**Date: 19981125**

**Docket: CMAC-420**

**CORAM:** **LINDEN J.A.**
**ROBERTSON J.A.**
**MEYER J.A.**

**IN THE COURT MARTIAL APPEAL COURT OF CANADA**

**BETWEEN:**

**HER MAJESTY THE QUEEN**

**Appellant**

**- and -**

**MASTER CORPORAL BROWN, G.C.**

**Respondent**

Heard at Ottawa, on Monday, September 28, 1998.

Judgment delivered at Ottawa, on Wednesday, November 25, 1998.

REASONS FOR JUDGMENT BY: LINDEN J.A.

CONCURRED IN BY: MEYER J.A.

DISSENTING REASONS BY: ROBERTSON J.A.

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**HER MAJESTY THE QUEEN**

**Appellant**

**- and -**

**MASTER CORPORAL BROWN, G.C.**

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**REASONS FOR JUDGMENT**

**LINDEN J.A.**

[1] The question on this appeal is whether the Standing Court Martial correctly stayed two charges of trafficking in cannabis, contrary to subsection 4(l) of the *Narcotics Control Act* (as it then was) on the basis of the defence of entrapment.

## I. The Facts

[2] The respondent, Corporal Brown, is a helicopter mechanic with the Canadian Forces. In January 1996, Corporal Brown was visiting the residence of a friend, Jeffrey Higgins, when the

police raided Higgins' home on the suspicion that Higgins was in possession of drugs. At that time, Corporal Brown was detained, searched, and released. From this event, and from previous information given by informants, the police suspected that Brown was involved with drugs.

[3] Given that Corporal Brown was a member of the military, it was agreed that a joint undercover operation would be conducted by military and civilian police authorities. In early May, 1996, Military Police Corporal Michael Stanford began undercover duties at the respondent's unit. Corporal Stanford befriended the respondent and attended at his house some six times between May and December, 1996. Corporal Stanford observed recreational use of cannabis and hashish at the respondent's house on August 16. He also witnessed the respondent engaging in communal use of cannabis on September 28 and 29.

[4] On November 30, 1996, Corporal Stanford again visited Corporal Brown's residence. Corporal Brown and Corporal Stanford, along with two of Corporal Brown's acquaintances, drove to the house of one Derek Brown (of no apparent relation) in order to obtain drugs. Corporal Stanford gave money to one of Corporal Brown's acquaintances, who purchased approximately two grams of either marijuana or hashish and delivered them to Corporal Stanford.

[5]On December 7, 1996, Corporal Stanford again attended at Corporal Brown's residence, this time accompanied by his “girlfriend,” undercover Police Constable Wilda Kaiser. After some conversation, the subject of obtaining drugs was raised. It is unclear who initiated the subject of obtaining drugs. After some discussion, Corporal Brown took orders from his guests as to

whether they wanted to purchase drugs, and in what quantity. Following this, Corporal Brown took his car keys, left the house for approximately 20 minutes, and returned with a small quantity of hashish, which he provided to Corporal Stanford and Constable Kaiser as per their request.

[6] On December 9, 1996, Corporal Stanford and Constable Kaiser again attended at Corporal Brown's residence. This time, Corporal Stanford inquired about obtaining drugs. Corporal Brown and Corporal Stanford drove to a house known to Corporal Brown, where Corporal Brown received a small quantity of hashish which he provided to Corporal Stanford and Constable Kaiser.

[7] uring the time period in question, Constable Stanford provided Constable Brown, a known abuser of alcohol, with three 60- ounce bottles of liquor.

**II. The Decision Below**

[8] President Barnes heard the testimony of the parties involved and found that the evidence of Corporal Stanford was not to be trusted as accurate without confirmation by other evidence. Specifically, President Barnes found that Corporal Stanford had not prepared himself for his testimony, and, as a result, was reluctant to answer questions. Further, President Barnes found Corporal Stanford reluctant to review his notes. He particularly doubted the credibility of Corporal Stanford's testimony regarding giving alcohol to Corporal Brown. President Barnes also found the evidence of Corporal Brown unconvincing. He noted several inconsistencies within the testimony of Corporal Brown, and also noted Corporal Brown's assertion that he was

in an "alcoholic haze" for much of the relevant time. President Barnes did, however, believe as credible the evidence of Constable Kaiser. President Barnes found that the events of December 7 and 9, 1996 constituted trafficking for the purposes of subsection 4(1) of the *Narcotics Control Act*.[1]

[9] On the issue of entrapment, President Barnes reviewed the test defined by the Supreme Court in *R.* v. *Barnes*.[2] He concluded that, while police can use hearsay as part of developing a reasonable suspicion of criminal activity, the context of that hearsay is important to the finding regarding entrapment. Specifically, if the hearsay has been embellished (either consciously or unconsciously) to the point where it no longer represents the legitimate information which the police possess, then it can not be a basis for reasonable suspicion. President Barnes reviewed the record before him, and held that Corporal Stanford was acting on greatly puffed evidence.[3] President Barnes also found that Corporal Brown's behaviour up to December 7 refuted the suspicion that he was trafficking drugs. Therefore, President Barnes held that on December 7 and December 9, when Corporal Stanford presented Corporal Brown with the opportunity to commit crime, he had no suspicion, reasonable or otherwise, on which to do so. President Barnes stated that this behaviour amounted to "random virtue testing," and further found that Corporal Stanford exploited Corporal Brown's weakness for alcohol when he presented the opportunities to commit crime. President Barnes refers to this exploitation as a "subtle inducement.[4]

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[1] *Narcotic Control Act* R.S.C. 1985, N-1 [REPEALED: S.C. 1996, c. 19, s. 94, effective May 14, 1997 (SI/97-47).]

[2] (1991), 63 C.C.C. (3d) 1 (S.C.C.).

[3] For example, despite only having an unconfirmed report of the purchase of hashish, Sergeant Scott of the Police conveyed to Sergeant Rogers of the Military Police that Brown was selling marijuana "by the pound." See Finding of the Court Martial, Appeal Book at p. 369 (hereinafter "Finding").

[4] Finding, at p. 371.

**III. Submission of the Appellant**

[10] The appellant submits that President Barnes' findings omit reliable sources from which Corporal Stanford formed a reasonable suspicion that Corporal Brown was involved with drugs. Further, the appellant notes that Corporal Stanford also gathered evidence which gave rise to the suspicion that Corporal Brown was involved in the illegal distilling of alcohol, as well as moose poaching. The appellant argues that there is no need for a reasonable suspicion of trafficking *per se* in order to produce the opportunity to commit trafficking, or, in the alternative, that a reasonable suspicion of trafficking exists here. The appellant argues that in order to satisfy the test in *R.* v. *Barnes,*[5] and *R.* v. *Mack*[6], there must be a reasonable suspicion of "related" criminal activity, not of the particular offence. Further, the appellant cites *R.* v. *Lebrasseur*[7] for the proposition that there does not need to be a perfect correlation between the suspected crime and the crime committed. The appellant points out that the accused must prove entrapment on the balance of probabilities, and argues that he did not do so in this case.

[11] Finally, the appellant argues that Corporal Brown was not induced to traffic in hashish by Corporal Stanford. The appellant submits that President Barnes erred in finding that the police exploited the respondent's weakness for alcohol when providing opportunities to commit the offence.

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[5] *Supra*, note 2.

[6] (1988), 44 C.C.C. (3d) 513 (S.C.C.).

[7] (1995), 102 C.C.C. (3d) 167 (Qué. C.A.)

## IV. Submission of the Respondent

[12] The respondent characterizes the appellant's argument as an attempt to convince the Court that, if police have suspicion of an offence, they may create the opportunity for the accused to commit a more serious offence. The respondent notes that both *Mack*[8] and *Barnes*[9] demand some connection between the suspected offence and the entrapment offence. The respondent argues that the necessary connection does not exist here. In the eyes of the respondent, trafficking, like importing, is very different from possession and use.

[13] The respondent also points out that the *National Defence Act*[10] is strict in its proclamation that the Crown may appeal questions of law only. In this case, argues the respondent, the appellant asks the Court Martial Appeal Court to re-evaluate the facts without there being a palpable error on the record. The respondent points out that, as with any question of mixed fact and law, the finding of entrapment is heavily based on the facts, and that the appellant is really seeking to review the Court Martial's findings in that regard.

## V. Analysis

### 1. An overview of the law of entrapment

[14] In this case, both parties agree that the basis for the law of entrapment is to be found in *R.* v. *Barnes* and *R.* v. *Mack, supra.* Both parties cite the following passage from *R.* v. *Barnes*:

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8 *Supra*, note 6.

9 *Supra*, note 2.

10 R.S.C. 1985, Chapter N-5, as amended.

> ...the basic rule articulated in *Mack* is that the police may only present the opportunity to an individual who arouses a suspicion that he or she is already engaged in a particular criminal activity. An exception to this rule arises where the police undertake a *bona fide* investigation directed at an area where it is reasonably suspected that criminal activity is occurring...

Both parties also cite a passage from *R.* v. *Mack*, where Lamer J. (as he then was) wrote for a unanimous Court that:

> ...if an individual is suspected of being involved in the drug trade, this fact alone will not justify the police providing him or her with an opportunity to commit a totally unrelated offence. In addition, the sole fact that a person is suspected of being frequently in possession of marijuana does not alone justify the police providing him or her with the opportunity to commit a much more serious offence, such as *importing* narcotics, although other facts may justify their doing so. (Emphasis added.)

[15] These passages from *Barnes* and *Mack, supra*, set out the basis for the so-called "defence" of entrapment in Canada. The test for entrapment is an objective evaluation of police behaviour, although the subjective effects of police behaviour on the vulnerabilities of the accused can be considered. In general, the defence of entrapment will be made out if one of three tests is satisfied. First, if the authorities provide a person with an opportunity to commit an offence without acting on reasonable suspicion that the person is engaged in criminal activity, impermissible entrapment will be found. Second, if the authorities engage in "random virtue testing" by randomly presenting people in an area with an opportunity to commit an offence, entrapment will be made out. However, if police have a reasonable suspicion of criminal activity within a particular area, they may commence a *bona fide* investigation of that area, including providing opportunities to commit crimes. Third, despite the presence of a reasonable suspicion,

or a *bona fide* investigation of a particular area, the police may impermissibly entrap a suspect by going beyond merely providing an opportunity to offend and inducing the commission of an offence.

[16] When evaluating police conduct under any of the three principles above, *Mack* sets out a series of considerations[11] which may form part of the court's consideration. These factors have been reproduced in many cases and textbooks, such that they now form part of the law of entrapment in Canada. In short, they include:

- . the type of crime being investigated;
- . whether other law enforcement techniques were available;
- . whether an average person with both strengths and weaknesses, in the position of the accused, would be induced to commit an offence;
- . the persistence of the police;
- . the type of inducement offered by the police;
- . whether the police instigated the offence;
- . whether the police exploited human emotions or vulnerabilities in offering the opportunity to offend;
- . the proportionality between police involvement and the behaviour of the accused;
- . any threats, express or implied, made to the accused; and,
- . whether the conduct of the police undermined constitutional values.[12]

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[11] *See,* Lamer J. (as he then was) paraphrasing from *R.* v. *Amato,* (1982), 69 C.C.C. (2d) 31 (S.C.C.), *supra* note 6 at p. 549-550.

[12] *Mack, supra,* note 6 at 549-550.

[17] The "defence" of entrapment arises out of concern for the integrity of the Court. As Justice Lamer (as he then was) wrote in *Mack,* entrapment stems from a fear that the processes of the justice system stand open to abuse in a system where the ends justify the means. Where evidence suggests that a conviction was obtained at too high a price, the Court exercises its power to stay the proceeding before it.[13]It should be noted that the stay of proceedings is only to be used in clear cases of impermissible entrapment, e.g., where the police scheme is such that it brings the administration of justice into disrepute.[14]

2. The connection required between the suspected crime and the entrapment crime in order to ground a reasonable suspicion.

[18] The law regarding the connection required between the suspected crime and the entrapment crime is clear. First, whether the authorities in question are acting under a reasonable suspicion is decided by reference to the factual context of the offence.[15]15 Second, a reasonable suspicion is more than a mere suspicion, but less than reasonable and probable grounds.[16]Third, where the reasonableness of a suspicion is based on the evidence of an informant, the threshold is necessarily low, because much police work is based on intuition.[17] Fourth, while it is not

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[13] *Mack, supra,* note 6 at 539-542.

[14] *See, e.g.,* MacFarlane, *Drug Offences in Canada* (loose-leaf service) (Aurora: Canada Law Book, 1996) at 24-9 (Hereinafter "Macfarlane").

[15] *See, e.g., R.* v. *Cahill* (1992), 13 C.R. (4th) 327 (B.C.C.A.).

[16] *See, e.g.,* MacFarlane, *supra* note 14 at 24-12.

[17] *R.* v. *Cahill, supra* note 15 at 339-340.

realistic to limit the reasonable suspicion to the same crime of which the police were informed,[18] the gap between the crime of which the police have evidence and the entrapment crime depends on the context and is decided on a case-by-case basis. For example, one decision of the Québec Court of Appeal found that, on the facts, drug use grounded the reasonable suspicion of trafficking,[19] while the Ontario Court of Appeal in another case came to the opposite conclusion.[20]20 Fifth, many cases hold that a reasonable suspicion can be properly based on prior dealings with the accused.[21]

[19] Let us recall the breadth of the offence of trafficking. The *Narcotic Control Act*, under which this case is brought, defined trafficking very widely as follows:

> Section 2..."traffic" means
> (a) to manufacture, sell, give, administer, transport, send, deliver or distribute, or
> (b) to offer to do anything mentioned in paragraph (a)... Section 4.(l) No person shall traffic in a narcotic or any substance represented or held out by the person to be a narcotic.[22]

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[18] *R.* v. *Lebrasseur, supra* note 7 at 175-176. ("To require a perfect correlation between the crime reasonably suspected and the one that the respondent Lebrasseur had the opportunity to commit, appears to me to be wrong in the present case. … In *Mack*, Lamer J. pointed out the importance of a rational connection or proportionality between the existing suspicion and the crime committed. It should be noted that in *Mack* the circumstances revealed that knowledge that an accused used various drugs could give rise to a reasonable suspicioin in the police that he could be involved in trafficking.")

[19] *Ibid.*

[20] *R. v. Fortin* [1989] 33 O.A.C. 123 (C.A.) (Oral endorsement).

[21] *See* Macfarlane, *supra* note 14, at 24-13 (collecting cases).

[22] *Narcotic Control Act, supra*, note 1.

This definition of trafficking is extremely broad, and its prohibition of trafficking is without exception. The plain words of the statute leave no room for doubt: a party who, *inter alia,* sells, gives, administers, transports, sends, delivers, or distributes drugs is guilty. Thus, one who furnishes or acts as a conduit for illegal drugs is trafficking. One need not sell illegal drugs for profit to be trafficking. One need not be a "dealer" in drugs to be liable. Sharing narcotics, even gratis, is also forbidden. So too is transporting them to friends. The recent repeal of the *Narcotic Control Act* and the establishment of its replacement, the *Controlled Drugs and Substances Act*,[23] gives no quarter to those seeking reprieve — its prohibition of trafficking is substantially similar to that of the *Narcotic Control Act*[24] The words of Dubé J.A. of the Quebec Court of Appeal regarding the *Narcotic Control Act* are appropriate:

> It appears obvious to me that Parliament's intent was to prohibit all forms of action which encompass the circulation of narcotics....[25]

So too are the comments of Seaton J.A. of the British Columbia Court of Appeal, who wrote:

> I think those decisions to be right when they suggest that the essence of trafficking is the making of drugs available to others.[26]

[20] The conclusion here is inescapable: trafficking is a very broad offence which encompasses many common forms of shared drug use. For example, a person who inhales from a marijuana cigarette (or does not inhale, for that matter) and then passes that cigarette along to

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[23] S.C. 1996, c. 19. See MacFarlane, *supra,* at 5-22 et ff. Obviously the penalty for sharing would be much less than for selling, even though both are trafficking.

[24] *Ibid.,* at ss. 2, 5(1).

[25] *R.* v. *Rousseau* (1991), 70 C.C.C. (3d) 445 at 453, leave to appeal denied 1992 1 S.C.R. x.

[26] *R. v. Eccleston and Gianiorio* (1975), 24 C.C.C. (2d) 564 at 574.

another is trafficking under Canadian law. An act of friendly sharing is thus harshly treated as a serious criminal offence by our law.

[21] While all evidence of drug use may not necessarily ground a reasonable suspicion of trafficking, the definition of trafficking is so broad that the police may sometimes even form a reasonable suspicion of trafficking based primarily on witnessing the communal use of cannabis. The definition of trafficking in our law permits that conclusion. This is not, however, the same for importing narcotics, which is a very different matter indeed.

3. Inducement

[22] Inducement has two meanings in the law of entrapment. First, it can be part of the considerations concerning whether the police acted on a reasonable suspicion, and thus part of the deliberations about the first of the three tests for entrapment. Second, proof of inducement itself gives rise to impermissible entrapment: regardless of whether there was a reasonable suspicion or a *bona fide* investigation of a particular area, impermissible entrapment will be found where the police go beyond merely providing an opportunity to commit crime and actually induce the commission of a crime.

[23] Courts examine the conduct of the police with reference to the factors from *Mack* listed above. At all times, the inquiry is as to whether the police went beyond providing an opportunity to commit a crime. Cases have held that impermissible entrapment will not be made out where the accused initiates the transaction, and aggressively pursues it throughout.[27] In general, Courts

[27] *R.* v. *Voustis* (1989), 47 C.C.C. (3d) 451 (Sask. C. A.).

are more inclined to find entrapment where the authorities have utilized trickery, or exploited the vulnerabilities of an accused.[28] For example, impermissible entrapment has been found possible where the police repeatedly gave the accused gifts, including expensive liquor.[29] Finally, the commission of illegal acts by police can be taken into account, although it is not likely to be the grounds for illegal entrapment.[30]

4. Application to this case

[24] Reviewing the evidence before him, President Barnes came to the conclusion that, in this case, there was an insufficient relationship between the evidence of drug use and the suspicion of trafficking. He concluded that the conduct of the authorities amounted to "random virtue testing," and he further concluded that, by giving Corporal Brown bottles of expensive alcohol, Corporal Stanford furnished Corporal Brown "subtle inducement" to commit the offence.

[25] After hearing the arguments of the parties, I have come to the conclusion that President Barnes made three reversible errors of law. First, he misunderstood the legal test for entrapment, conflating the three separate tests into one. Second, he misunderstood the breadth of the *Narcotic Control Act.* Third, President Barnes did not consider the legal test required before a stay can be imposed.

*a) President Barnes misunderstood the test for entrapment*

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[28] *R.* v. *El-Sheikh-Ali* (1993) 20 W.C.B. (2d) 541 (Ont. Gen. Div.).

[29] *R.* v. *Meuckon* (1990), 57 C.C.C. (3d) 193 (B.C.C.A.).

[30] *See* MacFarlane, *supra* note 14 at 24-21 (collecting cases).

[26] With respect, the reasons of President Barnes makes it clear that he did not sufficiently understand the three separate tests for entrapment. This is so for three reasons. First, he repeatedly refers to the behaviour of Corporal Stanford as "random virtue testing." Corporal Stanford was assigned to investigate the possible drug use of one person, Corporal Brown. By definition, this was not random virtue testing, which occurs where the police entrap people generally in a particular area, without a *bona fide* investigation of that area. Second, President Barnes also relies on the fact that Corporal Stanford gave three bottles of alcohol to Corporal Brown. With respect, he does not elucidate whether he feels that this "subtle inducement" is part of the analysis of whether the police acted under a reasonable suspicion, or whether this is impermissible inducement, that is, the third "form" of impermissible entrapment discussed in *Mack* and *Barnes*. The evidence, in my view, however, falls short of the standard set by our jurisprudence regarding what constitutes an impermissible inducement. By not stating whether the inducement was itself a ground for the finding of impermissible entrapment, or merely a factor speaking to Corporal Stanford's reasonable suspicion, President Barnes creates considerable doubt about the accuracy of his finding. Third, in his holding, President Barnes stated that:

> I am satisfied on the balance of probabilities that the police conduct amounted to random virtue testing and objectively amounted to entrapment of Master Corporal Brown. This constitutes a contravention of section 7 of the *Charter* relating to the deprivation of the security of the person by the fundamentally unjust conduct of the police...The court directs a stay of proceedings with respect to [the charges against Corporal Brown].

While Charter values now form part of the basis for the law of entrapment, impermissible entrapment was not grounded in the Charter, but rather in the duty of the Court to safeguard its own integrity.[31] Thus, President Barnes rests his finding of entrapment on the Charter without the scrutiny normally required under sections 7 and 1 of the Charter.

[27] Taken together, therefore, these errors make clear that President Barnes conflated the three separate tests for impermissible entrapment into one test. He also misapplied the Charter. In doing so, he committed reversible error.

*b) President Barnes misunderstood the breadth of the offence of trafficking under the Narcotic Control Act*

[28] President Barnes found that Corporal Stanford observed the communal use of cannabis on September 28 and 29, 1996. He found that there was also a joint mission on November 30, 1996 to obtain drugs at the home of Derek Brown. He then went on to conclude that Corporal Stanford had no reasonable suspicion on which basis to offer the opportunity to traffic in hashish on December 7 and 9, 1996. In doing so, President Barnes erred in law. This is so for four reasons.

[29] First, the evidence is not clear whether Corporal Stanford offered Corporal Brown the opportunity to traffic in hashish on December 7. The conflicting evidence on this point may yield the conclusion that Corporal Stanford only *observed* trafficking on December 7; this would certainly ground a reasonable suspicion of trafficking on which basis to provide the December 9

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[31] *See Mack*, *supra* note 6 at 539-541.

opportunity. Second, for the reasons given above, Corporal Stanford most likely observed some form of "trafficking", as it is defined in the Act, on November 30, 1996. Third, it is hard to see how, in the face of the broad definition of trafficking, the observation of communal drug use on September 28 and 29, 1996, coupled with the evidence of informants, would not ground a reasonable suspicion of trafficking. President Barnes makes the point that, at first, Corporal Stanford was acting under exaggerated evidence. This may well be true. Nonetheless, Corporal Stanford's evidence evolved well beyond the original informant reports. By November, Corporal Stanford had observed communal use of cannabis by Corporal Brown. President Barnes notes that Corporal Stanford observed Corporal Brown “sharing” drugs. As noted above, the definition of trafficking in our law is wide enough to catch such seemingly commonplace activity. Fourth, President Barnes did not seem to take into account that, in the context of an investigation like this, some leeway must be given to the investigating officer. Specifically, Corporal Brown occupies a vital position within our military system. The lives of our Canadian Forces' pilots are dependent on Corporal Brown discharging his duties efficiently and effectively. If Corporal Brown is frequently abusing substances which impair his ability to discharge his duties, then he becomes a danger not only to himself, but to those who depend on him. If Corporal Brown is spending his time providing narcotics to others – particularly to his colleagues – then he endangers other members of the Armed Forces whose lives depend on him and his colleagues. Corporal Stanford bore a duty to ensure that Corporal Brown was not a danger to the safety, integrity, or reputation of our Forces. A similar contextual analysis formed the basis for the decision of the Québec Court of Appeal in *R.* v. *Lebrasseur*, where Chouinard J.A. wrote:

> The mandate given to the [investigating officer]...included verifying the respondent Lebrasseur's involvement with drugs in

> the Chandler area. Such verification presupposed a certain latitude with respect to the means to be used, taking account of the position held by the respondent Lebrasseur in the police department. The investigation did not target just any user of drugs but rather the secretary of a police squad assigned to criminal activities linked to the drug milieu.[32]

A similar situation obtained in this case.

[30] For these reasons, I conclude that President Barnes erred in law in that he misunderstood the broad definition of trafficking in our law, and thus misdirected himself regarding what evidence might ground a reasonable suspicion of trafficking.

*c) President Barnes did not consider the legal test for imposing a stay of proceedings*.

As summarized above, Canadian law does not impose a stay of proceedings in every case of impermissible entrapment. Rather, as pointed out in *Mack*, the stay is imposed where compelling the accused to stand trial would violate our "fundamental principles of justice", forcing the Court to adjudicate "oppressive or vexatious proceedings".[33] The Court goes on to point out that a stay of proceedings is only to be exercised in the "clearest of cases."[34] In this case, President Barnes' discussion of the stay of proceedings is encapsulated in his holding, which I reproduce here:

> I am satisfied on the balance of probabilities that the police conduct amounted to random virtue testing and objectively amounted to entrapment of Master Corporal Brown. This constitutes a contravention of section 7 of the *Charter* relating to the deprivation of the security of the person by the fundamentally

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[32] *R.* v. *Lebrasseur, supra* note 7 at pp. 174-175.

[33] *Mack, supra* note 6 at 540-541. See also *R. v. Jewitt,* [1985] 2 S.C.R. 128 at 137.

[34] *Ibid.*

> unjust conduct of the police...The court directs a stay of proceedings with respect to [the charges against Corporal Brown].

In this case, President Barnes orders a stay of proceedings as if it were automatic. This was wrong. The grant of a stay is not automatic. In granting the stay without reflecting fully on the appropriateness of such a drastic remedy, he misdirected himself.

[31] In conclusion, President Barnes made three significant errors of law. First, he misdirected himself regarding the law of entrapment. Second, he misinformed himself regarding the breadth of the offence of trafficking under the *Narcotic Control Act*. Third, he erred regarding the true nature of an order of a stay of proceedings. These three errors require this Court to reverse his decision.

## VI. CONCLUSION

[32] In this case, both the Crown and the Defence have asked that, should we allow this appeal, a new hearing should be granted pursuant to section 239.2 of the *National Defence Act*[35], which reads:

> *Appeal against decision*
>
> On the hearing of an appeal respecting *the legality of a decision* referred to in paragraph 230.1(d), the Court Martial Appeal Court may, where it allows the appeal, set aside the decision and direct a new trial on the charge. (Emphasis added.)

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[35] *Supra*, note 10.

In my view, that is an appropriate disposition in this situation.

[33] Whether the actions of Corporal Stanford amounted to impermissible entrapment is a mixed question of fact and law, which is best decided by a trier of fact who hears the evidence of all the parties and assesses that evidence in accordance with the law as set out in these reasons. Further, this case is fraught with conflicting and confusing evidence. It would be unwise for this Court to wade into this thicket.

[34] For these reasons, I would allow the appeal, quash the Judgment of President Barnes, and send the matter back for a new trial in accordance with these Reasons.

"A.M. Linden"

J.A.

"I agree
P. Meyer, J.A."

**Date: 19981125**

**Docket: CMAC-420**

**CORAM:** **LINDEN J.A.**
**ROBERTSON J.A.**
**MEYER J.A.**

**IN THE COURT MARTIAL APPEAL COURT OF CANADA**

**BETWEEN:**

**HER MAJESTY THE QUEEN**

**Appellant**

**- and -**

**MASTER CORPORAL BROWN, G.C.**

**Respondent**

**REASONS FOR JUDGMENT**

**ROBERTSON J.A.**

[1] The principal issue on appeal is whether President Barnes of the Standing Court Martial erred in entering a stay of proceedings in respect of two trafficking offences committed by Master Corporal G.C. Brown. The stays were granted after President Barnes concluded that police conduct amounted to "random virtue testing giving rise to entrapment". My colleagues take the position that President Barnes committed three fundamental errors; namely, that he misunderstood the test for entrapment, misunderstood the legal concept of trafficking, and failed to apply the correct test for issuing a stay of proceedings. With respect, I cannot subscribe to these conclusions. For the reasons which follow, I would dismiss the appeal and uphold the decision of President Barnes.

[2] At the outset, I wish to acknowledge that there is one issue raised in this appeal which is of fundamental significance to the law of entrapment. That issue pertains to the "rational connection" between the underlying offence that the police suspected the accused was committing and the actual offence which he or she was given the opportunity to commit. As will be explained below, this leads to a correlative issue: whether the communal use of cannabis constitutes trafficking, as that term is defined in the *Narcotic Control Act* and its successor legislation, the *Controlled Drugs and Substances Act*. I begin my analysis with a recitation of the facts, as found by President Barnes.

**Facts**

[3] Brown was posted to the Canadian Forces base at Hare Bay, Newfoundland where he was an Avionics Technician in the Regular Forces. Based on reports from allegedly reliable informants in January and February 1996, and Brown's coincidental arrival at the home of a friend during a drug bust, the military police and R.C.M.P. suspected that Brown was heavily involved in the local drug trade, selling marijuana "by the pound" and growing it in his house. A joint undercover operation commenced on May 2, 1996, involving Military Police Corporal Michael Stanford and Constable Wilda Kaiser of the R.C.M.P. Stanford befriended Brown, posing as a technician and visiting Brown's home on a regular basis; Kaiser posed as Stanford's girlfriend. Stanford provided Brown with several large bottles of alcohol, which he represented as contraband liquor obtained from Kaiser's brother Jason. In spite of the fact that he knew Brown to be a heavy drinker or an alcoholic, Stanford did not demand monetary repayment for the liquor.

[4] From the outset of the undercover operation in early May until late November 1996, no evidence was found to support the informants' allegations that Brown was trafficking in narcotics. What Stanford did uncover was that Brown was an alcoholic and an occasional, recreational user of cannabis. On one occasion (August 16, 1996) Stanford observed Brown using cannabis alone, and on two occasions (September 28, and 29, 1996) Stanford witnessed Brown engaging in the "communal use" of cannabis. In colloquial terms, Brown was observed sharing a "joint" with friends. Nevertheless, Stanford and Kaiser persisted in their undercover operation.

[5] On November 30, 1996, Stanford presented Brown with an opportunity to purchase some hashish for him. Together they drove to a local supplier, but it was a third party, not Brown, who actually bought a small quantity of drugs and delivered them to Stanford. On December 7, 1996, Stanford dropped in at Brown's residence with Kaiser and, in the context of a general conversation involving the procurement of drugs, Kaiser requested some hashish and provided Brown with $40 to purchase some for her. Brown returned with four small pieces of hashish, two for Kaiser and two for a friend. On December 9, 1996, virtually the same series of events transpired. Brown was charged with two counts of trafficking pursuant to section 4 of the *Narcotic Control Act* with respect to the transactions on December 7, and 9, 1996.

[6] President Barnes found that Brown's actions amounted to trafficking on the two dates in question, but granted a stay of proceedings on the basis that the "defence" of entrapment had been established on the following grounds: first, as of November 30, 1996, the police did not

have a reasonable suspicion that Brown was engaged in drug trafficking. Second, the police went beyond providing Brown with an opportunity to commit an offence and actually induced its commission. The reasons of President Barnes on these points are set out more fully below.

**The Law of Entrapment**

[7] The "defence" of entrapment arises from the court's inherent jurisdiction to protect itself from an abuse of its own process, and the need to maintain integrity in the justice system. In the seminal case on entrapment, *R. v. Mack* (1988), 44 C.C.C. (3d) 513 at 541 (S.C.C.), Justice Lamer (as he then was) summarized the principal reasons why courts should not countenance law enforcement techniques which constitute entrapment:

> [o]ne 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 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.

[8] Attempting to ameliorate the tension between the need for flexibility in the way police operate to curtail criminal activity and the limits on police power in a free and democratic society, Justice Lamer postulated the following analytical framework for the defence of entrapment in *Mack* at page 559:

> 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.

[9] The same test was articulated three years later in *R. v. Barnes* (1991), 63 C.C.C. (3d) 1 (S.C.C.), where Chief Justice Lamer stated at page 8:

> As I summarized in *Mack*, at pp. 559-60, there are two principal branches of the test for entrapment. The defence is available 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.

[10] In addition to the above framework, Justice Lamer elaborated upon the necessity of establishing a "rational" or "sufficient connection" between the underlying offence that the police had a suspicion that the accused was committing and the actual offence which he or she was given an opportunity to commit. Without a rational connection, there can be no reasonable suspicion on the part of the police. The rational connection test was articulated in *Mack* at page 554:

> Obviously, there must be some rational connection and proportionality between the crime for which police have this reasonable suspicion and the crime for which the police provide the accused with the opportunity to commit. For example, if an individual is suspected of being involved in the drug trade, this fact alone will not justify the police providing the person with an opportunity to commit a totally unrelated offence. In addition, the sole fact that a person is suspected of being frequently in possession of marijuana does not alone justify the police providing him or her with the opportunity to commit a much more serious offence, such as importing narcotics, although other facts may justify them doing so.

Again, at page 559, Justice Lamer stated:

> Further there must be sufficient connection between the past conduct of the accused and the provision of an opportunity, since otherwise the police suspicion will not be reasonable.

[11] Chief Justice Lamer's restatement of the rational connection test in *Barnes* is even more precise: the police must have a suspicion that the accused is already engaged in the "particular" criminal activity before offering him or her an opportunity to commit that particular offence. At page 10, he stated:

> 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.

[12] In summary, it is entrapment for police to offer a person an opportunity to commit a crime unless they have a reasonable suspicion that that person is already engaged in criminal

activity, or unless there is a *bona fide* police investigation. A *bona fide* investigation permits the random testing of individuals in specific areas reasonably suspected of a particular criminal activity. With respect to the "reasonable suspicion" requirement, there must be a "sufficient" or "rational connection" between the crime a person is suspected of committing and the crime which police provide such person with an opportunity to commit. There can be no reasonable suspicion where such rational connection is lacking. Finally, even if police operate under a reasonable suspicion or pursuant to a *bona fide* investigation, entrapment can still be established if police go beyond providing the suspect with an opportunity to commit an offence and actually induce its commission. [For a non-exhaustive list of factors to assist in ascertaining inducement, see *Mack* at 560.]

**The Alleged Errors**

a) Misunderstood the Test for Entrapment

[13] My colleagues allege that President Barnes misunderstood the test for entrapment; specifically, that he "conflated" the test for entrapment and failed to appreciate that "random virtue testing" only applies to *bona fide* investigations. In my respectful opinion, President Barnes made no such errors.

[14] During the preliminary inquiry, President Barnes clearly articulated the two grounds of entrapment relevant to this case. The first was whether the police had a reasonable suspicion that Brown was engaged in trafficking, and the second was whether police conduct amounted to "inducement", even if they had a reasonable suspicion. *Bona fide* investigation was not raised by the parties and is obviously not relevant on the facts of this case. Citing Chief Justice Lamer in

*Barnes*, President Barnes correctly identified the proper analytical framework for the defence of entrapment (at page 63 of the Transcript):

> [i]n this case, entrapment could arise where the police provided the accused with an opportunity to commit the offences charged, in the absence of a reasonable suspicion that he was already engaged in similar criminal activity, or where the police go beyond providing the opportunity to commit an offence and actually induce the commission of the offences even though they had a reasonable suspicion.

[15] My colleagues also claim that "random virtue testing" only applies where there is a *bona fide* investigation; that is to say, it does not apply where police fail to act under a reasonable suspicion. In my respectful opinion, this view is unfounded in law. "Random virtue testing" as postulated by Chief Justice Lamer in *Barnes* clearly applies to both situations. He expressly stated as much at page 10 of his reasons:

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

[16] The above passage from *Barnes* was quoted by President Barnes (see Transcript at page 367). President Barnes refers to Stanford's conduct as "random virtue testing" because, in his opinion, Stanford lacked a reasonable suspicion that Brown was already trafficking in narcotics when he offered him an opportunity to traffic on November 30, December 7, and December 9, 1996. In my respectful opinion, this conclusion is amply supported by the facts of this case.

b) The Rational Connection Test - Failed to Understand the Scope of the Term "Traffic"

[17] As noted earlier, even if the police suspect that a person is engaging in criminal activity, a rational connection between the offence giving rise to that suspicion and the offence which the person is given an opportunity to commit is required. Otherwise there can be no "reasonable suspicion" on the part of the police. At this point, it is necessary to examine more fully the Supreme Court's understanding of the rational connection test.

[18] In *Mack*, Justice Lamer opined that a person's involvement in the drug trade did not justify the police providing that person with an opportunity to commit a totally unrelated offence. Using the example of a person known to possess marijuana, Justice Lamer stated that this knowledge would not justify the police providing that person with an opportunity to commit the more serious offence of "importing". In *Barnes*, Chief Justice Lamer went so far as to state that the police may only provide an opportunity to commit a "particular" offence in circumstances where there is a suspicion that the accused is already engaged in that "particular" criminal activity. In my view, the formulation of the rational connection test in *Barnes* leads to the conclusion that a meaningful degree of correlation is required between the underlying offence and the offence which police offer the accused an opportunity to commit: see discussion *infra* at paragraphs 20-35.

[19] In President Barnes' view, there was no rational connection between possession and trafficking that would justify police offering Brown an opportunity to commit the latter offence solely because he had committed the former. Thus, President Barnes concluded that the police had no reasonable suspicion upon which to extend Brown an opportunity to traffic in drugs on

December 7, and December 9, 1996, as there was no rational connection between the offences of possession and trafficking. The only evidence that the police had as of November 30, 1996 was that Brown was an occasional user of cannabis who engaged in its communal use with friends. [20] Counsel for the appellant argued that President Barnes applied the principles of *Mack* in an "overly mechanistic fashion": see *R. v. Benedetti*, [1997] 7 W.W.R. 330 (Alta. C.A.). Counsel also sought to persuade this Court that there is a sufficient correlation between drug possession and trafficking to meet the "reasonable suspicion" test. In my view, the Supreme Court rejected this "slender thread" approach in both *Mack* and *Barnes*.

[21] Admittedly, Chief Justice Lamer did not expressly hold that there is an insufficient correlation between possession and trafficking in *Mack*. The example he provided focussed on the lack of a rational connection between possession and importing. However, a reasonable corollary of his example is that there is no rational or sufficient connection between the possession of narcotics and trafficking. It is one thing to say that a sufficient connection exists between two serious offences; it is quite another to offer a person an opportunity to commit a serious offence based on a suspicion that a less serious offence has been committed. Two appellate court decisions consider the requisite degree of correlation: one supports my line of reasoning; the other challenges it. Before addressing those cases, I will deal with the second error which my colleagues allege that President Barnes committed.

[22] My colleagues claim that President Barnes failed to appreciate the breadth of the term "traffic" as defined in the *Narcotic Control Act.* Specifically, it is maintained that he failed to appreciate that the communal use of narcotics comes within the statutory definition of the term

"traffic". Consequently, it is maintained that there is a sufficient and rational connection between casual drug use and trafficking to support a finding of "reasonable suspicion". With respect, I am unable to find any legal support for the proposition that the sharing of drugs constitutes trafficking. In any event, it is clear that the police in this case did not equate drug sharing with trafficking. I shall deal with each of these counter-arguments in turn.

[23] I am not aware of any jurisprudence which holds that the communal use of drugs such as cannabis constitutes trafficking and I doubt that there are any cases where a conviction for trafficking has been obtained on this basis alone. While several reasons might be proffered for this apparent lack of precedent, it seems to me that courts should be reluctant to embrace an expansionist view of the term "traffic". Section 2 of the *Narcotic Control Act* (now repealed) defines "traffic" as "to manufacture, sell, give, administer, transport, send, deliver or distribute" or to offer to do the same. Section 2 of the successor legislation, the *Controlled Drugs and Substances Act,* defines "traffic" in essentially the same manner. To construe "traffic" broadly enough to embrace the concept of sharing, one would have to accept that the word "give" includes "sharing". In my respectful view, it requires a departure from accepted interpretative theory to conclude that the sharing of drugs should reasonably and necessarily fall within the meaning of the term "traffic".

[24] In interpreting a criminal statute, the penalty prescribed for the offence in question must be considered. In the present case, the penal and social consequences flowing from a conviction for trafficking are strikingly different than those flowing from a conviction for possession. As to penal consequences, a first offence of possession under section 3 of the *Narcotic Control Act* is

punishable on summary conviction by a fine not exceeding $1000 or imprisonment for a term not exceeding six months, or both. A subsequent summary conviction increases the maximum fine and sentence to $2000 and one year, respectively. If the Crown proceeds by indictment, the maximum sentence is seven years. By contrast, trafficking under the *Narcotic Control Act* is an indictable offence with a maximum penalty of life imprisonment. Although that *Act* was replaced by the *Controlled Drugs and Substances Act* in 1997, the new legislation continues to impose a maximum sentence of life imprisonment for trafficking, unless the quantity of cannabis is three kilograms or less, in which case the maximum sentence is five years less a day.

[25] As to the social consequences flowing from a conviction for trafficking, as opposed to possession, it is trite to note that they are more severe for the former than the latter. It is one thing for a person to have a conviction for simple possession; it is quite another to be branded with the stigma of a trafficking conviction: see *R. v. Greyeyes* (1997), 116 C.C.C. (3d) 334 (S.C.C.).

[26] At the end of the day, I am not compelled to decide the scope of the term "traffic" or to speculate as to whether an accused would be convicted of trafficking for sharing a joint. In the absence of persuasive precedent, the point is at least arguable. The proper inquiry in this case, however, is whether the police believed that drug sharing amounted to trafficking. If the police did not believe that the communal use of cannabis constituted trafficking, then it cannot be said that they had a reasonable suspicion that Brown was trafficking before giving him an opportunity to commit that offence. After all, it is the police who must harbour a reasonable suspicion, not

the courts. Not surprisingly, the police in the present case did not equate drug sharing with drug trafficking. The evidence of Stanford on cross-examination is revealing:

> Q. So you uncovered no evidence whatsoever of possession by Gary Brown for the purpose of trafficking or of the existence of trafficking conduct by Gary Brown prior to your first attempt to get narcotics from him on 30 November?
>
> A. No, sir, I did not.
>
> ....
>
> Q. Certainly, your attendance at the house was regular. If there was trafficking going on -- and your attendance at the house was for the purpose of gathering drug intelligence, was it not?
>
> A. Yes, sir.
>
> Q. So if there was drug trafficking going on around you, you would've known it?
>
> A. Yes, sir, I should've known it.
>
> [Transcript at 105]

[27] The above testimony led President Barnes to conclude that, "[u]ntil the 30th of November 1996, ... Corporal Stanford admits that he had not observed any evidence of drug trafficking by Master Corporal Brown, just usage" (Transcript at 370). Had the police associated drug sharing with trafficking, they would have charged Brown with trafficking after observing him engaging in the communal use of cannabis. They did not do so for reasons easy to understand. Equating casual drug use with trafficking conflicts with our common-sense appreciation that trafficking is a much more serious offence than possession for the purpose of personal use.

[28] I turn now to the two appellate court decisions dealing with the sufficiency of the "rational connection" between the offence underlying the suspicion and the entrapment offence. The first decision reinforces President Barnes' decision; the second represents a challenge to it.

[29] In *R. v. Fortin* (1989), 47 C.R.R. 348 (Ont. C.A.), the accused was approached on no less than ten occasions by an undercover officer inquiring about the purchase of drugs. Each time, the accused told the officer that he did not have any drugs and did not know where or from whom to obtain them. The accused stated that he was finally pressured by the officer into purchasing one-quarter of an ounce of hashish for him for $75. The trial judge rejected the accused's testimony that he was threatened or menaced by the officer and found him guilty of trafficking. The accused appealed. The Ontario Court of Appeal held that a user of drugs, even one who shared with friends, who was not otherwise suspected of trafficking in drugs, could not be pressured by police to sell drugs without police going beyond providing an opportunity to commit an offence and inducing its commission. On those facts, the Court of Appeal set aside Fortin's trafficking conviction on the ground of entrapment, and ordered a stay of proceedings. The full reasoning of the court on this point is found at page 350:

> Finally, the appellant submits that the trial judge erred in refusing to stay the proceedings on the ground of entrapment. We are all of the view that the appeal must succeed on this ground. The trial judge did not have the benefit of the judgment of the Supreme Court of Canada in *Mack v. The Queen*, released on December 15, 1988 in arriving at his conclusion. In reaching our decision, we accept the findings made by the trial judge. On his findings, however, it is clear that Fortin was never suspected of trafficking in drugs; he was known to be only a drug user. The trial judge found that Fortin was a user and not a seller of drugs, although he evidently was willing to share his own drugs with friends.

> In our opinion, the police officers went beyond merely providing the opportunity to commit an offence and procured the commission of an offence. In so doing they fell within the area of prohibited police activity as outlined in *Mack v. The Queen, supra*.
>
> We, therefore, allow the appeal, set aside the conviction, and order a stay of the proceedings [emphasis added].

[30] The decision in *Fortin* fully supports the position adopted by President Barnes. In short, the Ontario Court of Appeal was not prepared to find that there was a rational connection between drug possession and trafficking sufficient to support a reasonable suspicion by police. In *obiter*, it also concluded that drug sharing did not constitute trafficking. Although it issued a stay of proceedings on the basis of "inducement", not the lack of a "reasonable suspicion", I am in respectful agreement with that court's willingness to draw a distinction between drug usage, including sharing, and trafficking.

[31] The other relevant appellate court decision is *R. v. Lebrasseur* (1995), 102 C.C.C. (3d) 167 (Qué. C.A.). In that case, a police secretary, who had a part-time job as a barmaid, confided to the head of the organized crime squad that she took drugs on occasion and was trusted by people in the drug milieu. In response to this revelation, the police decided to investigate. An undercover officer was sent to the bar where Lebrasseur was working and proceeded to engage her in conversation. The officer related certain circumstances of her alleged personal life, including the fact that she had left her abusive former spouse and was eager to celebrate her regained personal freedom. The officer was aware that Lebrasseur had previously lived with a violent spouse and she exploited this information in order to gain Lebrasseur's confidence. The next day, the officer returned to the bar and expressed a desire to obtain some cocaine. Lebrasseur suggested that the officer go to other bars, but the officer refused on the pretext that

she was afraid to go alone and that she had been drinking. As each new patron entered the bar, the officer inquired of Lebrasseur whether he or she could supply her with some cocaine. Finally, a part-time employee of the bar came in, and Lebrasseur asked him to obtain some cocaine for the officer, advancing him some money from the till. When he returned with the cocaine, Lebrasseur took it from him and gave it to the officer in the washroom. Lebrasseur was subsequently charged with trafficking. The trial judge found that each constituent element of the offence had been proved beyond a reasonable doubt; nevertheless, he ordered a stay of proceedings on the ground of entrapment. He noted that not only did the police lack a reasonable suspicion that Lebrasseur was involved in drug trafficking, but they also conducted a *mala fides* investigation and induced the commission of the offence. The Québec Court of Appeal disagreed and reversed the trial judge.

[32] With respect to the "reasonable suspicion" argument, the Québec Court of Appeal held that "it is not reasonable to limit the reasonable suspicion to the same crime of which the police were informed". At page 175, it stated:

> [t]o require perfect correlation between the crime reasonably suspected and the one that the respondent Lebrasseur had the opportunity to commit, appears to me to be wrong in the present case.

[33] The Québec Court of Appeal then went on to describe the circumstances in that case which made it wrong to require such "perfect correlation", principal among which was the fact that "[t]he investigation did not target just any user of drugs but rather the secretary of a police squad assigned to criminal activities linked to the drug milieu" (*ibid*).

[34] In other words, the investigating officer in *Lebrasseur* was given "a certain latitude" in consideration of the fact that Lebrasseur occupied a "position of confidence" in the police department. Noting the importance of a rational connection or proportionality between the existing suspicion and the crime committed, as discussed in *Mack*, the Court of Appeal stated that the circumstances of the case must be taken into account. On the facts of this case, it found that

> the circumstances ... authorized the police to suspect the possible involvement of the respondent in the drug milieu, which suspicions are of particular importance in the context of her position as a secretary for the provincial police morality squad ..., a position which presupposed a relationship of unfailing confidence with respect to the drug milieu [*ibid*. at 177].

[35] I am in respectful agreement with the Québec Court of Appeal that a perfect correlation between the offence giving rise to the reasonable suspicion and the offence which the accused is given an opportunity to commit might not always be necessary in order to satisfy the rational connection test. At the same time, and with the greatest of respect, I cannot subscribe to the legal conclusion reached in *Lebrasseur*. The police only had a reasonable suspicion that Lebrasseur was a casual user of drugs and that she might be betraying police confidences. However, the police did not engage in an undercover operation in an effort to determine the extent of her involvement in the drug milieu, nor did they seek to uncover the extent to which she posed a risk to police security. Rather, the facts make it abundantly clear that, from the outset, the police went undercover with the immediate goal of determining whether Lebrasseur would assist in the purchase and sale of drugs. In my respectful view, these facts reveal a classic case of entrapment.

[36] It is evident that the Québec Court of Appeal attached great weight to the fact that the accused in *Lebrasseur* held a position of "confidence" within the police department and, therefore, it accorded greater latitude to the police when it considered the evidence pertaining to the defence of entrapment. My colleagues adopt a similar position in the case at hand. They point out that Brown occupies a "vital position within our military system" [paragraph 29]. As a helicopter technician, it is said that he is endangering the safety of fellow members of the Armed Forces because of his drug and alcohol abuse. In my respectful opinion, these considerations must be deemed irrelevant in the criminal law context, where the object is not the maintenance of employment standards, but the punishment of unacceptable social conduct.

[37] That police should be permitted to engage in covert operations with a view to curtailing criminal activity is not to be doubted. That they should assist in facilitating a person's removal from his or her employment is, at the very least, highly questionable. If Brown posed a threat to the safety of military personnel then he should have been removed from his position immediately, not after an eleven month investigation. Similarly, once it became known that Lebrasseur posed a potential threat to police security, appropriate employment-related measures should have been taken. Alternatively, the police could have continued the undercover operation for a period longer than the two days allotted for the purpose of entrapping Lebrasseur, in order to determine the precise extent of her involvement in the drug milieu and, correlatively, the risk which she posed to the police department. In my view, to facilitate the dismissal of an employee by coaxing him or her to commit a serious criminal offence raises the spectre of *mala fides* or an abuse of prosecutorial discretion.

[38] In conclusion, I am of the view that there is no rational or sufficient connection between the offence which Brown was given the opportunity to commit and the offence which the police reasonably suspected that he was committing as of November 30, 1996. Accordingly, President Barnes did not err in finding that the defence of entrapment had been established on the ground that police lacked a reasonable suspicion. Furthermore, even if the appellant had demonstrated that there is a rational connection between drug sharing and trafficking, leading to a reasonable suspicion on the part of the police, President Barnes also found that police conduct constituted "inducement", which is of itself sufficient to ground entrapment. I shall touch on this alternative finding only briefly.

[39] The "subtle inducement" referred to by President Barnes was Stanford's provision of "free" bottles of alcohol to Brown, which Stanford knew Brown could not afford, thereby placing Brown in Stanford's debt and making him vulnerable to Stanford's requests for the procurement of cannabis. According to President Barnes:

> ...[Stanford] knew that Master Corporal Brown was vulnerable respecting alcohol. The police used a subtle inducement. Stanford supplied bottles of liquor to Brown knowing that Brown could not repay. The bottles were not free however. There was a monetary price which was never demanded. There were suggestions that Brown could pay later or in kind .... The police put Brown into a situation where he was in their debt respecting liquor supplied to him which he could not easily repay. They then asked for drugs without any suspicion, reasonable or otherwise, by late November 1996, that he was involved in drug trafficking. The utilization of Master Corporal Brown's known weakness for alcohol made the offers or opportunities presented to Master Corporal Brown to deal in drugs much more attractive to him [Transcript at 371-372].

[40] No attempt was made by the appellant to displace the above finding of fact, either in written or oral argument. [A passing reference to the issue of inducement is found at paragraphs 14 and 15 of the appellant's factum.] Therefore, the appellant's appeal must fail on this alternative ground, unless the third and final error alleged by my colleagues is justified.

c) Failed to Apply the "Test" for Granting a Stay of Proceedings

[41] The third error allegedly committed by President Barnes is that he failed to consider the legal test for imposing a stay of proceedings. I have two responses to this argument. First, I am unable to find any reference to such a test in either *Mack* or *Barnes*. Second, and correlatively, if such a test does exist, I am at a loss as to its tenets. In *Mack*, Justice Lamer stated that "the defence of entrapment [should] be recognized in only the 'clearest of cases'" (at 568), adopting the language of Justice Dickson in *R.. v. Jewitt* (1983), 5 C.C.C. (3d) 234. In my opinion, if a judge is not inclined to grant a stay of proceedings, the most likely explanation is that the accused failed to establish entrapment. In my respectful view, there is no need to develop another legal test once entrapment is found. There is ample evidence to suggest that President Barnes considered all of the relevant factors in this case, and that he was fully justified in imposing a stay because the defence of entrapment had been made out. Since this is the "clearest of cases", President Barnes did not err in imposing a stay of proceedings.

**Disposition**

[42] I would dismiss the appeal and affirm the decision of President Barnes of the Standing Court Martial staying the proceedings against Master Corporal Brown on the ground of police entrapment.

"J.T. Robertson.
J.A.