August 18, 2016

Terrorism and Entrapment in the Era of Increased Scrutiny of Police

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Case Commented On: *R v Nuttall*, 2016 BCSC 1404 (CanLII)

On July 1, 2013, John Nuttall and Amanda Korody placed three pressure cooker bombs in the bushes next to the British Columbia Parliament Buildings ("the Legislature") in Victoria, B.C. The contents of the explosive devices included nuts, bolts, nails, washers and other materials intended to kill or maim people. Luckily, the bombs never detonated. It became public knowledge immediately after the incident that the devices were inert and were manipulated by the RCMP before Nuttall and Korody got their hands on them. The RCMP clarified that while the threat was real the public was never at risk as the threat was detected early and disrupted.

The initial reports indicated that Nuttall and Korody were a couple living in Surrey in the Lower Mainland and were converts to Islam who were self-radicalized. Over the following weeks, more details began to emerge about an elaborate RCMP and CSIS led investigation – Project Souvenir – that had been involved with Nuttall and Korody in the months, weeks, days, and hours leading up to the bombs being planted.

On June 2, 2015, Nuttall and Korody were convicted by a jury of a number of terrorism offences, but their convictions were not entered as they immediately applied for a stay of proceedings based on the conduct of the RCMP during its undercover investigation. This is known as entrapment. As I will describe below, entrapment occurs when someone is induced to commit a criminal offence as a result of unfair law enforcement practices such as trickery, persuasion or fraud.

In Canada, in a trial for a terrorism related offence, an accused person cannot put the defence of police entrapment before a jury and so Nuttall and Korody bore the burden of proving entrapment, on a balance of probabilities, in front of Madam Justice Catherine Bruce of the British Columbia Supreme Court in Vancouver, who was also the presiding judge during the jury trial. In a 288-page opinion, Justice Bruce found that, for the first time in Canadian history, defendants had been entrapped by the RCMP into committing a terrorist act.

In this post, I will first lay out the underlying facts of the RCMP's involvement with Nuttall and Korody, and then examine the existing law of entrapment and how it was applied by Justice Bruce to the facts of this case.

Underlying Facts of Project Souvenir (from paras 15-471)

The RCMP became involved with Nuttall in February 2013 when they received a tip that he was attempting to purchase potassium nitrate, a precursor to an explosive substance, at local pharmacies in Surrey. The RCMP had previously received tips in July and October 2012 from a neighbour who overheard Nuttall speaking on the phone espousing violent Islamic beliefs following his conversion to Islam in 2011.

A psychiatric nurse attended Nuttall's residence and concluded he was not suffering from a mental illness, though he might be developmentally delayed. At this time, the RCMP began Project Souvenir after CSIS passed on information that Nuttall constituted a "threat to public safety" (at para 20). The concern was that Nuttall might be a recent Muslim convert who was attempting to recruit others and might be capable of violence.

The RCMP surveillance on the pair began on February 2, 2013, when two officers attended the Nuttall residence on the pretext of a domestic complaint in the neighbourhood. While they didn't find anything suspicious in the residence, they continued enhanced surveillance over the following months, including direct contact with the pair through scenarios where an undercover officer ("Officer A") would make up a scenario that would bring him into direct contact with Nuttall and attempt to get Nuttall's assistance in completing a task. The first task was an attempt to find Officer A's niece, who in the scenario was someone who ran away from home due to her family's strict adherence to conservative beliefs about Muslim women. This scenario was intended to play on Nuttall's increasingly radicalized Islamic beliefs.

The scenarios gradually ratcheted up to plans to get Nuttall to devise a terrorist plan and execute it (with the idea being that the RCMP would intervene at the last minute and arrest the pair). Officer A told Nuttall that he was now part of Officer A's "organization", which was a jihadist organization, planning a large scale attack on the West. But Nuttall had to come up with the plan for the attack. These ranged from an attempt to blow up the naval base in Esquimalt Harbour, to hijacking a passenger train in Victoria, to the eventual plan to plant pressure cookers on the grounds of the Legislature, similar to the tactics used in the Boston Marathon bombing in 2013.

Unfortunately for the officers involved in Project Souvenir, Nuttall proved to not be particularly competent, organized, or able to devise a plan and come up with the details to execute it. Frequently he would concoct wild and unrealistic plans, including: firing Qassam rockets over the Legislature in Victoria, freeing Omar Khadr from prison, launching some sort of attack on the Vancouver Sun Run, and freeing prisoners from Guantanamo Bay.

Following a few months of failed plans and a lack of hard evidence to tie Nuttall and Korody to violent jihad, the members of Project Souvenir changed tack to attempt a more traditional "Mr. Big" style operation on the pair. In this scenario, Officer A would introduce Nuttall to another undercover officer, who would be a fictitious leader of a jihadist organization and he would press Nuttall to choose a target and execute a terrorist attack.

Officer A began to turn up the heat on Nuttall by getting mad at him and threatening to expel him from his organization, unless Nuttall could come up with a workable plan for an attack. Officer A promised to finance the plan if Nuttall could come up with a realistic plan of attack.

Eventually, a plan came together about planting pressure cookers on the grounds of the Legislature in Victoria. Nuttall demonstrated time and time again that he had no idea how to make an explosive. The RCMP took the pair to Kelowna in order to have Nuttall plan out the attack. It became clear that he had no idea how much black powder or C4 (a form of plastic explosive used in the making of bombs) he would need for his rockets. He had no idea where to get explosives. However, Officer A again eliminated Mr. Nuttall's lack of knowledge and resources as obstacles by promising to provide him with all the C4 that he would require. In fact, during the Kelowna trip Nuttall and Korody told the fictitious leader of the jihadist organization that they felt pressured by Officer A to support a plan that was quick and that he was not

interested in helping them with their long-term plan to build rockets, which was their dream.

At para 375, Justice Bruce summarized many of the things Officer A did for Nuttall and Korody in the days leading up to the pressure cookers being planted:

> Officer A systematically eliminated all of the obstacles that Mr. Nuttall had previously placed in his own path towards executing a plan for jihad. In particular, Officer A said that he would take care of the explosives and the guns; he would drive them around to shop for anything they required to build the bombs; he would give them the tools they needed; he had already found them a place where they could construct the devices; he would take them to Victoria a day prior to locate targets and transport them to the location where they would place the bombs. He would also provide them with a safe place to test their bombs. In addition, Officer A said he would do whatever he could to ensure that the defendants stayed alive after they planted the bombs. It was not going to be a suicide mission.

Law on Entrapment

The Supreme Court of Canada (SCC) developed the doctrine of entrapment in three major decisions: *R v Amato* [1982] 2 SCR 418 (CanLII), *R v Mack*, [1988] 2 SCR 903 (CanLII), and *R v Barnes*, [1991] 1 SCR 449 (CanLII), though *Mack* remains the leading case. In *Mack*, the police engaged a known drug dealer to act as their agent in the investigation of Mr. Mack for drug trafficking because he was someone previously known to Mack. The drug dealer repeatedly solicited Mack's participation in drug transactions, and eventually an undercover officer offered Mack $50,000 in clandestine circumstances at which point Mack agreed to arrange a drug transaction and was arrested upon delivery.

Justice Lamer, writing for the Court, concluded that entrapment occurs in circumstances where:

1. 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* police inquiry (known as "random virtue testing"); or

2. Although the police have a reasonable suspicion or are acting in the course of a *bona fide* police inquiry, they go beyond providing an opportunity and **induce** the commission of the offence. (known simply as "inducement") (*Mack* at para 130)

At paragraph 557 of *Nuttall*, Justice Bruce interpreted the principles from *Mack* to mean that the police are not entitled to embark on an investigation into criminal activity that includes providing a person with "an opportunity" to commit an offence unless they are acting on a reasonable suspicion that this person is already engaged in the type of criminal misconduct under investigation. Reasonable suspicion means more than **mere suspicion** but is less than **reasonable and probable grounds**. As explained in *Mack*, the absence of a reasonable suspicion may indicate that the police are engaged in random virtue-testing or, worse, acting in bad faith based on improper motives (*Mack*, at para 112).

Importantly, the second part of the entrapment defence outlined in *Mack* states that even where the police have reasonable suspicion that a person is already engaged in the type of criminal misconduct under investigation, the police may not induce the commission of an offence.

Application of Law to the Facts of this Case

1. *Reasonable Suspicion*

On the first part of the entrapment argument, Justice Bruce found that the police had very little evidence at the commencement of Project Souvenir to support any reasonable suspicion that Nuttall and Korody were **already** engaged in criminal activity of any type (at para 615). Justice Bruce found that the expression of radical beliefs, without more, is not enough to provide police with a reasonable suspicion that such a person is involved in criminal activity (at para 617).

At para 622, Justice Bruce held:

> An opportunity is a situation in which something one wants to do is made possible; however, a possibility is not an opportunity, it is only something that might happen sometime in the future…. The question is when or if any of the statements made by Officer A amounted to a true opportunity to commit a terrorism offence.

The Defence argued that when Officer A committed unconditionally to provide C4 to Nuttall in June 2013, the pair was induced into committing a terrorist offence. The question then turned to whether, at that point, Nuttall and Korody were already engaged in criminal activity. The Crown argued that even this offer of C4 did not constitute the provision of an opportunity to commit an offence.

At para 631, Justice Bruce held that:

> In my view, Officer A's offer was not merely an inquiry into whether the defendants were willing to engage in a terrorist act or some other type of preliminary step in the investigation. Nor was the offer necessary to perpetuate contact with the defendants who were by this time desperate to be with Officer A. It was a firm and specific opportunity and not a mere possibility that was communicated to the defendants. Accordingly, I find the RCMP presented the defendants with an opportunity to commit a terrorism offence when Officer A committed unconditionally to provide the C4 for the pressure cooker devices on June 16, 2013.

Justice Bruce was satisfied that, by June 2013, Nuttall had proven his ineptitude, his "scatterbrained character", and his inability to remain focused on a task, which would be "essential to the articulation and execution of a terrorist plot" (at para 634). She found that, at the time of the offer of C4, there "was little objective evidence to support a reasonable suspicion that Mr. Nuttall was already engaged in criminal activity related to terrorism." (at para 648)

2. *Inducement*

Justice Bruce also addressed the inducement issue, in case she was wrong that the RCMP lacked reasonable suspicion that Nuttall and Korody were already engaged in criminal activity.

In *Mack*, Lamer J. outlined a series of factors relevant to the assessment of whether police went beyond opportunity and strayed into inducement. These include: deceit, fraud, implied threats, exploitation of vulnerabilities and friendship, any police conduct that undermines constitutional values, and whether police conduct was persistent and proportional, and whether it included any illegal acts (*Mack* at para 125). Justice Bruce found that all these factors were engaged in this

case. At para 769, she found that:

> Based on the evidence before me, I am satisfied that the RCMP knowingly exploited the demonstrated vulnerabilities of the defendants in order to induce them to commit the offences. They adopted a multi-faceted approach that included most of the factors in favour of a finding of entrapment articulated in *Mack*, including the use of trickery, fraud and reward; the use of persistent direction to become more organized, focused and realistic in their jihadist ideas; the use of persistent veiled threats to adopt the pressure cooker plan as their own and to abandon the grandiose ideas that the police knew the defendants could never accomplish; the exploitation of the defendants' social isolation and desperation for friendship with Officer A, as well as their ongoing search for spiritual meaning in their lives; the creation of an elaborate ruse that led the defendants to fear for their lives if they failed to satisfy this sophisticated international terrorist organization; the repeated angry encounters with undercover officers who played roles as terrorists; and the decision to play the role of the defendants' spiritual advisor and exploit the influence Officer A had secured over them to direct their actions towards the use of violence to accomplish religious and political objectives.

The Court's Conclusion

Finding that the test laid out in *Mack* for raising the defence of entrapment was met, Justice Bruce held that this was a case where a stay of proceedings was warranted due to an abuse of process by the RCMP. She found that this was truly a case where the RCMP manufactured the crime: "[t]he police took two people who held terrorist beliefs but no apparent capacity or means to plan, act on or carry through with their religiously motivated objectives and they counselled, directed, urged, instructed and moulded them into people who could, with significant and continuous supervision and direction by the police, play a small role in a terrorist offence." (at para 775)

In overturning the jury's verdict, this case became the first instance in Canada where the defence of entrapment succeeded in a terrorism-related offence. Justice Bruce delivered a scathing critique of the RCMP's conduct in this case. She said, "Simply put, the world has enough terrorists. We do not need the police to create more out of marginalized people who have neither the capacity nor sufficient motivation to do it themselves." (at para 836) The Crown immediately announced that they would appeal Justice Bruce's decision to the British Columbia Court of Appeal.

It will also be interesting see what impacts the amendments to the *Criminal Code*, RSC 1985, c C-46 through the passing of Bill C-51 will have on future cases where entrapment is argued in a terrorism context. The new section 83.221 of the *Code* states:

> Every person who, by communicating statements, knowingly advocates or promotes the commission of terrorism offences in general — other than an offence under this section — while knowing that any of those offences will be committed or being reckless as to whether any of those offences may be committed, as a result of such communication, is guilty of an indictable offence and is liable to imprisonment for a term of not more than five years.

The Crown raised this section of the *Code* but Justice Bruce dismissed its application, seeing as this section of the *Code* was not in existence at the time of Project Souvenir or the planting of the pressure cookers by Nuttall and Korody.

Whether or not the Crown's appeal succeeds, we truly are in a watershed moment with respect to police actions in the context of home-grown terrorism.