In the Provincial Court of Alberta

Citation: [redacted]2018 ABPC 303

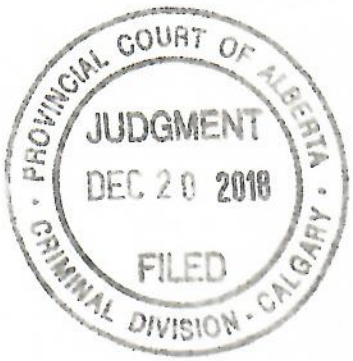
Date: 20181220
Docket: 161448204P1
Registry: Calgary

Between:

Her Majesty the Queen

- and -

[redacted]



Reasons for Judgment of the Honourable Judge T.C. Semenuk

Introduction

[1] The accused is charged with a single Count of trafficking fentanyl.

[2] It is alleged that on the date in question, the accused sold fentanyl to an undercover member of the Calgary Police Service (CPS). Defence Counsel has raised identification of the accused as an issue in the trial proper.

[3] Defence Counsel has also filed a *Charter* Notice alleging a violation of section 7 of the *Charter*.

[4] More specifically, Defence Counsel submits if the accused is found guilty in the trial proper, the accused was *entrapped* to commit the offence, through the conduct of members of the CPS, working in an undercover capacity.

[5] If the Court finds that section 7 of the *Charter* was violated, pursuant to section 24(1) of the *Charter*, Defence Counsel submits the Court should enter a *judicial stay of proceedings*.

[6] For the reasons that follow, the Court finds the accused guilty in the trial proper.

[7] The Court also finds that section 7 of the *Charter* was violated in the circumstances of this case, and pursuant to section 24(1) of the *Charter*, enters a *judicial stay of proceedings*.

Charge

[8] The accused is charged in an Information as follows:

> Count 1: On or about the 10th day of March, 2016, at or near Calgary, Alberta, did unlawfully traffic in a controlled substance, to wit: Fentanyl, contrary to section 5(1) of the *Controlled Drugs and Substances Act*.

Evidence

[9] The Crown called two witnesses at trial, Constables Telfer and Shala, both members of the CPS. No evidence was called by the Defence.

[10] By agreement of Counsel, at the outset of the trial, the Court marked in evidence the following Exhibits:

> **Exhibit 2 - (Crown) Certificate Under Section 5(1) of the *Traffic Safety Act*, Province of Alberta, Alberta Licence Plate Number BSX[...]**
>
> **Exhibit 3 - (Crown) Envelope Containing CD Titled 3410045[redacted] Telfer 4246 Buy 1**
>
> **Exhibit 4 - (Crown) Envelope Containing CD Titled 3410045[redacted] Penner 4239 Buy 1**

[11] **Constable Telfer** testified in examination-in-chief that he has been a member of the CPS for 13 years.

[12] He has been a member of the CPS Drug Unit for 4 years, and works in an undercover capacity (UC). He has worked as an UC operator more than 250 times, and has personally participated in over 100 drug buys. He has trained in surveillance and being an UC operator. He has been UC trained since 2009.

[13] On March 10, 2016, he was asked by the street boss, Constable Swanson to call a phone number, 403-922-2[...], with the objective of purchasing fentanyl from the person who answered the phone, and to make the meet at the North Hill Mall in Calgary.

[14] At 1317 hours that day, he placed a phone call to that number, 403-922-2[...]. The phone was answered by a male voice. He asked the male if he was around. The male said he was, and asked who he was. He told the male his UC name. The male asked if they had ever met. He told the male that they had. He then asked the male if he was good for five beans.

[15] When he asked the male "*if he was around*" this is a common question asked on dial-a-dope numbers meaning "*if he is working.*"

[16] When he asked the male "*if he was good for five beans*" he meant five fentanyl pills.

[17] He told the male that he would be heading up to the North Hill Mall. The male told him that the North Hill Mall would work, but he was in the southwest right now. He told the male he was trying to get some wheels, meaning a vehicle, and if it was easier if he came and met him. The male said no, just to call him when he got to the North Hill Mall. The male then asked where he has met him before. He told the male at the North Hill Mall. He then asked the male if he could sell him five beans for $100. At that point, the male repeated the question and said five for 100, do you know that I sell five for 80? He didn't have that information, so he played along and

said yeah, cool. The male then said, just call me when you get to the North Hill Mall, and the phone call ended.

[18] At 1358 hours, he was up in the area of the North Hill Mall. At 1359 hours, he placed two phone calls to the number 403-922-2[...], which rang out to voice mail. At 1400 hours, he sent three text messages, but did not get a reply. The first one was that he couldn't get wheels or a ride, but was hopping on the train, and would be there in 10 minutes, and was it good to meet at Cal Tire. At 1402 hours, he received a phone call from a different number, which was 403-922-4[...]. On answering the phone, the male on the other end that he believed was the same male that he had been speaking to previously, asked him if he was at the North Hill Mall. He told the male that he just sent him a text that he was hopping on the train and would be there in 10-15 minutes, and if he was good to meet at the Cal Tire. The male directed him to wait in the food court, that it would be easier, just in case there was no parking at Cal Tire. The male told him that he had to go meet a guy at Bow Trail, and then go meet his guy at Edmonton Trail, and that he would be about 25 minutes getting to him, and the phone call ended.

[19] At 1430 hours, he attempted to call the 403-922-4[...] number, which rang out to voice mail. At 1440 hours, he tried to call that number again, which rang out to voice mail. At 1441 hours, he received a call from that 403-922-4[...] number, and he believed it was the same male he had spoken to previously. The male asked him if he was at the North Hill Mall. He told the male that he was getting kicked out by security, and to come and meet him at Cal Tire. The male directed him over to the Home Depot. He told the male that he was going to get followed around at Home Depot, and probably get kicked out again, plus he has to catch a train back downtown. The male then directed him to the intersection of 14th Ave., and 20th St., which was west of his location at the time. The male told him to walk toward the LRT and keep walking until he saw 20th St., and to wait for him on the corner, and he would call him. He told the male he was on his way, and the male told him he would be about 10 minutes.

[20] At 1500 hours, he received another phone call from the 403-922-4[...] number. Again, it appeared to be the same male he had spoken to previously. The male asked if he was there, and he told the male he was waiting at the corner. He told the male he was standing in the cul-de-sac side of 20th St. The male directed him to cross to the south side of the street, and just stay on 20th St., walk back and forth, and he would come and pick him up. The male said he met with his guy, and was about 5 minutes away.

[21] At 1506 hours, a silver Volkswagen Passat drove past him, and a male was looking at him as he drove past. The car pulled over to the west curb facing southbound on 20th St. He wasn't sure if it was the male or not, so he waited and watched the car. At that point, he received a phone call from the 403-922-4[...] number. The male told him to walk over to his car. He could see the male in the car looking at him through the driver's side window when he was standing there.

[22] He walked over towards the car, passing behind the vehicle. He noted the licence plate on the car as being BSX[....]. He then walked around to the passenger side of the car, and got into the front passenger seat.

[23] He greeted the male. Right away the male started to ask how he knew him. He told the male he just got back into town and was calling his bean numbers in his phone, meaning whatever fentanyl numbers he had as part of his cover story. He told the male two numbers were out of service, and when he called him and he answered, there he was. The male asked where

they met previously. He told him at the North Hill Mall, but he was pretty messed up when he met him. It was at the backside of the Sears store at the Mall. The male said he remembered. He told the male that he left town to get help. He then asked the male if he had five beans, and passed him four $20 bills that were rolled up in his left hand. The male accepted the money and counted it out. He then pulled out a clear Ziplock baggy out of his left jogging pants pocket and counted out five green pills. He approximated that the male had 60 - 70 pills in the bag. The male passed him five pills into his left hand. He took them and secured them into his left jeans pants pocket.

[24] The male then asked him if he knew anybody else that did beans, meaning using fentanyl. He told the male most of his friends do. The male asked how many they would grip at a time, meaning purchase at a time. He told the male usually the same as him, 5, 6, 10 pills at a time. He then asked the male if it was okay to pass on his phone number to his buddies. The male said that he would have to have an intro first, meaning he would have to be at that first drug deal. In his experience, most drug dealers want an intro to vouch for someone.

[25] The male asked him a lot of questions. He asked him where he had been before he came back to Calgary after being messed up. He told the male he had been in Ontario for about a month. The male asked what rehab centre he was at. He told the male that he stayed with his parents in Ontario, but he couldn't handle them, so he came back to Calgary.

[26] The male asked if he was going to get a job, and they talked about construction work.

[27] The male then told him that he should start running a phone, meaning dealing drugs, dial-a-doping. He told the male that would be awesome, and asked if he could help him do that. The male said maybe. He then asked the male how business was. The male asked him, why? He told the male that he just wanted to know if it was busy or busier than the last time he saw him. The male said business was good, but it was slow right now. After that he gave the male a fist bump, thanked him, told him he would call him later and exited the car.

[28] The male was the driver and only occupant of the vehicle at the time. He described him as an East Indian male, brown skinned male in his 30's, wearing a Lucky Lager hat, dark grey jogging pants, black puffy vest, blue flannel plaid long sleeve shirt, thin goatee, and thick black frame glasses.

[29] Afterwards, he returned to the CPS evidence property room where he processed the five fentanyl pills he purchased for analysis by Health Canada.

[30] After analysis, he picked up a Certificate of Analyst, with DAS number Delta 0379847 on the top right corner. The analysis came back showing 1.6 grams of fentanyl per tablet.

[31] By consent it was marked, **Exhibit 5 - (Crown) Document Titled Certificate of Analyst No. N1532113V**.

[32] He made a dock identification of the accused in Court as being the person he bought the five fentanyl pills from.

[33] He had no prior dealings with the accused.

[34] A Video Recording was then played in open Court. He confirmed that he made that covert video recording on the date in question during his interaction with the accused in the car.

[35] On cross-examination, he testified that he made no note as to any facial characteristics of the accused, except the goatee. He made no note as to height, weight, hair or any other distinguishing feature.

[36] He maintained that he was certain about his dock identification of the accused. He was sitting in close proximity to the accused in the car at the time, for about 3 minutes and 50 seconds. He also had photographs of the accused taken from the Video recording he made in his notes to refresh his memory as to the identity of the accused.

[37] He stated that he did not have any communication with Constable Shala regarding the call that he placed to 403-922-2[...]. His direction to place that call came from Constable Swanson.

[38] His direction from Constable Swanson was to set up a fentanyl deal with whoever answered the phone.

[39] After March 10, 2016, he was given a further direction by Constable Swanson to buy more fentanyl. He made a further attempt to buy more fentanyl by calling both phone numbers 403-922-4[...] and 403-922-2[...]. He placed five calls, on five different occasions, between 9:34 pm. and 9:55 pm., on March 14, 2016. There was no answer. All the calls rang out to voice mail.

[40] On March 15, 2016, he made further calls to both numbers. He made two calls, one at 5:26 pm., and one at 8:46 pm. Again, there was no answer.

[41] On March 22, 2016, he made further calls to both numbers. He made a call to 403-922-4[...] at 1:01 pm., and again there was no answer. After that he sent some text messages, and there was no response.

[42] On March 29, 2016, he made further calls to both numbers, and again there was no answer.

[43] **Constable Shala** testified in examination-in-chief that he has been a peace officer for over 10 years. He was with the RCMP from 2008 - 2013, and with the CPS from 2013 to the present time.

[44] As to experience, he has been a part of too many drug investigations to count, over 100 at the very least.

[45] He is a part of the CPS Drug Undercover Street Team (DUST). He has been a member of DUST for 3 years.

[46] He was the primary investigator in the drug investigation in this case called *Operation Deflate.*

[47] In this case, he became involved in the investigation through Sergeant Guttridge, who assigned him the role as primary investigator. He received an e-mail from Sergeant Guttridge saying that he had received the e-mail from Detective Clark Budd from the robbery unit. In reading the e-mail and the file from the robbery unit, he learned that Detective Budd had investigated a bank robbery at the Scotia Bank, located on Uxbridge Drive, where he arrested two individuals. Both of these individuals admitted to being heavy fentanyl users, and that they had committed the robbery to support their fentanyl addiction. He also learned that after the robbery, these two individuals left in a taxi. While in the taxi, they asked to use the taxi driver's phone to call a number. Detective Budd was able to retrieve the number from the taxi driver's

phone. He believed and suspected that this phone number belonged to a fentanyl dealer based on his dealings with the two individuals he arrested and charged. The phone number Detective Budd retrieved was 403-922-2[...].

[48] Sergeant Guttridge did not add any further information to the e-mail sent to him by Detective Budd.

[49] He then did a Police Information Management System (PIMS) computer check on the phone number. The only file that came up was Detective Budd's robbery file. Other than learning more information about the robbery, the accused committing the robbery to support their drug addiction for fentanyl, and that they asked to go to the area of the North Hill Mall, nothing else about the number was known.

[50] Other than the PIMS computer check, there were no other avenues on the phone number that he could follow.

[51] Based on the totality of the circumstances on the robbery, he agreed with the suspicion of Detective Budd that the phone number was likely a phone number used to traffic drugs, specifically, fentanyl.

[52] He then made the decision to attempt to call the phone number using an undercover operator. The objective with the undercover operator was to attempt to engage in a drug conversation to either prove or disprove that this phone number is involved in drug trafficking. Specializing in undercover work, this is a technique that they had, and he made the decision to use that technique.

[53] Prior to this investigation, this was only the second or third time that he acted as primary investigator. As a primary investigator, he had used the same technique employed in this investigation in other drug investigations, maybe 20 times.

[54] He received the e-mail from Sergeant Guttridge in this case on March 9, 2016. After receiving the e-mail, he spoke to the street boss in this investigation, Constable Swanson, requesting that he direct an undercover operator to contact the phone number.

[55] At the time, he had no information regarding the actual or specific individuals who may be attached to the phone number.

[56] After his conversation with Constable Swanson, Constable Telfer made the phone call. The drug meet was set up for the North Hill Mall area. One thing that stood out was that Constable Telfer had been offered the drugs for a cheaper price than he had actually asked for.

[57] At the time of the phone call was made by Constable Telfer, he was there along with Constable Swanson and Sergeant Guttridge. Once the drug meet had been set up in the area of the Market Mall, he proceeded to that area with the rest of the team. His role at that time was to provide cover for officer safety, as well as surveillance.

[58] He didn't make any personal observations as to the drug meet.

[59] On cross-examination, he testified that his first involvement with this case was on March 9, 2016, at 8:12 am., by way of e-mail from Sergeant Guttridge. He had no direct communication with Detective Clark Budd. The e-mail that he received was the forwarding of the e-mail Sergeant Guttridge received from Detective Budd, and Sergeant Guttridge assigning the matter to him.

[60] The e-mail he received from Sergeant Guttridge at the top stated, "*Got it...it has been assigned to Cst Ylli Shala #5168, we'll let you know if we get into*" He agreed that there was no punctuation after the word "*into*" and maintained that the e-mail had not been redacted. To him the e-mail made sense and meant "*if we get into the phone number*" If something was missing from the e-mail, he was not aware of it.

[61] The balance of the e-mail was read into the record by him as follows:

> *"Hi Jason, We had a robbery on February 29. Both suspects arrested. After the robbery, they called 403-922-2[...] from a cabbies phone. We watched the video from the cab and they asked the person on the other end to meet at North Hill. Both suspects use Fentanyl and suspect the money was spent on Fentanyl. Given that 922-2[...] was called after the robbery, I suspect it may be a dealer's phone. My case number is 16089983 If you guys get a case up and going, please let me know and I will create a notebook for your file. Thanks, Clark, Detective Clark Budd ."*

[62] Referring to the e-mail, he knew that February 29, was February 29, 2016, because of the case number, and he reviewed the file.

[63] He did not watch the video from the cab that Detective Budd watched.

[64] He agreed that there was no reference made by the alleged robbers, or anyone else, during the course of that call, to fentanyl.

[65] He maintained that because Detective Budd stated that they were users of fentanyl, he suspects fentanyl.

[66] He understood that Detective Budd not only watched the video, but there was audio, and he actually heard the conversation.

[67] He agreed that there was nothing mentioned in the e-mail that Detective Budd heard the word fentanyl during that conversation.

[68] He didn't know if fentanyl was seized during the course of the robbery investigation, but he is aware that the suspects told that they committed the robbery to buy fentanyl.

[69] His suspicion that the robbery suspects used fentanyl was based on a review of the file, and that's what they said in an interview.

[70] He didn't know the names of the robbery suspects. He did not run their names on CPIC. He didn't know if they had a criminal record. He didn't know if the suspects had a history of drug use because that wasn't part of his investigation.

[71] He agreed that in the e-mail Detective Budd had two suspicions. First, he suspected the number dialled by the robbery suspects may be a drug dealer's phone. Second, he suspected that the money from the robbery was spent on fentanyl.

[72] Although he didn't speak with Detective Budd, he reviewed the robbery file on PIMS.

[73] He agreed that there was nothing on PIMS that identified the phone number dialled by the robbery suspects as being a drug trafficker's phone or a dial-a-doper's phone number.

[74] When he reviewed the robbery file, at least one of the suspects stated that he was tired of begging for money for two days. He was dope sick. He was a fentanyl user, and they committed

the robbery to get money to buy fentanyl. In his experience with drug files, if someone has gone for two days with no fentanyl, he would suspect as soon as that person had money, and they are dope sick, they are going to call their dealer.

[75] After receiving the e-mail, he did not take the time to interview or speak with the two robbery suspects himself.

[76] A copy of the e-mail he received from Sergeant Guttridge was marked **Exhibit 6 - (Defence) E-mail Titled FW: Fentanyl - 16089983 From Jason Guttridge on March 9, 2016, At 812 AM.**

[77] Finally, the CD previously marked **Exhibit 4**, was played on open Court.

Issues

[78] The issues in this case may be summarized as follows:

1. Has the Crown proven the identity of the accused as the offender in this case beyond a reasonable doubt?
2. If the accused is found guilty of the offence alleged, was the accused *entrapped* by police to commit the offence in violation of section 7 of the *Charter*? If so, pursuant to section 24(1) of the *Charter* should the Court enter a *judicial stay of proceedings*?

Law and Analysis

Relevant Legislation

[79] Sections 7 and 24(1) of the *Charter* read as follows:

LIFE, LIBERTY AND SECURITY OF PERSON

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

ENFORCEMENT OF GUARANTEED RIGHTS AND FREEDOMS / Exclusion of evidence bringing administration of justice into disrepute.

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

1. Has the Crown proven the identity of the accused as the offender in this case beyond a reasonable doubt?

[80] As to the issue of identity, I can do no better than to quote from the judgment of Millar PCJ., (as he then was) in ***R v Gouled***, 2007 ABPC 57, at paras 25 - 29 as follows:

> 25 Numerous Courts across Canada at all levels have warned of the frailties of eye witness identification. The Courts have commented upon the unreliability of human observation and

> recollection. All humans, and this includes police officers, may be entirely fallible in their powers of observation and recollection.
>
> 26 The danger associated with human observation is compounded by virtue of the fact that such evidence is frequently given in a trial in an honest and sincere manner. This is so because the witness who makes eye witness identification honestly and sincerely believes that he or she is correct. These witnesses who make eye witness identification, based on their powers of observation and recollection, are responsible for many cases of miscarriage of justice through mistaken identity.
>
> 27 It is clear that a trial judge must be satisfied beyond a reasonable doubt of not only the honesty of the witness but also of the correctness of the identification. Honesty of the police witnesses is not an issue in this case. Correctness of identification can only be concluded beyond a reasonable doubt from surrounding circumstances, the manner in which particulars of physical characteristics are recorded (in the case of police officer's notes) and the integrity of the process with respect to continuity of factors taken into account in arriving at conclusions on identification.
>
> 28 In the context of gathering identification evidence, police officers are charged with the responsibility of accurate, detailed, careful note-taking in order that their notes, once revealed to the Defence and thereafter utilized as an aide to recollection, may form a sound basis for the opinions of the officers on the issue of identification.
>
> 29 Accordingly, the Court will expect that details of identification of individuals who are subsequently accused of crimes will contain sufficient detail to allow the Court to assess the quality of the physical description of the perpetrator. The Court will expect that police officers will take time to record in their notes unusual physical characteristics, height, weight, body build, facial features, markings such as scars or tattoos, and clothing. This is especially so in cases where the police are charged with the surveillance of an undercover drug operation or where they are acting in the capacity of the buyer in an undercover drug operation.

[81] In this case, Constable Telfer in examination-in-chief gave a description of the male he dealt with on the date in question. He described him as an East Indian, brown skinned male in his 30's, wearing a Lucky Lager ball cap, dark grey jogging pants, black puffy vest, blue flannel plaid long sleeve shirt, thin goatee, and thick black frame glasses. He made a dock identification of the accused in Court as being the male he dealt with. During his interaction with the accused he made a covert video recording of the actual drug transaction.

[82] On cross-examination, he testified that he made no note as to any facial characteristics of the accused, except for the goatee. He made no note as to height, weight, hair, or any other

distinguishing feature. That being said, he maintained that he was certain about his dock identification. He was sitting in close proximity to the accused in the car for over 3 minutes. He also had photographs of the accused taken from the video he made in his notes to refresh his memory as to the identity of the accused.

[83] Despite the able argument made by Defence Counsel, I accept the evidence given by Constable Telfer as to the accused being the male he dealt with on the date in question. This is not a "*fleeting glance*" case. According to the evidence, he was sitting next to the accused in the car for about 3 minutes and 50 seconds. Despite the passage of time since the drug transaction, over 2 ½ years, Constable Telfer was able to refresh his memory of the accused by the covert video recording and photographs taken from the video he made in his notes. As well, the Certificate marked in evidence as Exhibit 2, although dated July 20, 2016, nevertheless confirms the accused identified by Constable Telfer, as being the registered owner of the car, occupied by him and Constable Telfer on the date in question. In my view, this cannot be a mere coincidence.

[84] The Crown has satisfied me beyond a reasonable doubt that Constable Telfer was dealing with the accused on the date in question.

[85] Identity being the only issue raised by Defence Counsel in the trial proper, based on the totality of the evidence adduced in this case, the Crown has satisfied me beyond a reasonable doubt as to the guilt of the accused on Count 1 contained in the Information.

2. If the accused is found guilty of the offence alleged, was the accused *entrapped* by police to commit the offence in violation of section 7 of the *Charter*? If so, pursuant to section 24(1) of the *Charter*, should the Court enter a *judicial stay of proceedings*?

Case Law

[86] Crown Counsel provided the Court with a Book of Authorities containing the following cases: ***R v Mack***, 1988 SCC 701; ***R v Gladue***, 2011 ABQB 194 (appeal dismissed, 2012 ABCA 143; application for leave to appeal to SCC dismissed, 2012 SCCA No. 305); ***R v Pucci***, 2018 ABCA 149; ***R v Le***, 2016 BCCA 155 (application for leave to appeal to SCC dismissed, 2016 SCCA 272); and ***R v Ahmad***, 2018 ONCA 534 (Application for leave to appeal submitted to the SCC November 26, 2017).

[87] Defence Counsel provided the Court with a Book of Authorities containing the following cases: ***Gladue***, (*supra*); ***R v Saggu***, (unreported judgment of Wilson J., in the ABQB Court in Calgary, May 5, 2017); ***R v Coutre***, 2013 ABQB 258; ***R v McDonald***, 2017 ABPC 225; and ***R v Lalonde***, (2015) A.J. No. 1454.

[88] The Court has also reviewed and considered the judgments in ***R v Anderson***, 2017 ABPC 210 and ***R v Ndahirwa***, 2018 ABCA 359.

[89] In ***Anderson***, this Court reviewed the authorities dealing with *random virtue testing* and *entrapment* at paras 56 - 57 as follows:

> 56 In determining the issues to be decided in this case, the Court has reviewed and considered the following authorities: ***R v Mack*** (1988), 44 CCC (3d) 513 (SCC); ***R v Barnes*** (1991), 63 CCC (3d) 1 (SCC); ***R v Benedetti***, 1997 ABCA 169; ***R v Schacher***, 2003

ABCA 313; ***R v Zakreski***, 2004 ABPC 81; ***R v Faqi***, 2011 ABCA 284; ***R v Bayat***, 2011 ONCA 778; ***R v Le***, 2016 BCCA 155 and ***R v Gambin,*** 2017 NLTD(G) 39.

Random Virtue Testing and Entrapment

57 In ***Zakreski***, this Court canvassed the law relating to *random virtue testing* and *entrapment* at paras. 26 - 30 as follows:

> **Random Virtue Testing**
>
> 26 Random virtue testing is a species of entrapment that may constitute an abuse of process. Its nature was described by Lamer, J., (as he then was) in ***R. v. Mack*** (1988) 44 C.C.C. (3d) 513 at page 559 as follows:
>
> "In conclusion, and to summarize, the proper approach to the doctrine of entrapment is that which was articulated by Estey, J., in ***Amato***, *supra*, and elaborated upon in these reasons. As mentioned, and explained earlier there is entrapment when,
>
> > (a) the authorities provide a person with an opportunity to commit an offence without acting on a reasonable suspicion that this person is already engaged in criminal activity or pursuant to a bona fide inquiry;
> >
> > (b) although having such a reasonable suspicion or acting in the course of a bona fide inquiry, they go beyond providing an opportunity and induce the commission of an offence.
>
> The absence of a reasonable suspicion or a bona fide inquiry is significant in assessing the police conduct because of the risk that the police will attract people who would not otherwise have any involvement in a crime and because it is not a proper use of the police power to simply go out and test the virtue of people on a random basis." (emphasis added)
>
> 27 And at page 568, Lamer, J., concluded:
>
> > "... In conclusion, the onus lies on the accused to demonstrate that the police conduct has gone beyond permissible limits to the extent that allowing the prosecution or the entry of a conviction would amount to an abuse of the judicial process by the State. The question is

> one of mixed law and fact and should be resolved by the trial judge. The stay should be entered in the clearest of cases' only."

28 In ***R. v. Barnes*** (1991) 63 C.C.C. (3d) 1, Lamer, C.J.C., clarified what he had stated in ***Mack*** (*supra*) at page 10 as follows:

> "In my respectful opinion, this argument is based on a misinterpretation of ***Mack***. I recognize that some of my language in ***Mack*** might be responsible for this misinterpretation. In particular, as noted above, I stated, at p. 552:
>
> ***In those cases [where there is a particular location where it is reasonably suspected that certain crimes are taking place] it is clearly permissible to provide opportunities to people associated with the location under suspicion, even if these people are not themselves under suspicion. This latter situation, however, is only justified if the police acted in the course of a bona fide investigation and are not engaged in random virtue-testing.'***
>
> This statement should not be taken to mean that the police may not approach people on a random basis, in order to present the opportunity to commit an offence, in the course of a bona fide investigation. ***The basic rule articulated in Mack is that the police may only present the opportunity to commit a particular crime to an individual who arouses a suspicion that he or she is already engaged in the particular criminal activity. An exception to this rule arises when the police undertake a bona fide investigation directed at an area where it is reasonably suspected that criminal activity is occurring. When such a location is defined with sufficient precision, the police may present any person associated with the area with the opportunity to commit the particular offence. Such randomness is permissible within the scope of a bona fide inquiry.***
>
> ***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."***

[90] As to *reasonable suspicion* this Court at para 58 stated as follows:

> **Reasonable Suspicion**
>
> 58 In ***Zakreski***, this Court canvassed the law relating to *reasonable suspicion* at paras. 33 - 38 as follows:
>
> ***Reasonable Suspicion***
>
> 33 The focal point of the defence argument on "random virtue testing" in this case is the submission that the police did not have a "reasonable suspicion" of criminal activity, on the part of any of the accused, or at Goliath's prior to engaging in the first active undercover operation on October 9, 2002. Absent the requisite "reasonable suspicion", the subsequent investigation, in toto, lacked bona fides.
>
> 34 Consideration of the meaning of the term "reasonable suspicion", in law, is essential to the Court's decision in this case.
>
> 35 ***From my review of the authorities, a "reasonable suspicion" is something more than a "mere suspicion" and something less than "reasonable and probable grounds". It requires both a subjective and objective assessment. It is equivalent to "articulable cause" and must be based on a constellation of objectively discernible facts. A "hunch" based on intuition gained by experience will not suffice. In deciding the issue of "reasonable suspicion" the Court is required to view the facts and circumstances as a whole rather than in isolation.***

[91] None of the cases dealt with by me in ***Anderson***, dealt with the issue that arises in this case specifically, *cold calls and reasonable suspicion.*

[92] In ***Gladue***, Costigan J.A., delivering the judgment of the Court at paras 9 - 13 stated as follows:

Analysis

9 It is common ground that the trial judge articulated the correct test. Entrapment may be found when "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": ***Mack*** at 964. The *bona fide* inquiry exception permits the police to present an opportunity to commit a crime to a person associated with a location where it is reasonably suspected that criminal activity is taking place: ***Barnes*** at 461. Although a reasonable suspicion that a person is engaged in criminal activity can be developed during the course of an investigation of a tip, it must exist before the opportunity to commit an offence is provided: ***R. v. Imoro***, 2010 ONCA 122 at para 16, 251 CCC (3d) 131 aff'd 2010 SCC 50, [2010] 3 SCR 62.

10 ***The Crown says the trial judge erred by imposing a requirement that police have a reasonable suspicion of a person whose identity has been pre-established. The respondent conceded at trial, and again on appeal, that determining the identity of a person is not a precondition to acquiring a reasonable suspicion that the person is engaged in criminal activity. We agree that police can acquire a reasonable suspicion of a person without establishing the person's identity: R. v. Benedetti, 1997 ABCA 169, 200 AR 179. Although it is not entirely clear that the trial judge imposed an identification requirement, to the extent that he did so he erred.***

11 Nevertheless, the question remains whether the trial judge erred in finding the police lacked a reasonable suspicion that the respondent was engaged in criminal activity before providing him with an opportunity to commit a crime. It is common ground that Constable Smith provided the respondent with an opportunity to commit a crime when he asked if he could get "four for a hundred" during their initial phone call. ***A reasonable suspicion that the respondent was engaged in criminal activity had to exist before that opportunity was provided. We agree with the trial judge that the unverified tip, received from a first time informant with a criminal record, was not enough to raise a reasonable suspicion. We also agree that the conversation between Constable Smith and the respondent, particularly the use of the words "rolling" or "working", was not enough to elevate the circumstances beyond mere suspicion: R. v. Swan, 2009 BCCA 142, 244 CCC (3d) 108 at para 28.***

12 ***The Crown argues, for the first time on appeal, that, in calling the dial-a-doper number, the police were engaged in a bona fide investigation of a unique digital location similar in***

> ***concept to the geographic location considered in Barnes. In Barnes at 461, the Supreme Court said "the police may present the opportunity to commit a particular crime to persons who are associated with a location where it is reasonably suspected that criminal activity is taking place." Assuming, without deciding, that a phone can be equated to a specific physical location, the requirement for a reasonable suspicion must still be met. We have concluded that the reasonable suspicion requirement is not met on the facts of this case. Therefore, this ground of appeal must also fail.***
>
> 13 ***The appeal is dismissed.***
>
> [Emphasis added]

[93] In ***Pucci***, the Court was asked by the Crown to reconsider its decision in ***Gladue.***

[94] In refusing the Crown's request, Watson and Wakeling JJ.A., at paras 7 - 12 stated as follows:

> 7 The Crown presses this Court with decisions such as ***R v Ralph***, 2014 ONCA 3 at paras 29 to 32, 313 OAC 384 and ***R v Le***, 2016 BCCA 155 at paras 93 to 94, 28 C.R. (7th) 187, leave denied [2016] SCCA No 272 (QL) (SCC No 36969) to say that since 2012 the case law has moved on to support a different view than contained in ***Gladue***. The Crown also refers to trial decisions from Alberta which distinguished ***Gladue*** on the facts.
>
> 8 ***The Crown would have it that cold calls by the police without any prior verification and without any other circumstances giving rise to a pre-existing reasonable suspicion about the recipient of the call or about the location of the recipient can still involve facts sufficient to constitute reasonable suspicion to proceed to provide the opportunity to commit a drug crime.***
>
> 9 Put another way, the Crown view is that if the *content* of the discussion in the call reveals that the person on the other end of the call understands drug lingo and seems prepared to deal in drugs then the reasonable suspicion standard can be met *during* the call before the opportunity is provided. The point in ***Gladue*** was whether the reasonable suspicion was pre-existing to the opportunity to commit the crime in that case not whether there had to be reasonable suspicion pre-existing to any investigation at all. On its record, it is arguable that the Court in ***Gladue*** was dealing with an issue of mixed fact and law and was out of reach of a Crown appeal: compare ***R v George***, 2017 SCC 38, [2017] 1 SCR 1021.
>
> 10 ***For its part, the defence position is that the Gladue has not created any uncertainty in the law. We agree. The important thing in Gladue was that the reasonable suspicion had to exist or***

> ***to come into existence before the opportunity to offend is provided. Taken to its end, the Crown position could encourage police to think they might move directly to providing opportunity in cold calls -- which would erase any intervening need to have suspicion beforehand.***
>
> 11 ***Under the principles in Gladue, the police cannot elide the reasonable suspicion requirement within what otherwise may well be a legitimate preliminary investigation. It may be that the police will need to make a second call to verify what the first call suggested, a circumstantial evidence phenomenon raised by Fish J in R v Baldree, 2013 SCC 35 at paras 71 to 72, [2013] 2 SCR 520. It may be that the police will have to do other inquiries or checking about the phone number or any named target. It may be that the original informer or some other source will have provided a constellation of details which can be checked as to whether they give rise to a 'locational' reasonable suspicion. Other alternatives can be imagined.***
>
> 12 ***The reasonable suspicion requirement set out in Imoro as applied in Gladue is not a heavy price to pay to uphold the relevant aspects of the rule of law in this province. There is no plain defect in the decision in Gladue. The application is dismissed.***
>
> [Emphasis added]

[95] In ***Ahmad***, C.W. Hourigan J.A., delivering the majority judgment of the Court, after an extensive review of the authorities, at paras 64 - 68 stated as follows:

> 64 I note that the Alberta Court of Appeal briefly considered, without deciding, whether a phone number connected to drug activity is analogous to a geographic location as in ***Barnes***. In ***R. v. Gladue***, 2012 ABCA 143, 524 A.R. 237, leave to appeal refused: [2012] S.C.C.A. No. 305, the police called the accused based on a tip from a first time informant with a criminal record. The tip included a phone number being used to sell crack cocaine in a dial-a-dope scheme. Nothing was done to verify the tip. The officer called, asked the accused if he was "working" or "rolling", and said he wanted to buy "four for a hundred". The court upheld the trial judge's conclusion that the police did not have reasonable suspicion that the accused was engaged in criminal activity before providing him with an opportunity to commit a crime. The court also rejected the Crown's alternative argument that the police were engaged in a *bona fide* inquiry. With respect to the Crown's submission that "a unique digital location" is analogous to the geographic location in ***Barnes***, the court observed at paragraph 12:
>
> > The Crown argues, for the first time on appeal, that, in calling the dial-a-doper number, the police were

> engaged in a *bona fide* investigation of a unique digital location similar in concept to the geographic location considered in ***Barnes***. In ***Barnes*** at 461, the Supreme Court said "the police may present the opportunity to commit a particular crime to persons who are associated with a location where it is reasonably suspected that criminal activity is taking place." Assuming, without deciding, that a phone can be equated to a specific physical location, the requirement for a reasonable suspicion must still be met. We have concluded that the reasonable suspicion requirement is not met on the facts of this case.

65 ***Gladue*** therefore left open whether a telephone line associated with a dial-a-dope scheme is similar to a "location" where it is reasonably suspected that criminal activity is taking place, as the concept of "location" is understood in ***Barnes***. It also confirmed that the requirement of a reasonable suspicion must nevertheless be met for the police to be engaged in a *bona fide* inquiry: see also ***Barnes***, at p. 463; Bruce A. MacFarlane, Robert J. *Frater & Croft Michaelson, Drug Offences in Canada*, 4th ed. (Toronto: Thomson Reuters, 2015), at s. 26:80.40. Importantly, however, the reasonable suspicion analysis for *bona fide* inquiries shifts away from a particular individual. In ***Barnes***, it was directed at "a location where it [was] reasonably suspected that criminal activity [was] taking place" (p. 461). In a dial-a-dope case, where there is no set location, it should be directed at the phone line.

66 The concurrence suggests that it is incongruous for the police to reasonably suspect that a particular phone line is being used for a dial-a-dope scheme, but not reasonably suspect that the person who answers that phone to be engaged in drug trafficking. I disagree. Reasonable suspicion may be directed at a particular individual or, as in ***Barnes*** and these cases, a particular location or particular phone line. In ***Barnes***, for instance, Lamer C.J. observed that the factors that drew the officer's attention to the particular accused were not sufficient to give rise to reasonable suspicion that he specifically was engaged in criminal activity (p. 460). Rather, it was the fact that the accused was in a particular area where it was reasonably suspected that drug activity was occurring that allowed the police, as part of a *bona fide* inquiry, to present him with the opportunity to sell drugs (pp. 461-62). In my view, in much the same way, when the police have reasonable suspicion that a phone line is being using in a dial-a-dope scheme, they should be allowed to provide opportunities to a person associated with that phone line, even if they do not have reasonable suspicion that the person is himself or herself engaged in drug-related activity.

> 67 It follows that, because reasonable suspicion may be directed at a particular individual, a particular location or a particular phone line, the relevant considerations will vary depending on the context. This means that certain facts may support a finding that the police had reasonable suspicion that a particular phone line is being used in a dial-a-dope scheme, but not that the particular individual who is using that phone line is engaged in criminal activity, or vice-versa. While there may be overlap, different considerations may take on different weight in the analysis. For example, the fact that a phone line has been linked through a tip to the drug trade may take on greater importance in determining whether the police had reasonable suspicion the line was being used for criminal activity than when assessing whether the police had reasonable suspicion that a particular person using that line was already selling drugs. Reasonable suspicion must be assessed in the context of the particular case.
>
> 68 ***To summarize, to make out entrapment under the first category of the test articulated in Mack, the accused must establish: (i) that the police provided an opportunity to commit an offence, and (ii) that the police did so without acting either on a reasonable suspicion that the accused was already engaged in criminal activity or pursuant to a bona fide inquiry. A bona fide inquiry, however, is not necessarily limited to a particular geographic location. In the context of a dial-a-dope scheme, the police will be engaged in a bona fide inquiry if they are acting for the purpose of investigating and repressing criminal activity and their investigation is directed at a person or persons associated with a phone line that is reasonably suspected to be used in the scheme.***
>
> [Emphasis added]

Position of the Defence

[96] In this case Defence Counsel relies on ***Gladue*** and ***Pucci***. He submits that in Alberta, a *cold call* made by police to a specific phone number, absent a *reasonable suspicion* that the person who answers the call is already engaged in drug trafficking amounts to *entrapment*. Without the police acting on credible and reliable informant information or otherwise conducting a legitimate preliminary investigation as to the person answering the call, there can be no *reasonable suspicion.*

Position of the Crown

[97] Crown Counsel submits that the Court ought to adopt the reasoning of the ONCA in ***Ahmad***. He submits that the Court in that case distinguished ***Gladue***, and that a *cold call* made by police to a *specific phone number* related to drug trafficking activity is analogous to the police having information about a *specific location* related to drug trafficking activity. In both situations, there is no *entrapment* because the police are conducting a *bona fide* inquiry into drug trafficking activity. He submits it is not necessary for the police to conduct any further

investigation as to the person answering the phone for them to have a *reasonable suspicion* that the person is already engaged in drug trafficking activity.

Ruling

[98] The thorny issue that arises in this case will be settled by the SCC after hearing argument in ***Ahmad***.

[99] I do not think that it is proper for this Court to depart from the principles enunciated by the ABCA in ***Gladue*** and ***Pucci***. Absent the police having some credible and reliable informant information as to the person answering the phone already being engaged in drug trafficking activity, as was the situation in ***Ndahirwa***, or conducting some other legitimate preliminary investigation as the person answering the phone already being engaged in drug trafficking activity, there can be no *reasonable suspicion*.

[100] In my view, the police had no more than a *hunch* based on experience, that the phone number called by the robbery suspects in the cab after the robbery, was related to a person involved in drug trafficking activity. This conclusion was based on one or both suspects admitting to police after their arrest to being heavy fentanyl users, being dope sick and committing the robbery to buy drugs. There was no evidence that either suspect admitted calling a drug dealer in the cab. There was no mention of fentanyl, drugs or drug lingo. The police made no further internal police inquiries to determine if the person connected to that phone number had any criminal record or any prior drug history. No steps were taken by the police involved in this case to interview one or both of the robbery suspects to ascertain who they were calling in the cab.

[101] In passing, I would also note that the facts in ***Gladue***, ***Saggu*** and ***Coutre*** were more compelling than the facts in this case, and still were not enough to satisfy the requirements of *reasonable doubt*.

[102] I agree with Defence Counsel that the police had no *reasonable suspicion* that the person answering the phone call placed by police was already engaged in drug trafficking activity.

[103] The police were not engaged in a *bona fide* inquiry, and the accused was *entrapped* into committing the offence.

[104] In the circumstances of this case, there has been a violation of section 7 of the *Charter*, and pursuant to section 24(1) of the *Charter*, the Court orders a *judicial stay of proceedings*.

Dated at the City of Calgary, Alberta this 20th day of December, 2018.

T.C. Semenuk
A Judge of the Provincial Court of Alberta

Appearances:

K. McDonald
for the Crown

P. Fagan, Q.C.
for the Accused