area of 389 Church Street and Yonge and Dundas." The only reference to a phone number anywhere is the assertion that "The phone number the POI uses is 647-400-4562":[121]

> **SOURCE INFORMATION:**
>
> This male is a cocaine dealer in the area of 389 Church Street and Yonge & Dundas.
>
> Phone number the POI uses is **647-400-4562**

84. Unsurprisingly, there is no reference in the trial record to *bona fide* inquiries or an investigation into a phone number. The sole issue at trial was whether the police had reasonable suspicion over Landon Williams and that was the focus of the entirety of the Crown's submissions, the defence submissions, and Justice Trotter's ruling. The Crown never argued the police were conducting a *bona fide* investigation, and none of the officers testified that they were investigating a phone line or anything other than Landon Williams.

85. The majority's recharacterization of this case does not line up with what happened in the real world — the investigation the police actually conducted or the way the case was prosecuted at trial. This was an investigation of Landon Williams and the case falls squarely in the first branch of *Mack* — the question was whether the police had reasonable suspicion over Landon Williams at the time they offered him an opportunity to commit an offence.

(ii) Responding to the Name "Jay" was Incapable of Confirming the Tip

86. The Court of Appeal based its finding of reasonable suspicion on the fact that Mr. Williams responded to the name "Jay" when D.C. Canepa phoned him. The Court of Appeal reasoned that this response confirmed the information provided by the officer's source.

87. The reality, however, is that we simply have no idea what information the source provided to the police, and Mr. Williams' response to the name "Jay" is incapable of confirming the tip on this record. The Court of Appeal's finding of confirmation is predicated on the

[121] Exhibit 2 (Email from Christopher Fitkin) (emphasis added) [A.R. Tab 5].

conclusion that the informer told the police that "Jay" was using the phone number to sell drugs. There is simply no evidence that this is the case. We know nothing about what the informer told the police and there is nothing in the record that tells us what name the informer provided for Mr. Williams. It is entirely possible that the tipster provided the police with Mr. Williams' name, and that the alias "Jay" was simply already known in the police system. If in fact the informant provided the police with the name "Jay," how did the police link that name to Mr. Williams and identify him as the suspected drug dealer? Nothing in the record helps answer this question. There is no way to know whether the source said "Jay" or "Landon Williams" to the police and to find that answering to Jay corroborated the tip is speculative.

(iii) The Police Lacked Reasonable Suspicion

88. When D.C. Canepa phoned Mr. Williams and made a specific offer to buy cocaine from him, the police did not have reasonable suspicion that he was already engaged in drug trafficking. P.C. Fitkin had relayed an undated and bald tip to D.C. Hewson, and she had never received information like this from P.C. Fitkin before. The Crown did not call P.C. Fitkin to testify to shed any light on the information he received.

89. The police acted on undated information from a source about which nothing was known. The source had not provided a "drop-name" to the police (i.e. the name of someone that D.C. Canepa could reference to build trust with Mr. Williams and corroborate the source's information). And nothing said on the call grounded a reasonable suspicion before the specific offer was made. Although the officer asked Mr. Williams if he was "working," he didn't get an answer to the question before offering to buy drugs from him. Other cases where the police proceeded on bald, unconfirmed tips have similarly been stayed.[122]

90. This case can be contrasted with those where the police have been found to have had reasonable suspicion. In *Williams* (2010),[123] a police officer received a call from a confidential informant. He testified that he had used this informant 10 times in the past two years. The source had proven to be reliable in the past and was not seeking payment or "judicial consideration" in

[122] See for example: *Arriagada*, *supra* note 95 [BOA, Tab 1] and *Reid*, *supra* note 46.
[123] *R. v. Williams*, [2010] O.J. No. 1234 (Sup. Ct) ["*Williams* (2010"].

exchange for the information.[124] The informant told the officer that a black male who used the name Bizz and drove a black coloured car was selling crack cocaine in Brampton. The source provided the officer with Bizz's phone number.[125] When an undercover officer phoned Bizz, Bizz confirmed his name and affirmed that he was "around" (which the officer testified meant was selling drugs).[126] Based on the officer's history with the informant, the detail of the tip, and the conversation on the phone before the offer was made, Justice Hill held that the police had reasonable suspicion.[127]

91. In *Sawh* (2016), a police officer received a tip about a crack cocaine dealer. The source provided the officer with the information on January 2, 2013, and told the officer that a man named Dickie was selling drugs out of a bar called Champs. The source provided Dickie's address and phone number, and told the officer to use the drop-name "Ravi" on the call. The officer passed this information on to the Drug Squad. He testified that he had known the source for five years, that he had always been reliable in the past, and that his source had no crimes of dishonesty on his criminal record.[128] An officer from the Drug Squad phoned the accused, used the drop name Ravi, and the accused asked the officer "what do you need?" The officer then made a specific offer to buy drugs.

92. In both *Williams* (2010) and *Sawh* (2016), much more was known about the tip, including: i) when it was provided; ii) the detail it contained; iii) the source's track record; and iv) the "drop name." Justice Trotter had none of this information. As he noted in his judgment, he had no answers to any of these questions:

- Did the source have a criminal record?
- Did the source have outstanding charges?
- Had the source provided credible information to the police in the past?
- What was the source's motivation for providing the information to Fitkin?

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[124] *Ibid*, at para. 12.
[125] *Ibid*, at paras. 6-7.
[126] *Ibid*, at para. 15.
[127] *Ibid*, at para. 52.
[128] *Sawh*, *supra* note 2, at para. 8.

- How much detail did the source provide?
- Was the source's information first hand or was it based on hearsay?
- When did the source acquire the information?
- When did the source provide it to Fitkin?
- Was the information current, or did it relate to Mr. Williams' previous arrest for trafficking cocaine?
- Where did the link between the name "Jay" and Mr. Williams come from? Did it originate from the source, from Fitkin, or from somewhere else?[129]

93. The only other information the police had was Mr. Williams' dated criminal record, which Justice Trotter found, relying on *Mack*, was of little value on its own in evaluating whether the police had reasonable suspicion. This dearth of evidence made it impossible for Justice Trotter to figure out whether the suspicion the police had "was reasonable or not" and that judicial review was "rendered meaningless" in the circumstances.[130]

(iv) The Drug Squad Made No Attempt to Comply with Mack

94. The reality is that the Drug Squad was found to have entrapped Mr. Williams in this case because they didn't make any effort to comply with the demands of *Mack*. D.C. Hewson received an email from P.C. Fitkin that — when it came to the *basis* for suspecting Landon Williams — was devoid of detail. She testified that she had never received information from P.C. Fitkin before and had no idea who his source was. Despite his email stating that he was still waiting to get a drop name from his source, D.C. Hewson didn't pick up the phone and call P.C. Fitkin or reply to his email and ask any follow up questions. Instead, she simply forwarded the email to D.C. Canepa and told him to set up a purchase.

95. D.C. Canepa for his part has conducted hundreds of cold calls and is a recurring character in Ontario's entrapment jurisprudence. He was the officer in *Townsend*, *Marino-Montero*, *Henneh*, and this case. Despite his unparalleled experience in entrapment cases, D.C. Canepa did not ask D.C. Hewson whether she had taken any steps to satisfy herself that they had reasonable

[129] Judgment of the Trial Judge Re: Entrapment at para. 14 [A.R. Tab 1].
[130] *Ibid*, p. 38, para. 18.

suspicion. He simply called Mr. Williams. Nor did he take any steps on the call to try and investigate or confirm the claim that he was a drug dealer. He called to set up a drug transaction and he immediately made an offer for a specific amount of drugs.

96. The Crown at trial chose not to call P.C. Fitkin to testify — despite the fact that he is the only one who could shed light on the tip that was received.

97. The law does not need to change so that there is even less oversight of the thousands of cold-calls police are now making across Canada. On this record and in the face of this investigation, Justice Trotter's entrapment finding was inevitable. The Drug Squad did not take even basic steps to try and comply with the law as it has existed since *Mack* was decided in 1988. This Court must restore the finding that Mr. Williams' was entrapped.

PART IV – SUBMISSIONS CONCERNING COSTS

98. The Appellant does not seek costs.

PART V – ORDER SOUGHT

99. The Appellant asks that the appeal be allowed and the stay of proceedings restored.

PART VI – SUBMISSIONS ON CASE SENSITIVITY

100. The present case is not subject to any limitations on access and there is no case sensitivity that would have an impact in the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 6th day of March, 2019

Owen Goddard
Counsel for the Appellant

Janani Shanmuganathan
Counsel for the Appellant

PART VII – TABLE OF AUTHORITIES

Cases **at paragraph(s)**

Other

Legislative Provisions

Controlled Drugs and Substances Act, S.C. 1996, c. 19, s. 2

Loi réglementant certaines drogues et autres substances, L.C. 1996, ch. 19, s. 2

Criminal Code , R.S.C., 1985, c. C-46, ss. 487(1), 494(1)

Code criminal, *L.R.C.*, (1985), ch. C-46, ss. 487(1), 494(1)