

The Use of Undercover Operators by Professional Organizations When Gathering Evidence to Enforce Their Monopolies: “Reprehensible” Tactics and “Outright Deception”?

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I. INTRODUCTION: THE UNDERCOVER TERRAIN

State undercover operators are used to investigate, and even instigate, criminal or regulatory violations in a variety of settings. First, undercover officers or state agents infiltrate rock concerts, political gatherings, high profile sporting events, airports and other locations, observe violations, and arrest suspects.¹ Second, they are involved in creating opportunities for targets in order to entice, trick, induce, or frame them, facilitating their commission of a crime.² Although such tactics are controversial in some jurisdictions, they are readily acceptable in Canada so long as the state agents do not entrap a suspect (discussed *infra*). Third,

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¹ For example, the RCMP used undercover officers in the “Jetway” initiative to identify possible drug couriers at airports, bus depots, and train stations. See *R v Kang-Brown*, 2008 SCC 18, [2008] 1 SCR 456 at para 217.

² CBC News, “John Nuttall, Amanda Korody found guilty in B.C. Legislature bomb plot” (2015 June 2), online: <<http://www.cbc.ca/news/canada/british-columbia/john-nuttall-amanda-korody-found-guilty-in-b-c-legislature-bomb-plot-1.3094670>>.

Lawyers for John Nuttall and Amanda Korody are presently arguing that their clients, who were convicted of conspiring to commit murder and possession of explosives on behalf of a terrorist organization, were entrapped by the RCMP undercover operators who “manufactured” the crime.

undercover officers or state agents are used to gather evidence (often a confession) of a crime after an offence has been committed. For example, they are planted in holding cells with in-custody suspects in the hope of obtaining admissions. So long as the undercover operators do not “actively elicit” statements from the suspects, the statements are admissible as evidence in a criminal trial.³ When undercover officers target suspects who are not in custody, often referred to as “Mr. Big” or “Crime Boss” investigations, there were few limits to what they could do to obtain a confession⁴ until the Supreme Court of Canada’s decision in *R v. Hart*.⁵

Undercover operations are not limited to state agents as described in the roles above but are also used increasingly in the private arena. As the Law Commission of Canada observed, “[the] overlapping, complimentary

³ *R v Broyles*, [1991] 3 SCR 595 at 12-15.

⁴ See Kouri T Keenan & Joan Brockman, *Mr. Big: Exposing Undercover Investigations in Canada* (Halifax and Winnipeg: Fernwood Publishing, 2010); Amar Khoday, “Scrutinizing Mr. Big: Police Trickery, the Confessions Rule and the Need to Regulate Extra-Custodial Undercover Interrogations” (2013) 60(2) *Crim LQ* 277; MaDonna Maidment, *When Justice is a Game: Unravelling Wrongful Convictions in Canada* (Halifax and Winnipeg: Fernwood Publishing, 2010), ch 4; David Milward, “Opposing Mr. Big in Principle” (2013) 46 *UBC L Rev* 81; Timothy E Moore, Peter Copeland & Regina Schuller, “Deceit, Betrayal and the Search for Truth: Legal and Psychological Perspectives on the ‘Mr. Big’ Strategy” (2009) 55:3 *Crim LQ* 348; Timothy E Moore & Kouri Keenan, “What is Voluntary? On the Reliability of Admissions Arising from Mr. Big Undercover Operations” (2013) 5:1 *IL-RP* 46; Christopher Nowlin, “Excluding the Post-Offence Undercover Operation From Evidence: ‘Warts and All’” (2004) 8 *Can Crim L Rev* 381; Kate Puddister & Troy Riddell, “The RCMP’s Mr. Big Sting Operation: A Case Study in Police Independence, Accountability and Oversight” (2012) 55:3 *Can Pub Admin* 385; Steven M Smith, Veronica Stinson, & Marc W Patry, “Using the Mr. Big Technique to Elicit Confessions: Successful Innovation or Dangerous Development in the Canadian Legal System?” (2009) 15(3) *Psychology, Public Policy, and Law* 168. Elizabeth Sukkau & Joan Brockman, “Boys, You Should All Be in Hollywood: Perspectives on the Mr. Big Investigative Technique” (2015) 48:1 *UBC L Rev* 47.

⁵ *R v Hart*, 2014 SCC 52, [2014] 2 SCR 544 [*Hart*].

Also see commentaries: Lisa Dufraimont, “*R. v. Hart*: Standing Up to Mr. Big” (2014) 12 *CR* (7th) 294; Nikos Harris, “The Less-Travelled Exclusionary Path: Sections 7 and 24(1) of the *Charter* and *R v. Hart*” (2014) 7 *CR* (7th) 287; H. Archibald Kaiser, “*Hart*: More Positive Steps Needed to Rein In Mr. Big Undercover Operations” (2014) 12 *CR* (7th) 304; Adriana Poloz, “Motive to Lie? A Critical Look at the ‘Mr. Big’ Investigative Technique” (2015) 19:2 *Can Crim L Rev* 231; David M Tanovich, “*Hart*: A Welcome New Emphasis on Reliability and Admissibility” (2014) 12 *CR* (7th) 298.

and mutually supportive" relationship between public police and private security makes it "increasingly difficult to distinguish between public and private responsibilities."⁶ Floor walkers in department stores infiltrate as shoppers while watching for shoplifters. Private security observes possible infractions at rock concerts, political gatherings, and airports. Private investigators are also used in the area of white-collar and corporate crime, with some investigators "rebranding themselves as risk mitigators."⁷

Outside the policing arena, undercover operations are conducted by investigative reporters; for example, Marketplace conducted two undercover studies of dentists' assessments and fees, one in 1998,⁸ and another in 2012.⁹ The *Toronto Star* sent undercover reporters to immigration consultants posing as potential immigrants. The reporters were told by a number of immigration consultants (some registered as such and some not) how to fabricate stories in order to immigrate to Canada.¹⁰

⁶ Law Reform Commission of Canada, *In Search of Security: The Future of Policing in Canada* (Ottawa: Law Commission of Canada, 2006) at xiii. See George S Rigakos & David R Greener, "Bubbles of Governance: Private Policing and the Law in Canada" (2000) 15:1 CJLS 145.

⁷ Danielle Egan, "Watching Vancouver's Private Investigators" *BC Business* (7 July 2010), online: <www.bcbusiness.ca/careers/watching-vancouvers-private-investigators>. See Duncan Investigations Inc. website (Winnipeg) for examples of services offered by private investigators in the legal arena: <www.duncaninvestigations.com>.

⁸ Marketplace, "Drilling for Dollars" now titled "Dental Fraud;" (March 31, 1998), online: <<http://www.cbc.ca/marketplace/episodes/archives/dental-fraud>>.

⁹ Marketplace, "Money Where Your Mouth is" (October 19, 2012) online: <<http://www.cbc.ca/marketplace/episodes/2012-2013/money-where-your-mouth-is>>. For criticism of undercover journalism, see Shannon Fay, "Lying to get the Truth" *The King's Journalism Review* (30 March 2009), online: <<http://thekjr.kingsjournalism.com/lying-to-get-the-truth/>>.

¹⁰ Nicholas Keung, Surya Bhattacharya & Jim Rankin, "How to stay in Canada by Cooking up a Story", *The Toronto Star* (17 June 2007), A7, online: <http://www.thestar.com/news/2007/06/17/how_to_stay_in_canada_by_cooking_up_a_story.html>. Letter from J. Parker MacCarthy, Q.C. to Diane Finley, P.C., M.P. "Re: CSIC and Ghost Consultants" (10 July 2007), online: <<http://www.cba.org/cba/submissions/pdf/07-36-eng.pdf>>. The president of the Canadian Bar Association advised the Minister of Citizenship and Immigration to "monitor [the Canadian Society of Immigration Consultants] investigation and any resulting disciplinary hearings closely". Undercover investigative journalists (sometimes dubbed muckrakers) have a long history. Upton Sinclair's *The Jungle* (Doubleday, 1906) exposed conditions at a Chicago meat-packing plant that led to

The only location where undercover investigations have been sharply curtailed appears to be in the academic world, where ethics boards appear more concerned with informed consent, anonymity, and confidentiality than the need to study and understand social phenomena.¹¹

A stunning example of an inappropriate use of private investigators occurred in 2007 when the Alberta Energy and Utilities Board employed them to observe landowners who were going to be affected by a transmission line application before the Board. As Professor Woolley summarizes, “The Board was accused of ‘spying and lying’, its process was described as ‘scandal plagued’ and the judge went so far as to describe aspects of the private investigators’ conduct as ‘repulsive.’”¹²

Professional self-regulating organizations (SROs) use undercover operators (both private investigators and their own investigators) to determine if a professional is abiding by restrictions imposed or standards set by the SRO. For example, the College of Physicians and Surgeons of Ontario had one of their own investigators pose on Facebook as a 17-year-old girl in order to determine if a physician was violating the conditions of his registration.¹³ An undercover officer in California managed to get a prescription for the painkiller of her choice by showing a physician an x-ray of her German shepherd to illustrate the pain the undercover officer

regulations in the food-processing industry in the United States.

¹¹ Some of the issues surrounding academic research are discussed in Ted Palys & John Lowman, *Protecting Research Confidentiality* (Toronto: Lorimer, 2014). Also see Suze G Berkhout, “Private Talk: Testimony, Evidence, and the Practice of Anonymization in Research” (2013) 6:1 IJFAB 19; and Laurie Ann Henderson, *Public Sector Paralegals in British Columbia: An Analysis of the Difference Between Paralegals and Lawyers in the Provision of Summary Advice* (MA Criminology Thesis, Simon Fraser University, 1985): In conducting her “undercover” research on the difference in advice between paralegals and lawyers, Henderson had to first get the permission of each staff member of each Legal Services Office who might encounter her pseudo-clients.

¹² Alice Woolley, “Enemies of the State?: The Alberta Energy and Utilities Board, Landowners, Spies, a 500 kV Transmission Line and Why Procedure Matters” (2008) 26:2 JERL 234 at 234 (footnotes omitted). Woolley provides greater context for the Board’s use of private investigators and concludes that more attention needs to be directed at the principles of procedural fairness.

¹³ Michael Woods, “Doctor seeks reinstatement after sexual exploitation charge” (22 August 2012) Toronto Star GT4, online: < http://www.thestar.com/news/gta/2012/08/22/doctor_seeks_reinstatement_after_sexual_exploitation_charge.html>. The College rejected his argument of entrapment: *Seidman (Re)*, [2013] OCPSP No 20 at para 155.

was experiencing. The doctor was apparently unable to identify the dog's tail on the x-ray for what it was.¹⁴

This paper is about professional SROs' use of undercover operators to enforce their monopolies and protect the public from professional impersonators. For example, private investigators were used by the British Columbia Veterinary Medical Association to pose as pet owners (with their dogs Beau and Quincy) in order to determine if Sylvia MacDonald was carrying on the practice of veterinary medicine at her K9 Dental Care business,¹⁵ contrary to the *Veterinarians Act*.¹⁶ An undercover sting in New York found that Fred the kitten was going to be neutered by a man pretending to be a veterinarian.¹⁷ In *Lagerbom*, the Society of Notaries Public of British Columbia's panel found that the Law Society of British Columbia engaged in "reprehensible" behaviour and "outright deception" by using a private investigator to engage Lagerbom, a notary, in providing legal advice.¹⁸

Deciphering the extent to which professional SROs use undercover agents to enforce their monopolies is not an exact science. According to Ontario Justice of the Peace Madigan, the Law Society of Upper Canada uses undercover investigators "frequently"¹⁹ when it gathers evidence to enforce its monopoly. Data from a study of 285 cases in which the Law

¹⁴ "Undercover Officer Uses Dog X-Ray in Police Sting Busting Doctor, 69, for 'dealing drugs'" *Daily Mail Reporter* (14 July 2012), online: <www.dailymail.co.uk/news/article-2173581/Undercover-officer-uses-dog-x-ray-police-sting-busting-doctor-69-dealing-drugs.html>.

¹⁵ *British Columbia Veterinary Medical Association v MacDonald*, 2004 BCSC 807 at para 7; *British Columbia Veterinary Medical Association v MacDonald*, 2005 BCCA 225: An appeal from the finding that the teeth cleaning engaged in by MacDonald was not a veterinary practice under the legislation was dismissed by the BC Court of Appeal.

¹⁶ *Veterinarians Act*, RSBC 1996, c 472, s 27(2).

¹⁷ Associated Press, "Fake vet caught in 'undercover kitten' sting gets probation" (23 May 2007), online: <<http://newsok.com/article/2829486>>: He was put on probation and ordered to undergo psychiatric treatment.

¹⁸ *Dawn Lagerbom*, The Society of Notaries Public of British Columbia, Discipline Digest, April 2006 [*Lagerbom*].

¹⁹ *Law Society of Upper Canada v Tassiopoulos*, [2005] OJ No 4425 (Ont Ct J) at para 24 [*Tassiopoulos*]. Similar comments have been made by the courts in the United States; see Bernard W. Bell, "Theatrical Investigation: White-Collar Crime, Undercover Operations, and Privacy" (2002) 11:1 Wm & Mary Bill Rts J 151 at 155. A search for "undercover and unauthorized" in case names with the words "college or society" on July 17, 2015 in the Quicklaw Court Cases database turns up only four decisions.

Society of British Columbia took action to protect its monopoly between 1998 and 2006,²⁰ show that at a minimum²¹ undercover agents were used in 54 (19%) of the cases.

With regard to the lack of professional courtesy noted by the Society of Notaries Public panel in the *Lagerbom* case, private investigators were used against five of the 16 notaries (31%) and against two of the 19 former members of the Law Society (11%). Limiting the analysis to actions involving court injunctions, private investigators were used against all four notaries (100%) and two out of the nine former members of the Law Society (22%). The use of undercover operators against notaries was in excess of their use against other encroachers and also in excess of their use against former members of the Law Society.²²

Why do professional SROs use undercover agents to enforce professional monopolies? In 2006, the Law Society of British Columbia explained its use of private (undercover) investigators:

In an unauthorized practice case, unless a client who is willing to swear an affidavit complains or the person providing the advice is publicly advertising his or her services such that it is apparent the person is providing legal services for a fee, the Law Society will retain a private investigator. The investigator will usually attend at the person's office as a prospective client. It is necessary to do this so the Law Society can determine whether the person is engaging in unauthorized practice or if it was an isolated incident. In addition, if it is necessary to take the matter to court, the Law Society needs evidence of unauthorized practice.²³

²⁰ Joan Brockman, "Money for Nothing, Advice for Free: The Law Society of British Columbia's Enforcement Actions Against the Unauthorized Practice of Law" (2010) 29 Windsor Rev Legal Soc Issues 1.

²¹ There may have been more cases where a private investigator was used but the matter was settled (through undertakings or other agreements) without public knowledge that a private investigator was used.

²² It may be that it is more difficult to gather evidence against notaries than it is to gather evidence against former lawyers, as former lawyers may be more likely to interact with lawyers who are prepared to report unauthorized practice.

²³ Law Society of British Columbia, "Unauthorized practice investigations" (2006) 5 Benchers' Bulletin. Madigan JP of the Ontario Court of Justice classified the unauthorized practice of law as a *mens rea* offence even though it is rare that public welfare offences are classified as such (*Tassiopoulos*, *supra* note 19 at paras 15, 19, 20). He reached this conclusion on the basis of the "large" maximum penalty of \$10,000. The court's decision was contrary to a previous Law Society decision concluding that it was a strict liability offence in the context of practising while under a Law Society suspension; *Law Society of Upper Canada v Michael McKenzie Lynch*, [2002] LSDD No

Even when clients are prepared to provide evidence, an examination of a couple of cases clearly illustrates the advantages of professional witnesses over lay witnesses. Professional witnesses are more readily available and usually understand the rules of evidence and the type of evidence the Law Society needs for an injunction or a finding of contempt.²⁴

Undercover operators used to enforce professional monopolies usually engage in two types of evidence gathering: 1) creating the opportunity for the targets to offer services they are prohibited from offering; and 2) hearing or eliciting admissions from the target during the undercover operation. The undercover operators are interactive, as opposed to passive and unobtrusive. Evidence gathered from undercover operations can be used informally to convince the target to stop engaging in the prohibited behaviour, and in some cases to enter undertakings with the professional SRO. The evidence can also be used formally in provincial court for prosecution of unauthorized practice under legislation which creates an offence to violate a professional monopoly and in superior court to obtain an injunction against unauthorized practice and subsequently a contempt order if the injunction is violated.

This paper examines three issues surrounding the use of undercover operators by professional SROs to gather evidence of unauthorized

64 [Lynch]. A subsequent decision by the Law Society of Upper Canada decided that the *Lynch* case must have been wrongly decided in light of the court decision in *Tassiopoulos*; *Law Society of Upper Canada v Peter Guy Martin*, [2008] LSDD No 14 [Martin]. Madigan JP in a later decision, accepted both parties agreement that unauthorized practice offences committed by corporations (maximum penalty \$25,000) and individuals related to the corporation (maximum penalty \$15,000) were strict liability offences; *College of Veterinarians of Ontario v Greenberg-Blechman*, [2010] OJ No 3600 [Blechman]. The legislation provides a due diligence defence for officers, directors, and employees when a corporation is convicted; however, the legislation is silent on whether an individual (without the involvement of a corporation) would have such an option. Madigan JP made it clear the individuals' liability in this case was dependent on the corporation's liability (para 118).

²⁴ See, for example, the 195-paragraph decision in *The Law Society of British Columbia v Dempsey*, 2005 BCSC 1277 [Dempsey] and the 142-paragraph decision in *The Law Society of British Columbia v McLeod* (unreported, Vancouver Registry, A952288) [McLeod]. Both cases involved witnesses who were aggrieved clients and some who were private investigators. In some cases, the evidence of complainants is sufficient; see, for example, *Law Society of British Columbia v Lauren*, [2012] BCJ No 1004 at para 14 [Lauren].

practice: 1) invasion of privacy and the right against unreasonable search and seizure; 2) entrapment; and 3) professional ethics and professional courtesy. It then concludes with a number of recommendations to address some of the concerns raised with what appears to be an ever expanding use of undercover agents to enforce laws from the most serious to the more mundane.

II. INVASION OF PRIVACY AND THE *CHARTER*

Does s. 8 of the *Canadian Charter of Rights and Freedoms*²⁵ apply to professional SROs when they are gathering evidence (e.g., search and seizure, recording private conversations and so on) for the purposes of enforcing their monopolies? In *Law Society of Manitoba v. Pollock*, the Law Society of Manitoba's private investigator, in an effort to determine whether Pollock (a self-taught litigator) was engaged in the unauthorized practice of law, recorded conversations with Pollock, without notice to him and without judicial authorization.²⁶ Monnin CJQB (as he then was), found that the Law Society was bound by the *Charter*:

In my view, the Law Society was exercising its statutory authority in the public interest and, on the facts of this case, was performing a regulatory function on behalf of the "legislature and government" within the meaning of s. 32 of the *Charter*. As such it was a governmental agency subject to the provisions of s. 8 of the *Charter*.²⁷

In examining the powers of the Ontario College of Physicians and Surgeons to appoint investigators with "all the powers of a commission under...*Public Inquiries Act*", the Ontario Superior Court of Justice wrote: "There is no issue that the *Charter* applies to the College's powers under s.

²⁵ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c 11, s 8 [*Charter*]: S. 8 of the *Charter* provides that "everyone has the right to be secure against unreasonable search and seizure."

²⁶ *Law Society of Manitoba v Pollock*, 2007 MBQB 51, [2007] MJ No 67 (MBQB) at paras 37-38 [*Pollock MBQB*]; aff'd 2008 MBCA 61 [*Pollock MBCA*].

²⁷ *Pollock MBQB*, *ibid* at para 40 (citations omitted). To obtain authorization for consent surveillance, a law society investigator would have to qualify as a "public officer" and then apply to a judge for authorization to record such interceptions under s. 184.2 of the *Criminal Code*, RSC 1985, c C46 as amended. However, such applications are limited to investigations of federal offences.

76(1) of the *Code*.”²⁸ Both the Superior Court and the Ontario Court of Appeal found that s. 76(1) did not violate the *Charter*.²⁹

Section 8 of the *Charter* applies to SROs which are generally considered to be acting on behalf of government when they carry out their enforcement activities. Powers of search and seizure will vary with the degree of privacy expected in the circumstances and the degree of judicial oversight the court thinks appropriate in the circumstances. In *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, La Forest J wrote:

The application of a less strenuous and more flexible standard of reasonableness in the case of administrative or regulatory searches and seizures is fully consistent with a purposive approach to the elaboration of s. 8. As Dickson J. made clear in *Hunter v. Southam*, the purpose of s. 8 is the protection of the citizen's reasonable expectation of privacy. But the degree of privacy the citizen can reasonably expect may vary significantly depending upon the activity that brings him or her into contact with the state. In a modern industrial society, it is generally accepted that many activities in which individuals can engage must nevertheless to a greater or lesser extent be regulated by the state to ensure that the individual's pursuit of his or her self-interest is compatible with the community's interest in the realization of collective goals and aspirations.³⁰

In *Pollock*, Monnin CJQB disagreed with the Law Society's argument that Pollock had no reasonable expectation of privacy because he was advertising his services to the general public:

Telephone conversations with another party, even though a stranger, should not be the subject of surreptitious tape recording, a truly intrusive procedure, especially, as in this case, if the call comes from a state actor. While admittedly the expectation of privacy may not be as high as one would have with respect to a

²⁸ *Sazant v College of Physicians and Surgeons of Ontario*, 2011 ONSC 323 at para 116, repeated at para 142 [*Sazant ONSC*]; aff'd 2012 ONCA 727 [*Sazant ONCA*]; leave to appeal refused in [2012] SCCA No 549 [*Sazant SCCA*]. Subsection 76(1) of the *Health Professions Procedural Code* (being Schedule 2 to the *Regulated Health Professions Act*, 1991, SO 1991, c 18) states that "[a]n investigator may inquire into and examine the practice of the member to be investigated and has, for the purposes of the investigation, all the powers of a commissioner under Part II of the *Public Inquiries Act*."

²⁹ *Sazant ONSC*, *ibid* at para 19: At the Superior Court level, the College agreed that *Sazant* had standing to challenge s. 76(1) of the *Code*. *Sazant ONCA*, *ibid* at para 151: The Ontario Court of Appeal made its decision assuming, but not deciding, that *Sazant* had standing.

³⁰ *Thomson Newspapers Ltd. v Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 SCR 425 at paras 121-122 [*Thompson Newspapers*].

personal conversation, I would not consider it as the equivalent of having a conversation in a public place.³¹

The fact that a particular means of investigating unauthorized practice is not legally mandated means an SRO cannot employ it. In *Pollock*, the Law Society argued that since prior judicial authorization was not available to it under the *Criminal Code*, its surreptitious taping the conversation between the private investigator and Pollock was reasonable. Monnin CJQB was not persuaded:

[The Law Society] is looking at the argument from the wrong perspective. Prior judicial authorization was not available because the conduct is not authorized. Accordingly, its investigators should not have been engaged in the surreptitious taping. I find that there was an infringement of Mr. Pollock's rights under s. 8 of the *Charter* as the taping of the telephone conversations by the investigator was an unauthorized search.³²

³¹ *Pollock MBQB*, *supra* note 26 at para 42. In *Markandey v Ontario Board of Ophthalmic Dispensers*, [1994] OJ No 484 at para 48 [*Markandey*], Trafford J states that since an undercover operation was “conducted in the public domain” (i.e., the office of an Ophthalmologist), the privacy of s. 8 of the *Charter* was not engaged. The objection in *Markandey* was to the use of an undercover shopper, not the surreptitious recording of conversations.

³² *Pollock MBQB*, *ibid* at para 43. Monnin CJQB then went on to find that the admission of the evidence would not have brought the administration of justice into disrepute under s. 24(2) of the *Charter* (at paras 44, 45). However, the transcripts did “not add materially to the case” against Pollock (at para 46), and “little weight” was placed on their contents (at para 50). Impersonators probably have a greater expectation of privacy than professionals who work in a self-governing system, which is expected to monitor their conduct. *Sazant ONCA* *supra* note 28 at para 166: According to the Ontario Court of Appeal, “it is not unreasonable to expect doctors to have a very limited expectation of privacy when it comes to allowing their regulator to ensure that they are carrying out their practices in a manner that will not expose the public to risk. An individual chooses to become a doctor and in so doing accepts that his or her activities will be supervised and monitored. Not only does this benefit the public, but it also benefits the member by preserving the integrity of his or her profession”. *Sazant ONSC* at para 167 quoting from *Law Society of Saskatchewan v Robertson Stromberg* (1995), 122 DLR (4th) 433 (Sask CA) which had quoted from *British Columbia (Securities Commission) v Branch*, [1990] BCJ No 415 (BCCA): The Divisional Court in *Sazant* observed that a statement, from the BC Court of Appeal, about the powers of the BC Securities Commission, was equally applicable to the professions: “Those who do not wish to accept the supervision and regulation of the commission ought to find another occupation.”.

Although it is often difficult to determine if undercover agents record their conversations, it is sometimes possible to infer such facts from the reported content. For example, in *Lagerbom*, conflicting evidence of what was said between the Law Society of British Columbia's private investigator and the notary makes it very unlikely that the private investigator recorded the conversation.³³

The possible breach of privacy appears to be limited to recording such investigations, not conducting them. Even in the cases of aggressive Mr. Big operations, there is little concern that the act of appearing as an undercover agent (without wiretap equipment) and invading one's personal space and sparking sexual interest might violate a person's right to privacy.³⁴ Only Madam Justice Karakatsanis, in her concurring decision in *Hart*, raised the possibility that a Mr. Big investigation raised issues of privacy.³⁵ The Supreme Court of Canada's imposition of restrictions on

³³ *Supra* note 18. However, undercover operations are sometimes recorded by professional SROs when investigating their own members. For example, see *College of Physicians and Surgeons v Lambert* [2011] OCPSP No 27 at paras 19, 29-31, 40 [*Lambert*]: In *Lambert*, the College of Physicians and Surgeons hired two private investigators to determine if Lambert was practising outside his restrictions. The private investigators recorded telephone conversations with Lambert arranging the meeting. One of the private investigators wore a concealed camera and an audio recording was made of the meeting. Another example: see "Naturopaths file lawsuit against unlicensed Surrey physicians", *CBC News* (22 August 2014), online: <<http://www.cbc.ca/news/canada/british-columbia/naturopaths-file-lawsuit-against-unlicensed-surrey-physicians-1.2742533>>, where the BC College of Naturopathic Physicians conducted an undercover investigation against Sam Samrai and Sarge Sandhu with a hidden camera. As indicated earlier (*supra* note 27), there is no legislation that would allow these recordings.

³⁴ See for example David Staples, "Part 10: The bait and switch", *Edmonton Journal* (28 June 2009) A4; David Staples, "Part 11: A strange kind of bonding", *Edmonton Journal* (29 June 2009) A1: A series of articles in the *Edmonton Journal* illustrates how an undercover officer dangled sex in front of shy Dennis Cheeseman and then extracted herself through a series of lies, including telling Cheeseman she had been beaten up by her former boyfriend and sporting a made up pulverized face. For the argument that this Mr. Big operation may have led to a guilty plea from two innocent men, see Joan Brockman, "'An Offer You Can't Refuse:' Pleading Guilty When Innocent" (2010) 56(1&2) *Crim LQ* 116 at 121-122.

³⁵ *Hart*, *supra* note 5, at para 180. See commentaries *supra* note 5. See also, David M Tanovich, "Rethinking the *Bona Fides* of Entrapment" (2011) 43 *UBC L Rev* 417 at 440-445 for the argument that the law on entrapment implicates both privacy and equality.

Mr. Big operations, after a number of cases in which appeared to approve of such techniques, is an indication that the verdict might change on the question of whether undercover operations in themselves invade privacy under s. 8 of the *Charter*. Even if this change ever occurred, it is open to question whether these privacy concerns would make their way down to obtaining confessions or other evidence of unauthorized practice.

III. ENTRAPMENT

Entrapment, based on the argument of abuse of process or a violation of s. 7 of the *Charter*, may be applicable following a criminal prosecution and conviction. The convicted person must prove entrapment by state actors or agents,³⁶ on the balance of probabilities, in order for the court to enter a judicial stay of proceedings.³⁷

A. The General Contours of the Doctrine

According to the Supreme Court of Canada in *R v. Mack*, there are a number of reasons why entrapment by the state is unacceptable:

One reason is that the state does not have unlimited power to intrude into our personal lives or to randomly test the virtue of individuals. Another is the concern that entrapment techniques may result in the commission of crimes by people who would not otherwise have become involved in criminal conduct. There is perhaps a sense that the police should not themselves commit crimes or engage in unlawful activity solely for the purpose of entrapping others, as this seems to militate against the principle of the rule of law. We may feel that the manufacture of crime is not an appropriate use of the police power. It can be argued as well that people are already subjected to sufficient pressure to turn away from temptation and conduct themselves in a manner that conforms to ideals of morality; little is to be gained by adding to these existing burdens.

³⁶ In *R v Mack*, [1988] 2 SCR 903 at 951 [Mack], Lamer J wrote: "The lack of support for an extension of the defence to provide against entrapment by private citizens demonstrates that the real problem is with the propriety of the state employing such law enforcement techniques for the purpose of obtaining convictions. If this is accepted, then it follows that the focus must be on the police conduct" [emphasis added]. Despite the argument that entrapment was limited to police conduct, Reed J in *Apple Computer Inc v Apple Canada Inc*, [1987] 3 FC 452 (TD) at paras 28-30, a private civil case, found that the private detectives did not engage in entrapment. Reed J wrote "I could not find that the detectives went beyond, what is referred to in the cases cited to me [citations omitted] as 'mere solicitation or mere decoy work.'"

³⁷ *Mack*, *ibid* at 968.

Ultimately, we may be saying that there are inherent limits on the power of the state to manipulate people and events for the purpose of attaining the specific objective of obtaining convictions. These reasons and others support the view that there is a societal interest in limiting the use of entrapment techniques by the state.³⁸

There is a compelling interest in a democratic society to have the state leave individuals alone. McLachlin J, as she then was, in her dissent in *R v. Barnes*, states that the doctrine of entrapment involves considering “whether the state’s interest in repressing criminal activity in the particular case outweighs the interest which individuals have in being able to go about their daily lives without courting the risk that they will be subjected to the clandestine investigatory techniques of agents of the state.”³⁹

On the other hand, according to Lamer J for the Court, in *Mack*:

The competing social interest is in the repression of criminal activity. Further, our dependance [*sic*] on the police to actively protect us from the immense social and personal cost of crime must be acknowledged. There will be differing views as to the appropriate balance between the concepts of fairness and justice and the need for protection from crime but it is my opinion that it is universally recognized that some balance is absolutely essential to our conception of civilized society. In deciding where the balance lies in any given case it is necessary to recall the key elements of our model of fairness and justice, as this is the only manner in which we can judge the legitimacy of a particular law enforcement technique.⁴⁰

Lamer J then states that entrapment occurs 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.⁴¹

³⁸ *Mack*, *ibid* at 941.

³⁹ *R v Barnes*, [1991] 1 SCR 449 at 3 of Dissent [*Barnes*]. See Paul M Hughes, “Temptation and Culpability in the Law of Duress and Entrapment” (2006) 51 *Crim Law Q* 342 for an argument that some temptations should negate or mitigate criminal liability.

⁴⁰ *Mack*, *supra* note 36 at 941-942.

⁴¹ *Mack*, *ibid* at 964-965.

In *Barnes*, Lamer CJ reiterated the decision in *Mack* that random virtue testing⁴² (in the context of trafficking in cannabis resin) is unacceptable.⁴³ Randomness is appropriate only 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.⁴⁴

Lamer J condemned random virtue testing:

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.⁴⁵

Following a finding of reasonable suspicion or a *bona fide* inquiry, the judge must decide if the state has gone “beyond providing an opportunity” and induced the target to commit an offence. According to Lamer J in *Mack*, a number of factors to be considered by the trial judge (including the type of offence and availability of other techniques)⁴⁶ are to be used in determining “*whether the police have employed means which go further than providing an opportunity.*”⁴⁷ In commenting on the type of offence in *Mack* and “whether the police went too far,” Lamer J wrote:

⁴² *Supra* note 39 at 11: According to Lamer CJ in *Barnes*, random virtue-testing occurs 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.”

⁴³ *Ibid* at 3.

⁴⁴ *Ibid* at 11 [emphasis in original].

⁴⁵ *Mack*, *supra* note 36 at 965.

⁴⁶ *Ibid* at 964: Other factors referred to in *Mack* clearly indicate that the list of factors is directed at whether the police have gone beyond providing an opportunity (after they pass the first part of the test): the strengths and weaknesses of the target; the persistence of the undercover officers; the types of inducements; whether the undercover officers exploit compassion or friendship; the existence of threats; and whether the undercover officers are “undermining other constitutional values”.

⁴⁷ *Ibid* at 966 [emphasis added].

Returning to the list of factors I outlined earlier, this crime is obviously one for which the state must be given substantial leeway. The drug trafficking business is not one which lends itself to the traditional devices of police investigation. It is absolutely essential, therefore, for police or their agents to get involved and gain the trust and confidence of the people who do the trafficking or who supply the drugs. It is also a crime of enormous social consequence which causes a great deal of harm in society generally. This factor alone is very critical and makes this case somewhat difficult.⁴⁸

In her concurring decision in *Hart*, Karakatsanis J suggests that the factors set out in the entrapment doctrine “inducements, threats, and manipulation” could also assist in determining whether the state engaged in abusive conduct in a Mr. Big investigation.⁴⁹ Her concern with “human dignity [and] personal autonomy” for the suspect do not appear in the majority decision.⁵⁰ Again, Karakatsanis J’s decision may open future doors in this direction.

B. The Applicability of the Entrapment Doctrine to Regulatory Offences

A number of lower court judges have addressed the question of whether entrapment applies to provincial and federal regulatory offences. Other judges have simply entertained the entrapment argument following a conviction for regulatory offences, some finding that entrapment occurred, and others, that the convicted person had not established entrapment on the balance of probabilities.

In *Ordre Des Opticiens D’Ordonnances Du Québec c. Lussier*, the accused was convicted of engaging in a service that was limited to opticians and optometrists; her argument that she was entrapped was rejected by the trial judge.⁵¹ Martin JSC, hearing Lussier’s first appeal from her conviction, also rejects her argument that she had been entrapped by the *Ordre Des*

⁴⁸ *Ibid* at 977-978.

⁴⁹ *Supra* note 5 at para 213.

⁵⁰ *Ibid* at para 165. See also paras 10-11: The majority decide that in the limited circumstances of a Mr. Big operation that involves a “fictitious criminal organization” the evidence is presumptively inadmissible and the Crown must establish its admissibility showing its probative value outweighs its prejudicial effect. The defence has the onus of establishing abuse of process.

⁵¹ *Ordre Des Opticiens D’Ordonnances Du Québec c Lussier*, [2011] JQ No 1776 [Lussier].

Opticiens D'Ordonnances Du Québec by deciding that entrapment does not apply in these circumstances:

In the case at bar we are dealing with a regulatory matter which does not in any sense involve the intervention of the state or its agents. These professional Orders, namely the Optometrists and the Dispensing Opticians supervise themselves pursuant to the authority granted to them in the statutes which respectively regulate each profession...

This is not a state prosecution. It is a prosecution by a provincially constituted professional Order. While it may be possible to imagine circumstances where entrapment, if established, may be invoked in support of a stay of proceedings in a prosecution for a provincial regulatory offence that is certainly not the case here.⁵²

The Quebec Court of Appeal, however, found otherwise, stating that investigators under the *Professional Code*⁵³ would be held to the same standards as a police officer and a Crown prosecutor. The fact that the government privatized these state powers does not mean that these investigators are not state agents.⁵⁴

In *R v. Huebner*,⁵⁵ Manitoba Provincial Court Judge Corrin first decides that the tobacco compliance control officer did not go too far by using a 15 year old undercover test shopper. He then decides that the officer's investigation was "premised on a reasonable suspicion,"⁵⁶ and later adds that it was "completely consistent with a *bona fide* enquiry" and was not based on random virtue testing.⁵⁷ Judge Corrin further opines, "Of course, if the investigators had been acting pursuant to statutory authority the proportionality analysis would heavily favour a rejection of an abuse of process argument in most cases of this nature."⁵⁸

⁵² *Lussier c Ordre Des Opticiens D'Ordonnances Du Québec*, 2011 QCCS 6774 at paras 50, 68.

⁵³ *Code des professions*, LRQ, c C-26, s 32. [Translated by author]

⁵⁴ *Lussier c Ordre Des Opticiens D'Ordonnances Du Québec*, [2012] QJ No 2278 (QCA) at paras 16-17. The Supreme Court of Canada's clarification of who is a state agent in *R v. Buhay*, 2003 SCC 30, [2003] 1 SCR 631 was in relationship to private policing. The Quebec Court of Appeal characterized the professional SRO as a state-created entity and therefore it was subject to the *Charter* without an analysis of the relationship between it and the state.

⁵⁵ *R v Huebner*, [2003] 9 WWR 337, 171 Man R (2d) 247 at paras 8-9.

⁵⁶ *Ibid* at para 11.

⁵⁷ *Ibid* at para 17.

⁵⁸ *Ibid* at para 16.

In *R. v. Au Canada Monetary Exchange Inc.*, Cowan J examines “the type of crime being investigated and the availability of other techniques for the police detection of its commission”⁵⁹ as factors to consider in determining if entrapment can be argued following a conviction under the *Proceeds of Crime (Money Laundering) Act*⁶⁰ [PCMLA] and regulations made thereunder. Cowan J labels the “record-keeping offences” under the anti-money laundering legislation as “regulatory,” rather than “true crime[s],”⁶¹ dismissing the “mere fact that the offence may result in imprisonment.”⁶² According to Cowan J, since the offences were regulatory in nature, the police could conduct “spot checks” without reasonable suspicion or a bona fide inquiry. Unfortunately, Cowan J relies on a case, in which a section of the *Income Tax Act*⁶³ allowing for “spot checks” was found not to violate s. 8 of the *Charter*,⁶⁴ to justify arbitrary spot checks under the PCMLA which provided no authority to do so. Cowan J is not entirely clear in his decision, as in the end he appears to apply the second aspect of the entrapment doctrine:

In my opinion when the conduct of the police in this case is viewed objectively, as stipulated in *Mack*, it cannot be said that it would offend the “basic values of the community” and most certainly it cannot be said that the facts and circumstances of this case make it one of the “clearest of cases” so as to warrant the court entering a stay of proceedings.⁶⁵

The other confusing aspect of *Au Canada* is that Lamer J, in *Mack*, states that the more serious the offence the more leeway the courts will provide the police when it comes to whether they “went too far in their efforts to

⁵⁹ *R v Au Canada Monetary Exchange Inc.*, [1999] BCJ No 455, 41 WCB. (2d) 367 at para 23 (SC) [*Au Canada*].

⁶⁰ *Proceeds of Crime (Money Laundering) Act*, SC 1991, c 26, ss 2, 6.

⁶¹ *Au Canada*, *supra* note 59 at para 24.

⁶² *Ibid* at para 27. Cowan J does not set out the possible penalties; however, failure to comply with the record keeping requirements of the Act or regulations was at the time of the decision a hybrid offence punishable by a fine of up to \$500,000 and/or imprisonment for up to five years, for a conviction on indictment, and a fine of up to \$50,000 and/or imprisonment for up to six months, for a summary conviction according to *Proceeds of Crime (Money Laundering) Act*, SC 1991, c 26, s 6.

⁶³ *Income Tax Act*, SC 1972, c 63, s 231(3).

⁶⁴ *R v McKinlay Transport Ltd.*, [1990] 1 SCR 627.

⁶⁵ *Au Canada*, *supra* note 57 at para 40.

attract the [accused] into the commission of the offence.”⁶⁶ Cowan J, however, decides that since the offence is regulatory (not so serious?) entrapment does not apply at all.

After reading Cowan J’s reasons in *Au Canada*, Alberta Provincial Court Judge Fradsham, in *R v. Moosemay*, concludes that Justice Cowan “did not intend to set down a hard and fast rule that the law of entrapment does not apply to any regulatory offence,” rather one must ask whether it is the type of violation that attracts sufficient stigma in order for the entrapment doctrine to apply.⁶⁷ Judge Fradsham then concludes that entrapment applies to the *Wildlife Act*,⁶⁸ because the offences [hunting game out of season, trafficking in big game, firearm offences and so on] “attract, to varying degrees, a social stigma because they either involve matters of public safety or conservation.”⁶⁹ In addition, there were other means of investigating such offences. However, the accused was unable to prove entrapment in the circumstances because there was reasonable suspicion that the accused was involved in these offences.⁷⁰ The decision in *Moosemay* appears to conflate the prerequisites to entrapment (reasonable suspicion or bona fide inquiry) with the factors the court should consider in determining if the undercover operations crossed the line.

Although asked to address the broader question of whether entrapment applies to regulatory offences, the Ontario Court of Appeal in *R v. Clothier*⁷¹ limited its decision to whether entrapment applies to the *Smoke Ontario Free Act*.⁷² Laskin JA for the Court follows the same reasoning as Cowan J in *Au Canada*; that is, he distinguishes between

⁶⁶ Mack, *supra* note 36 at para 170. Nightingale Prov Ct J in *R v Coullonneur*, 2002 SKPC 10, [2002] SJ No 73 (SKPC) at para 44 [Coullonneur]: interprets the case as follows: “I do not take any of Cowan J’s observations to amount to a conclusion by him that entrapment *per se* is not available in answer to a charge that an accused person has committed a regulatory offence. Rather, I take him to be saying that the investigative leeway afforded law enforcement officers is perhaps somewhat wider in the context of regulatory offences than it is in the context of criminal offences.”

⁶⁷ *R v Moosemay*, 2005 ABPC 13, [2005] AJ No 191 at para 36 [Moosemay].

⁶⁸ *Wildlife Act*, SA 1984, c W-9.1.

⁶⁹ *Supra* note 67 at para 38.

⁷⁰ *Ibid* at para 41.

⁷¹ *R v Clothier*, 2011 ONCA 27, [2011] OJ No 102 [Clothier].

⁷² *Smoke Ontario Free Act*, SO 1994, c 10, ss 3(1), 3(2).

“truly criminal conduct [criminal offences] and conduct that, though not inherently wrong, is nonetheless prohibited for the protection of the public [regulatory offences].”⁷³ Laskin JA classifies the *Smoke Ontario Free Act* as regulatory in nature and notes that the strict liability offence does not include imprisonment,⁷⁴ but is “important public health” legislation which restricts the sale of a “dangerous product.”⁷⁵ He decides that entrapment does not apply to the *Act* because the rationales underlying the doctrine of entrapment in criminal law “have no relevance to a charge under the *Smoke Free Ontario Act*.”⁷⁶ With regard to the concern over an invasion of privacy, he writes, that the “concern that random virtue testing will result in too great an invasion of privacy...simply does not apply in this regulatory context”⁷⁷ Secondly, “virtue” is irrelevant to random test shopping because it “is a strict liability offence [and] a person can be convicted for merely being negligent.”⁷⁸ A third reason entrapment does not apply is that test shoppers provide the same opportunity as other customers, and so any invasion of privacy is “minimal at best.”⁷⁹ Laskin JA adds that random virtue testing “is the most effective way to achieve the government’s purpose of ensuring compliance.”⁸⁰

Some of the above cases are ripe with unnecessary moral judgment about what is a crime and what is a regulatory offence. They make it very difficult to determine when entrapment applies, as the decision is left to individual judges to decide what is a “mere” regulatory offence and what attracts sufficient stigma of a “real crime,”⁸¹ and hence the doctrine of

⁷³ *Supra* note 71 at para 21.

⁷⁴ *Ibid* at para 22.

⁷⁵ *Ibid*, *R v Seaway Gas & Fuel Ltd* (2000), 47 OR (3d) 458 cited in *Clothier* at para 25.

⁷⁶ *Supra* note 71 at para 33.

⁷⁷ *Ibid* at para 38.

⁷⁸ *Ibid* at para 39.

⁷⁹ *Ibid* at para 40.

⁸⁰ *Ibid* at para 45.

⁸¹ This complex artificial distinction was questioned by the Law Reform Commission of Canada in 1976 (*Report: Our Criminal Law* (Ottawa: Law Reform Commission of Canada, 1976)), and was then again the subject of research by the Law Commission of Canada (ed) (*What is a Crime?* (Ottawa: Law Commission of Canada, 2004)) and in a second edited volume sponsored by the Law Commission of Canada: Janet Mosher & Joan Brockman, eds, *Constructing Crime: Contemporary Processes of Criminalization* (Vancouver: UBC Press, 2010). Also see Alan N Young, “Done Nothing Wrong: Fundamental Justice and the Minimum Content of Criminal Law” (2008) 40 SCLR

entrapment. The fact that the Supreme Court of Canada has recognized the defence of officially induced error in the prosecutions of regulatory (strict liability) offences and compared it with the excuse of entrapment bolsters the position that entrapment is applicable to regulatory offences.⁸² The controversy could be bypassed if the legislators simply made their wishes known as to whether or not random testing was appropriate; and, if so, what was required prior to its use. Then the question the courts would have to decide is whether legislated random testing violates s. 8 of the *Charter*. Such an analysis would engage the issue of privacy⁸³ and the question of whether the use of undercover agents is an appropriate investigative tool for such offences.

In the absence of legislation allowing for random testing (that is testing without reasonable suspicion or a bona fide inquiry), the entrapment doctrine should be applicable to all offences. This approach was taken by MacAdam J in *R v. Sobeys Inc.*, deciding that because the Nova Scotia *Tobacco Access Act*⁸⁴ allows for “test purchases” (i.e., random testing), any argument about entrapment would require the accused to first challenge the validity of the legislation under the *Charter*.⁸⁵ Ontario Justice of the Peace Quon, in *R v. Hong*,⁸⁶ relies on the *Sobeys* case to find that, in the absence of legislation allowing for random virtue testing, anyone convicted of selling cigarettes to a minor test purchaser could argue entrapment.⁸⁷ Since there was no reasonable suspicion or a bona fide inquiry in the circumstances (the first branch of the entrapment doctrine), the Justice of the Peace stayed the charges.⁸⁸

441. What is a crime is politically and socially constructed not only through legislation but also through its enforcement and threats of enforcement.

⁸² *Lévis (Ville) c Tétreault*, 2006 SCC 12, [2006] 1 SCR 420 at para 27 [Levis].

⁸³ *Hunter et al v Southam Inc.*, [1984] 2 SCR 145 at 159 [Hunter].

⁸⁴ *Tobacco Access Act*, SNS 1993, c 14.

⁸⁵ *R v Sobeys Inc.*, [2000] NSJ No 32 at para 21 [Sobeys]. The accused had not challenged the legislation in this case.

⁸⁶ *R v Hong* [2001] OJ No 568 [Hong]. Justice of the Peace Quon was examining the *Tobacco Control Act*, SO 1994, c 10 which was later replaced by the *Ontario Smoke Free Act*.

⁸⁷ *Ibid* at paras 75-78.

⁸⁸ *Ibid* at paras 83-93.

In *R v. Myers*,⁸⁹ McLellan J upholds the trial judge's decision to enter a stay of proceedings based on entrapment after Myers sold tobacco to an under-aged test shopper, contrary to the *Tobacco Act*.⁹⁰ There is no discussion surrounding the question of whether entrapment is applicable to this federal offence; however the court notes that there is nothing in the legislation that allows for test shopping.⁹¹ The judge rejects the notion that testing all tobacco retailers in Regina, without any reasonable suspicion, constitutes a *bona fide* inquiry.⁹²

After citing the Saskatchewan Queen's Bench decision in *Myers* for the proposition that the doctrine of entrapment applies to prosecutions under the *Tobacco Act*, Alberta Provincial Court Judge Sully enters a stay of proceedings in *R v. Tyzuk*,⁹³ finding that there was no reason to target the accused with test shoppers as the store had a record of compliance, and there was no *bona fide* reason to target all 140-150 stores in Alberta.⁹⁴

A number of cases decide the entrapment issue without first analyzing whether the entrapment doctrine is applicable to the offence. Some decisions are decided on the first part of the test (do agents have reasonable suspicion to target an individual or are they engaged in a *bona fide* inquiry?), and there is no need to move to the second part (did they go beyond providing an opportunity?) For example, in *R v. Unterschute*,⁹⁵ Veale J upholds the trial judge's decision to enter a stay of proceedings based on entrapment after Unterschute sold liquor to an undercover police officer, contrary to the *Liquor Act*.⁹⁶ The police had no reason to suspect Unterschute of bootlegging, and the fact that Unterschute knew bootleggers in Pelly Crossing (a village of 300) did not provide the investigators with a *bona fide* reason to target the entire village.⁹⁷

⁸⁹ *R v Myers*, [1999] SJ No 671 [Myers SKPC]; appeal dismissed [2000] SJ No 313 [Myers SKQB].

⁹⁰ *Tobacco Act*, SC 1997, c 13, ss 8(1), 8(2).

⁹¹ *Myers SKQB*, *supra* note 89 at para 9.

⁹² *Ibid* at para 10.

⁹³ *R v Tyzuk*, 2009 ABPC 282, [2009] AJ No 1045 (ABPC) at paras 21, 25 [Tyzuk].

⁹⁴ *Ibid* at para 23.

⁹⁵ *R v Unterschute*, [2004] YJ No 19 (YTSC) [Unterschute].

⁹⁶ *Liquor Act*, RSY 2002, c 140, s 22(4).

⁹⁷ *Supra* note 95 at paras 24-25.

Following a conviction under the *Wildlife Act Commercial Activities Regulation*⁹⁸, for trafficking in eagles in *R v. Sampson*,⁹⁹ BC Provincial Court Judge Blake finds that while the “defence [of entrapment] deserves careful analysis” on the facts, the defence was not made out. The officer had reasonable suspicion and was “following up on a bona fide line of inquiry.”¹⁰⁰ With regard to the tactics used by the undercover officer, Judge Blake writes:

I am certain that the Defendant feels that he was unfairly duped by a charlatan playing the role of a person setting out on a spiritual journey. To some extent I can understand this sense of disillusionment in a man whose spiritual sensibilities I do not doubt. But at the same time, I am completely satisfied that Officer B's actions fall well short of the sort of coercion which the defence of entrapment seeks to address. Officer B was engaged in the investigation of a form of illegal activity, trafficking in wildlife, which would be extremely difficult to root out without the use of the sort of stratagems which are essential to legitimate undercover police work. In doing so, he encountered a man who succumbed all too easily to financial temptation. On balance, Officer B's actions did not exceed the permissible use of governmental power, and accordingly I find that there is no merit to the defence of entrapment in this case.¹⁰¹

Similarly in *R v. Coullonneur*,¹⁰² Saskatchewan Provincial Court Judge Nightingale finds that the investigators had both a reasonable suspicion and were engaged in a bona fide inquiry for the illegal sale of fish under the *Fisheries Act*.¹⁰³ After applying “the non-exhaustive list of factors from *Mack*” in great detail, he concludes that the officers did not entrap the offender.¹⁰⁴ In *R v. Sigurdson*,¹⁰⁵ BC Provincial Court Judge Woodward finds that the use of a decoy deer along a highway was part of a bona fide inquiry, and that there was nothing that unusual about the trophy quality of the deer such that it could be said that the officers were going beyond providing an opportunity.

How would the law on entrapment apply to undercover tactics used to enforce professional monopolies? Given the nature of unauthorized

⁹⁸ *Wildlife Act Commercial Activities Regulation*, BC Reg 338/82.

⁹⁹ *R v Sampson*, 2009 BCPC 36, [2009] BCJ No 197 [*Sampson*].

¹⁰⁰ *Ibid* at para 68.

¹⁰¹ *Ibid* at para 80.

¹⁰² *Coullonneur*, *supra* note 66 at paras 47-48.

¹⁰³ *Fisheries Act (Saskatchewan)*, 1994, SS 1994, c F-16.1 and Regulation 1.

¹⁰⁴ *Supra* note 102 at paras 49-82.

¹⁰⁵ *R v Sigurdson*, 2002 BCPC 19, [2002] BCJ No 170 [*Sigurdson*].

practice and the ease with which targets are caught offering unauthorized services, it is very likely that the focus of an entrapment argument would more often be on the first stage: do the investigators have reasonable suspicion or are they engaged in a bona fide inquiry, rather than on the second stage which determines if agents who meet one of the first two criteria have “gone too far” in their tactics.¹⁰⁶ For example, a law society (without reasonable suspicion) should not be allowed to call up non-practising members of the law society or paralegals and ask them if they can represent them on a legal matter which would violate the law against unauthorized practice. This type of investigation would be random virtue testing and unacceptable.¹⁰⁷ In the unauthorized practice study,¹⁰⁸ the Law Society of British Columbia’s evidence appears to meet the requirement of reasonable suspicion, as its affidavits often referred to complaints prior to sending in a private investigator to gather evidence of unauthorized practice.

The issue of whether undercover investigators went too far in their entrapment was raised tangentially in two of the cases in the unauthorized practice study but was never developed. In the *Law Society v. Gorman*, Gorman’s affidavit alleges that the Law Society had “refused repeatedly” to provide the names of the people who had alleged he was practising law, “save and except private investigators, employed by the Law Society to entrap” him.¹⁰⁹ He also accused the Law Society of “being vindictive, revengeful and vexatious,” and acting in “restraint of trade” to curtail his legitimate business as an agent/property manager.¹¹⁰ Although Morrison J “paid particular attention” to Gorman’s affidavits because he was

¹⁰⁶ *Supra* note 20 at 16. A search of Quicklaw cases turns up no cases where a law society in Canada was accused of entrapment in an unauthorized practice investigation. Targets of these investigations often enter into undertakings or consent injunctions once faced with the evidence of the private investigator.

¹⁰⁷ Although I have no evidence that a law society would engage in this type of investigation, I did as a non-practising member of a law society receive a telephone call that made me wonder if I was being investigated for unauthorized practice. I had never been in private practice in the province and had been on the non-practising list for years. Yet someone called me to see if I could represent them. I raise the example here as a hypothetical one, as I have no idea where the call originated.

¹⁰⁸ *Supra* note 20.

¹⁰⁹ *Law Society of British Columbia v Gorman*, (Vancouver Registry L001154, 2001), (Affidavit of Gorman, 12 December 2001, at para 23) [*Gorman*].

¹¹⁰ *Ibid* at paras 25-26.

unrepresented, she did not address the issue of entrapment in her decision to grant an injunction. In the *Law Society v. Blanchette*, Blanchette alleged that the Law Society's use of a private investigator "begs the question of fraudulent misrepresentation and possible entrapment."¹¹¹ There was, however, no mention of entrapment in the decision to grant the injunction or in the Court of Appeal decision.¹¹²

To summarize, although the case law is somewhat conflicting, it can be argued that in the absence of legislation allowing random virtue testing, the defence of entrapment is available for regulatory offences, including violations of unauthorized practice legislation. Legislation allowing for random virtue testing could be challenged under s. 8 of the *Charter* as allowing for unreasonable search and seizure. The application of s. 8 of the *Charter* also raises the question of whether undercover operators should be used at all.¹¹³ The argument that such undercover operations violate privacy would likely be successful against unauthorized recordings of these undercover operations,¹¹⁴ but perhaps not against the undercover operation by itself.¹¹⁵

IV. PROFESSIONAL ETHICS AND COURTESY

The *Lagerbom* case in 2006 raises the question: what are the professional rules surrounding the use of undercover agents by professional SROs when it comes to enforcing their monopolies? The notaries' panel called the BC Law Society's deception in using an

¹¹¹ *Law Society of British Columbia v Blanchette and Kessler doing business as the Public Advocacy Society*, Kelowna Registry, 2002 No S56543 (Affidavit of Blanchette, 2 April 2002 at para 15).

¹¹² *Law Society of British Columbia v Blanchette and Kessler doing business as the Public Advocacy Society*, 2003 BCSC 89; 2003 BCCA 221.

¹¹³ Ian Bailey, "The police sting that netted a drunk driver", *The Globe and Mail* (23 August 2012), online: <<http://www.theglobeandmail.com/news/british-columbia/the-police-sting-that-netted-a-drunk-driver/article1387826/>>. In response to the use of an undercover operation to obtain incriminating statements from Carol Berner, defence counsel David Tarnow stated, "This was a case of impaired driving. In my respectful view, it really isn't the kind of case where that kind of tactic should be used".

¹¹⁴ *Pollock MBCA*, *supra* note 26.

¹¹⁵ *Markandey*, *supra* note 31.

undercover agent against a notary as “reprehensible.” The notary panel was criticizing the Law Society’s use of a private investigator to investigate whether a notary was providing legal advice contrary to the *Legal Profession Act*¹¹⁶ and thereby engaged in the unauthorized practice of law. The panel went on to say:

The use of outright deception by the Law Society to entrap Notaries makes one wonder if such activity is really in the public’s best interest. Even the Law Society’s own members would be justifiably appalled at the tactics used by their governing society, were they to learn about them.¹¹⁷

The professional rules surrounding the use of undercover agents by professional SROs are relevant to law societies which direct investigations of unauthorized practice and lawyers who may be involved in advising or directing such investigations as in-house or *ad hoc* counsel for other professional SROs.

In 1987, the Canadian Bar Association’s (CBA) *Code of Professional Conduct*, Rule 1.3 footnote 3 illustrated conduct that may infringe Rule 1 on Integrity, including “(g) knowingly assisting, enabling or permitting any person to act fraudulently, dishonestly or illegally towards the lawyer’s client”. In 2009, the phrase “towards the lawyer’s client” was removed so that illustrations of breaches of integrity included: “knowingly assisting, enabling or permitting any person to act fraudulently, dishonestly or illegally.”¹¹⁸ There was no explanation or discussion at the Council level as to why the section was broadened by removing the reference to a lawyer’s client.¹¹⁹ In 2009, the Federation of Law Societies of Canada (FLSC)

¹¹⁶ *Legal Profession Act*, SBC 1998, c 9.

¹¹⁷ *Supra* note 18 at 4. What the notaries panel found offensive was not the use of undercover tactics but the fact that undercover tactics were used against another profession. In commenting on the *Gravelle* case (*Law Society of British Columbia v Gravelle*, 2001 BCCA 383 [*Gravelle*]), Adrian Chaster (lawyer for the Society of Notaries Public) commented, “they’re now talking to each other, which is good...so we don’t have situations like the law society secretly sending out private eyes to stop someone from doing something we say that person can do...”. B Daisley, “B.C. Notary Slapped with Permanent Injunction” (6 November 1998) 18(25) *Lawyers Wkly* 6. The Law Society sent a private investigator to notary public Marian Gravelle’s office during a time when the notaries and lawyers were disputing jurisdiction over probate matters.

¹¹⁸ The Canadian Bar Association, CBA Code of Professional Conduct, Ottawa: CBA, 2009, c 1, rule 1.5(g).

¹¹⁹ Correspondence from the Canadian Bar Association to the author (March 28, 2014).

developed a *Model Code of Professional Conduct* in a move towards encouraging law societies to harmonize standards, and the CBA stopped updating its *Code*.¹²⁰

The FLSC *Model Code* does not include a similar illustration of what is prohibited under Integrity. When asked why not, the Federation explained that the Code states broad principles and rules and that “Fraud, dishonesty and illegal conduct are all prohibited by the general requirement to act with integrity.” Dishonesty and fraud are further addressed directly in rule 3.2-7: “When acting for a client, a lawyer must never knowingly assist in or encourage any dishonesty, fraud, crime or illegal conduct, or instruct the client on how to violate the law and avoid punishment.”¹²¹ This rule reintroduces a reference to the client but in a slightly different way than the CBA’s 1987 rule. It appears sufficiently broad to prohibit lawyers from directing undercover agents for their clients.

Although the FLSC was not influenced by the American Bar Association’s discussion around the use of deception by lawyers,¹²² it may be worth considering some of the developments in the United States. After a number of cases involving lawyer deception in the United States,¹²³ the courts and the legislators began making rules for which lawyers could act deceptively (in some cases prosecutors could, but defence counsel could not) and the terms of that deception (some were only allowed to direct deception, not engage in it).¹²⁴ After reviewing these developments,

¹²⁰ Correspondence from the Federation of Law Societies to the author (June 3, 2014): The Federation developed national standards in response to the National Mobility agreement that the law societies entered into beginning in 2002.

¹²¹ *Ibid.*

¹²² *Ibid.*

¹²³ See, for example, William J Stuntz, “Lawyers, Deception, and Evidence Gathering” (1993) 79:8 Va L Rev 1903; Monroe Freedman, “Ethical Problems Involved in Undercover Operations against Lawyers—The Congressional Testimony of Monroe Freedman” (1984) 9 J Leg Prof 73.

¹²⁴ American Bar Association, *Model Rules of Professional Conduct*. Rule 5.3 makes a lawyers ethically responsible “with respect to a nonlawyer employed or retained by or associated with the lawyer.” See Kevin C McMunigal, “Investigative Deceit” (2011) 62 Hastings LJ 1377 for a detailed analysis of these and related ABA’s rules on deceit and their implications. In practice, American lawyers violate these rules on a regular basis, and state bar associations have modified the rules to exempt prosecutors (asymmetrical), exempt prosecutors and defence counsel (symmetrical), or exempt

Lucas argues that the ABA Model Rules should address this “vexing” problem by including what he refers to as an “investigative deception exception,” so that lawyers are allowed to direct non-lawyers to engage in deception in some circumstances, but not to engage in unlawful activities themselves.¹²⁵ Lucas writes that allowing lawyers to engage in lies and deception would reinforce “negative stereotypes of attorneys as liars and cheats and encourage people to avoid attorneys;” the result would be that people would avoid lawyers and “then the legal profession’s standing and ability to support our judicial system and rule of law will diminish.”¹²⁶

A search of the Quicklaw database (court cases) turns up one instance where a law firm was identified as directing an undercover operation to enforce unauthorized practice legislation. In *Markandey v. Ontario Board of Ophthalmic Dispensers*, the law firm that was general counsel and prosecutor for the Ophthalmic Dispensers Board sent one of its articling students in as an undercover shopper to see if the target was improperly dispensing contact lenses contrary to the regulations under the *Ophthalmic Dispensers Act*.¹²⁷ The student had fairly specific instructions including “Your responsibility is not to obtain a conviction but merely to record the facts of your investigation.”¹²⁸ The respondent argued that the use of the articling student in these circumstances proved professional misconduct by her principals violating a) Rule 1: requiring integrity in practice; b) Rule 24: the duty of an articling principal “to convey to the student an

people acting at the behest of lawyers, but not lawyers themselves. See McMunigal at 1384-1391. He also discusses the pros and cons of allowing lawyers to engage in deceit at 1391-1396.

¹²⁵ Tory L Lucas, “To Catch a Criminal, to Cleanse a Profession: Exposing Deceptive Practices by Attorneys to the Sunlight of Public Debate and Creating an Express Investigation Deception Exception to the ABA Model Rules of Professional Conduct” (2010) 89 Neb L Rev 219 at 251-253. See also Michael Bonsignore, “Rules Exist for a Reason: A Commentary on Lawyers Hiring Investigators to Partake in Deceptive Tactics” (2008) 21 Geo J Leg Ethics 21; H Morley Swingle & Lane P Thomasson, “Big Lies and Prosecutorial Ethics” (2013) J Missouri Bar 84; Will Hill Tankersley & Conrad Anderson, “Fishing with Dynamite: How Lawyers can Avoid Needless Problems From ‘Pretextual Calling’” (2008) 69 Ala L Rev 182.

¹²⁶ Lucas, *ibid* at 253.

¹²⁷ *Ophthalmic Dispensers Act*, RSO 1990, c O-43.

¹²⁸ *Markandey*, *supra* note 31 at para 12. Trafford also writes, “To conduct an inspection in the regulatory context is one thing; to conduct an undercover investigation in the same context is another very different thing” (para 39).

appreciation of the traditions and ethics of the profession”; and c) Rule 17: to ensure that outside activities do not interfere with professional integrity. Trafford J writes:

Although this use of articling students may have been inadvisable, I am not prepared to conclude it is in violation of any of the Rules of Professional Conduct of the Law Society of Upper Canada. The instructions do, I emphasize, create an opportunity for an optician to be unprofessional in his or her practice but they do not lead inexorably to such misconduct. This is particularly so as the students are instructed to accurately record the facts of the investigation - it is not their responsibility to obtain a conviction.¹²⁹

The use of deceptions by lawyers, whether working for private firms, governments, corporations, law societies, or other professional bodies is a complex area of the law. It needs more attention and research in Canada. In the absence of legislation or judicial clarification, the FLSC should consider setting ethical guidelines for lawyers caught up in enforcing unauthorized practice legislation.

V. CONCLUSIONS

The use of undercover investigators appears to be on the increase, ranging from Mr. Big investigations of murder suspects to the more mundane enforcement of professional monopolies. This paper raises a number of issues regarding the use of undercover agents to enforce unauthorized practice legislation that spill over into a more general concern about the use of undercover agents in a free and democratic society. Deceptive investigations can be characterized as an invasion of our privacy, as discussed by Karakatsanis J in *Hart*. Yet, the courts still maintain that judicial authorization is only necessary when such invasions are electronically recorded, and judicial restrictions (so far) are limited to aggressive Mr. Big investigations. When it comes to what the Supreme Court of Canada will allow undercover officers to do in order to gather evidence to “solv[e] serious crimes,”¹³⁰ the tolerance level is very high. The notion that investigative techniques have “proved indispensable [*sic*] in the

¹²⁹ *Ibid* at para 41. In para 46 he refers to the use of articling students as “shoppers” as “inadvisable.”

¹³⁰ *Hart*, *supra* note 5 at para 3.

search for truth”¹³¹ appears to have priority over the damage that might be done to individual privacy and personal integrity.

One solution to invasion of privacy during the more mundane undercover investigations,¹³² such as enforcing monopolies, could be to apply the law surrounding entrapment to such undercover work. Such a requirement would at least ensure that undercover operations are directed at persons where there is “a reasonable suspicion” that the target is “already engaged” in the prohibited activity or the investigation is “pursuant to a bona fide inquiry.”¹³³

The Supreme Court of Canada in *Mack* (in the context of the entrapment defence) expressed concern over “the manufacture of crime,” “the power of the state to manipulate people,” and “testing the virtue” of people.¹³⁴ Legislation that creates a professional monopoly should also prohibit random virtue testing. This prohibition would eliminate the impossible task of differentiating between “real crime” and regulatory offences and make it clear that investigations will be limited to where there is “a reasonable suspicion” that the target is “already engaged” in the prohibited activity or the investigation is “pursuant to a bona fide inquiry.”¹³⁵

Another solution would be to require judicial authorization to conduct such investigations. Such authorizations could be designed to include the requirements of judicial authorization for surreptitious interception of communications under s. 185 of the *Criminal Code* (requiring an evaluation of such techniques in light of the “best interests of the administration of justice” and whether “other investigative procedures have been tried and have failed”) or the less stringent requirement under s. 184.2 for one-party consent authorizations. Interception of private communication is viewed as a serious invasion of our privacy. So should undercover work. It may be time to revisit what we will tolerate in a “civilized society” concerned with “fairness and justice”¹³⁶

¹³¹ *Ibid* at para 4.

¹³² See footnotes 4 and 5 for recommendations for ways to reign in the more aggressive and more deceptive Mr. Big operations.

¹³³ *Mack*, *supra* note 36 at para 134.

¹³⁴ *Ibid* at paras 75 and 133.

¹³⁵ *Ibid* at para 134.

¹³⁶ *Ibid* at para 76.

and question the circumstances, if any, under which professional SROs should be allowed to engage in “reprehensible” tactics and “outright deception” to enforce their monopolies.