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What is the Threshold for Entrapment?

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In the heist film "Entrapment," Mac, a professional thief (played by Sean Connery), says, "I don't like surprises." Gin, an undercover agent pretending to be a thief herself (played by Catherine Zeta-Jones), replies: "Trust me, there won't be any." Mac then replies: "Trust me, there always are surprises." And there always are surprises.

At first glance, *R v Turgeon-Myers*, 2019 ABQB 493, may seem like a case about entrapment. Yet upon closer examination, a careful reader may be surprised to learn that there is an evidentiary issue beneath the issue of entrapment. Similar to my earlier blog article about the informant privilege, *Turgeon-Myers* involved a police informant. This informant provided the police with information about drug trafficking, and the police subsequently conducted an undercover operation to make an arrest. The accused, while initially admitting guilt, applied for a stay of proceedings on the basis of entrapment.

Entrapment is a type of abuse of process. Even when the elements of the offence have been proven, the courts may grant a stay of proceedings on the basis of entrapment, where "a judicial condonation of the prosecution would by definition offend the community" (*R v Mack*, [1988] 2 SCR 903 (SCC), at para 153). The absence of a reasonable suspicion is a factor in determining the existence of entrapment because it is "significant in assessing the police conduct" (*Mack*, at para 133).

The existence of a reasonable suspicion, in turn, must rest on an evidentiary foundation. In *Turgeon-Myers*, the crucial evidence was a phone conversation between the undercover operator and the suspect prior to the arrest. However, the police never made notes of this phone conversation. Given this weak evidentiary foundation for the assessment of a reasonable suspicion, the court should have focused more on the issue of missing police notes about the phone conversation in assessing the existence of entrapment.

The Facts of *Turgeon-Myers*

To understand the claim of entrapment, one must review the events leading to the arrest of Mr. Turgeon-Myers, who was charged for unlawfully trafficking 1.5 grams of cocaine for $160 to a third party in Edmonton, Alberta on 31 January 2017. That third party, to whom he sold cocaine,

was an undercover operator working for the Drug Undercover Street Team (DUST) in Edmonton. The DUST is a combined forces special enforcement unit (CFSEU) that uses specialized investigative techniques to tackle organized and serious crimes.

The chain of events leading to his arrest was triggered by a tip-off from a police informant. The informant told the Stony Plain RCMP that there was a certain male who was using a particular phone number and selling drugs in Edmonton and Stony Plain. Because of the previous relationship between the Stony Plain RCMP and the informant, the Stony Plain RCMP considered this tip-off reliable. The Stony Plain RCMP then relayed the information to a DUST cover manager, who further relayed the information to an undercover operator. The undercover operator received the same information as the original tip-off, with no additional information.

When the undercover operator made a phone call to the particular phone number, a male (identifying himself as "Jay") answered the phone. On the phone, Jay asked the undercover operator how much cocaine he needed. The undercover operator did not answer the question immediately. Instead, the undercover operator asked Jay for the price. Jay replied that he sells a cocaine ball for $80 and 3 balls for $240, to which the undercover operator finally answered that he will take 2 balls for $160. During this conversation, the undercover operator was in a car with his colleague. However, he was not on the speakerphone, and his colleague did not hear the conversation in its entirety. No contemporaneous notes remain of this conversation. As will be discussed later in this post, this phone conversation would become crucial in this case.

After the phone conversation, the undercover operator met Jay in person by West Edmonton Mall. They exchanged cash and cocaine. Later that day, the undercover operator made entries in the Undercover Operator Report ("Report"), noting that he wrote the Report as soon as safely possible after the contact with Jay. The Report referred to the phone conversation with Jay but contained no notes regarding when the offer to sell or buy was made or what words were used in the phone conversation.

The next day, the undercover operator engaged in a similar transaction with Jay. The police arrested Jay during this second transaction. The police later identified Jay as Mr. Turgeon-Myers. He pled guilty to the charges relating to the transaction on 31 January 2017, under section 5(1) of the *Controlled Drugs and Substances Act*, SC 1996, c 19. However, he later applied for a stay of proceedings on the basis of entrapment, which became the central issue of this case.

The Legal Issues

Mr. Turgeon-Myers, while admitting guilt, asked for a stay of proceedings on the basis of entrapment. In determining whether there was entrapment, Justice Renke of the Court of Queen's Bench of Alberta considered the following questions.

First, was the undercover operator under a duty to make notes or records respecting the offers made to the suspect?

Second, did the failure to take notes affect the reliability of the testimony of the undercover operator?

Third, did the undercover operator have a reasonable suspicion that the suspect was engaged in cocaine trafficking, *prior* to making an offer to buy?

The third question is critical in an entrapment case. The court must examine whether the police had a reasonable suspicion based on credible evidence *at the time* the police engaged in the undercover operation. This reasonable suspicion must exist *before* the facts were uncovered. The focus of the entrapment inquiry is on the police conduct leading to the arrest, not the accused's illegal conduct. The fact that the police found the drugs from the accused must not justify the means of the police conduct (*R Hatton*, 2011 ABQB 242, at para 46).

The Law of Entrapment in Canada

In *Turgeon-Myers*, Justice Renke, who was formerly a Vice-Dean of the Faculty of Law of University of Alberta and a professor of criminal law, explained the law of entrapment as "a variant of the abuse of process doctrine" (*Turgeon-Myers*, at para 3). Citing previous case law by the Supreme Court of Canada, Justice Renke defined the two types of entrapment as follows.

The first type of entrapment exists when the authorities provide a person with an opportunity to commit a crime without acting on a reasonable suspicion based on a *bona fide* inquiry (*Mack*, at para 130). A reasonable suspicion is defined as "a robust standard determined on the totality of the circumstances, based on objectively discernible facts, and is subject to independent and rigorous judicial scrutiny" (*R v Chehil*, 2013 SCC 49, at para 3). The policy rationale behind this first type of entrapment is to protect individuals from needless state investigations (*R v Pucci*, 2018 ABCA 14, at para 4).

The second type of entrapment exists when the authorities go beyond merely providing an opportunity but rather induce a person to commit a crime (*Mack*, para 130). The policy rationale here is to prevent the state from creating more crime (*Pucci*, at para 4).

Turgeon-Myers fell under the first type of entrapment concerning a reasonable suspicion (*Turgeon-Myers*, at para 4). A reasonable suspicion must be "more than a mere hunch or intuition but less than a belief based on probable grounds" (*Turgeon-Myers*, at para 7). Moreover, a reasonable suspicion must be objective, and determined on the totality of the evidence (*Turgeon-Myers*, at para 7). If the authorities provided a suspect an opportunity to commit a crime without first having a reasonable suspicion and without making a *bona fide* inquiry, the reasonable suspicion standard would not be satisfied, and there would be a finding of

entrapment (*Turgeon-Myers*, at para 6). The defense of entrapment is only allowed in the "clearest of cases" (*Mack*, at para 154), and the accused bears the burden of proof on a balance of probabilities (*Mack*, at para 5).

The Court's Reasoning in *Turgeon-Myers*

Applying the law of entrapment to the facts of *Turgeon-Myers*, Justice Renke examined how the informant tip-off was relayed to the undercover operator. In Justice Renke's opinion, the initial tip-off received by the Stony Plain RCMP failed the reasonable suspicion standard, since the tip-off was not specific enough, lacked corroborating evidence, and had potential credibility issues regarding the informant (*Turgeon-Myers*, at para 18). Even when the information was passed to the DUST cover manager, there was no reasonable suspicion, because merely relaying the original information was insufficient to transform "suspicion into reasonable suspicion" (*Turgeon-Myers*, at para 32). By the same logic, the information received by the undercover operator also failed the reasonable suspicion standard.

According to Justice Renke, the pivotal moment when the information finally passed the reasonable suspicion standard was during the phone conversation between the undercover operator and Mr. Turgeon-Myers, where additional information gave rise to a reasonable suspicion (*Turgeon-Myers*, at para 82). Mr. Turgeon-Myers disclosed on the phone that the police had caught him before, which was sufficient to give rise to a reasonable suspicion (*Turgeon-Myers*, at para 82). Moreover, the undercover operator let Mr. Turgeon-Myers initiate the transaction and only offered to buy after Mr. Turgeon-Myers proposed the price (*Turgeon-Myers*, at para 83). The incremental steps taken by the undercover operator provided corroborating evidence to transform a suspicion into a reasonable suspicion (*Turgeon-Myers*, at paras 83-84).

This analysis demonstrates the following. First, the suspicion held by the police did not reach a reasonable level *until* the undercover operator communicated directly with the suspect. Second, because the direct communication between the undercover operator and the suspect was pivotal in transforming a mere suspicion into a reasonable suspicion, the police records of this communication would form the evidentiary foundation to prove the existence of a reasonable suspicion, which in turn was important for the entrapment analysis.

In regards to the police records, Justice Renke first examined the law to determine whether there was a legal requirement for the law enforcement to take notes. According to the Canadian case law, the police enjoyed "a wide degree of discretion" on determining what to take down in notes (*R v Medwed*, 2011 ABQB 231, at para 3), and there was no obligation to "collect all available evidence or to record all evidence in the most probative manner" (*R v Dirie*, 2018 ONSC 2269, at para 57). Further, a failure by the police to take notes was "not a breach of any *Charter* right" (*R v Davidoff*, 2013 ABQB 244, at para 28).

Therefore, Justice Renke concluded that "waiting to write the notes until after the drug transaction was concluded fell within the scope of reasonable conduct" (*Turgeon-Myers*, at para 65). While it was *theoretically* possible for the undercover operator to take notes while on the phone, to make a recording of the conversation as he spoke, or to speak on the speakerphone to allow his colleague to take notes, such actions were not necessary (*Turgeon-Myers*, at paras 65-66). In the opinion of Justice Renke, "a failure to record a four sentence or sentence fragment exchanges – would not by itself show improper conduct" on the part of the undercover operator (*Turgeon-Myers*, at para 62).

Having established that there was no duty to take notes, Justice Renke then turned to the question whether the failure to take full notes (and the subsequent shortcomings of the Report) affected the testimony of the undercover operator. Justice Renke reasoned that the lack of notes was one factor to consider in the reliability assessment, which must be conducted on a case-by-case basis (*Turgeon-Myers*, at paras 68-70).

Based on the above analysis, Justice Renke rejected the stay of proceedings based on the defense of entrapment and convicted Mr. Turgeon-Myers for the crime of drug trafficking (*Turgeon-Myers*, at paras 85 and 87).

A Critical Analysis of the Court's Reasoning in *Turgeon-Myers*

While Justice Renke applied the law of entrapment convincingly to the facts of the case, the court ought to have paid more attention to the issue of the missing notes about the critical conversation that took place between the undercover operator and the suspect prior to the arrest. The information held by the police did not become sufficiently accurate, precise, and corroborated to pass the reasonable suspicion standard *until* the phone conversation between the undercover operator and the suspect occurred. Given that this communication was crucial to assess the existence of a reasonable suspicion, how can the court conclude that there was no entrapment when the evidentiary foundation was weakened by the lack of police notes?

(1) The Charter Rights

Given that the entrapment analysis must be based on evidence, the failure of the police to record the critical conversation with the suspect in the Report poses legal issues involving the *Charter* rights. While Justice Renke ruled that the police had no duty to take notes and the lack of notes did not amount to a *Charter* breach, the existence of some notes was critical to determine whether a reasonable suspicion existed prior to the arrest.

While the police had no duty to collect all evidence, the undercover operator – who was from the Edmonton Police Service – had statutory duties and obligations under the *Police Service Regulation*, Alta Reg 356/1990 of the *Police Act*, RSA 2000, c P-17. In the *Police Service Regulation*, "neglect of duty" (at s 5(1)(h)) includes "failing to report a matter that it is his duty

to report" (at s 5(2)(h)(v)). Under the relevant regulations, the police recognized their duty not to act negligently in investigations and had internal disciplinary measures for a failure to report important information.

Furthermore, the Supreme Court of Canada ruled in *R v Stinchcombe*, [1991] 3 SCR 326 (SCC), that the Crown had a duty of disclosure that was essential for the right of the accused to make full answer and defense under s 7 of the *Charter*. While Justice Renke reasoned that the missing notes in the Report was only a factor in the reliability assessment of the testimony of the undercover operator (*Turgeon-Myers*, at para 70), the lack of proper records by the police affected the Crown's ability to disclose fully, which in turn engaged the accused's rights under s 7 of the *Charter*.

Previous Canadian cases suggested differences between the lack of records produced by the police and the destruction of records already created by the police. For example, in *R v Monteith*, 2018 ONSC 2903, the court held that the *lack of records* of a conversation between the suspect of drug trafficking and the undercover operator was to be distinguished from the *destruction of records* (*Monteith*, at paras 24-25).

Furthermore, the Canadian courts handled the lack of police notes differently. For instance, in *R v Moradi*, 2016 ONCJ 829, the court held that the police's ASD demand to the accused had no reasonable suspicion. In this case, one of the factors was that the police lacked notes to demonstrate the existence of a reasonable suspicion prior to the arrest. On the contrary, in *R v Thompson*, 2019 ONCJ 260, the court ruled that the lack of police notes only affected the credibility, since there was corroborating evidence from other witnesses (*Thompson*, at para 88).

In some instances, the courts considered the lack of notes as a serious violation of *Charter* rights. For example, in *R v Nguyen*, 2017 BCPC 131, the court ruled against the admission of evidence under *voire dire* that was obtained from a police search of a vehicle that yielded cocaine. This was because the police made no notes until after the arrest. In *Nguyen*, Judge Arthur-Leung noted, "I am troubled by the complete absence of notes by the officer prior to the accused being arrested" (*Nguyen*, at para 35).

In light of these cases, the circumstances in *Turgeon-Myers* were closer to *Nguyen* and *Moradi*, since the police failed to make notes of the critical conversation that transformed a mere suspicion into a reasonable suspicion (*Turgeon-Myers*, at para 55). Further, *Turgeon-Myers* should be distinguished from *Thompson*. In *Thompson*, the lack of notes was overcome by the totality of evidence because there was "the evidence of others who were present at the scene and whose evidence this court finds credible" (*Thompson*, at para 87). On the contrary, the critical conversation in *Turgeon-Myers* occurred only between the undercover operator and the suspect, with no other witness to provide corroborating evidence. The colleague of the undercover operator, who happened to be in the car when the phone conversation took place, never listened to the entire conversation because the speakerphone was off (*Turgeon-Myers*, at para 48).

Considering that the *Charter* rights were engaged, it should have been more difficult for the court to find the police conduct reasonable in *Turgeon-Myers*.

(2) The Totality of Circumstances

Secondly, in Justice Renke's reasoning, the totality of the circumstances bridged the evidentiary gap created by the missing police notes regarding the phone conversation (*Turgeon-Myers*, at para 82). Justice Renke downplayed this evidentiary gap as "a failure to record a four sentence or sentence fragment exchange" (*Turgeon-Myers*, at para 62), and that "what was missing was but a short passage, only about 4 sentences or sentence fragments" (*Turgeon-Myers*, at para 76). Yet, as noted above, these sentence fragments were not just any sentence fragments; they were an integral part of the evidentiary foundation of this case.

To put this into perspectives, the unrecorded exchange in *Turgeon-Myers* was similar the disputed exchange in *R v Imoro*, 2008 CanLII 30696 (ONSC), where an undercover operator asked a suspected drug dealer "Can you hook me up?" While the trial judge found this statement to be entrapment (*Imoro* (ONSC), at para 53), the higher courts overturned this ruling and considered this exchange a crucial step in ascertaining that the suspect was in fact a drug dealer (*R v Imoro*, 2010 ONCA 122, at para 16; affirmed *R v Imoro*, 2010 SCC 50, at para 1). This *Imoro* trilogy illustrated that the actual exchange with the suspect can have great importance. Similar to *Imoro*, the unrecorded interaction in *Turgeon-Myers* was the tipping point when a mere suspicion became a reasonable suspicion. As such, the court ought to have been more cautious in using the totality of circumstances argument to overcome the evidentiary gap.

(3) The Law of Adverse Inference

Finally, Justice Renke noted that the gap in the police records regarding the critical phone conversation was a factor in his reliability assessment of the undercover operator's testimony (*Turgeon-Myers*, at para 70). However, was weighting alone sufficient for such an evidentiary gap? For the inability of the police to produce this critical piece of evidence, adverse inference may have been more appropriate.

In *R v Jolivet*, 2000 SCC 29, the Supreme Court of Canada held that the adverse inference principle stemmed from "ordinary logic and experience" (*Jolivet*, at para 24). As Lord Mansfield elaborated in an English civil case *Blatch v Archer* (1774), 1 Cowp 63, 98 ER 969, "[i]t is certainly a maxim that all evidence is to be weighted according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted." (*Blatch v Archer*, at 65; cited in *Jolivet*, at para 25). The principle of adverse inference was extended to criminal law in *Graves v United States*, 150 US 118 (1893), a case often cited by the Canadian courts. In *Graves*, the United States Supreme Court held that "[t]he rule, even in criminal cases, is that if a party has it peculiarly within his power to produce witnesses whose testimony would

elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable" (*Graves*, at 121).

In *Turgeon-Myers*, the failure to record the critical conversation in the police notes was not the same as the unwillingness of the police to disclose them. However, as Justice Binnie noted in *Jolivet*, where "the 'missing proof' lies in the 'peculiar power' of the party against whom the adverse inference is sought to be drawn... there is a stronger basis for an adverse inference" (*Jolivet*, at para 27). As summarized in *R v Walter*, 2006 ABPC 135, "if the crown is in sole possession of information which relates to the 'reasonableness' of the police suspicion that the target was involved in criminal activity, then a failure to provide the defence with that information may well result in an adverse inference being drawn against the Crown" (*Walter*, at para 23). In *Turgeon-Myers*, the police could not produce the evidence to support its reasonable suspicion because the police never made notes; yet even so, the police had the power to make these notes.

I also refer to *R v Peters*, 2002 CanLII 49629 (ONSC), where the facts were remarkably similar to those in *Turgeon-Myers*. In *Peters*, a confidential informant provided the police with a name and a pager number, which on their own were merely "a bald allegation" (*Peters*, at para 40). After an exchange between an undercover operator and the suspect, the police arrested the suspect. Justice Ferguson, however, stayed the proceedings for entrapment because the police failed to provide the informant file. Justice Ferguson noted that the court needed to know "what was known to Dobbs [the undercover operator] before calling the pager number" (*Peters*, at para 49). Given that the police did not provide this evidence, Justice Ferguson held that "the court is justified in drawing an adverse inference" (*Peters*, at para 58). Given the similarities in facts, the court's reasoning in *Peters* was the alternative path the court could have taken in *Turgeon-Myers*.

Turgeon-Myers was about the lack of evidence, not the unwillingness of the police to disclose evidence. Yet despite this difference, viewed in light of the case law above, the failure of the police to record the critical conversation ought to have raised the question of adverse inference.

Conclusion

Tur*geon-Myers* demonstrated the difficulties of reconciling the reality of undercover operations with the rights of the accused. For a well-functioning criminal justice system, the state must be allowed to use special investigative techniques in tackling organized crime, but at the same time, the state must not infringe on individuals' rights protected by the *Charter*. In *Turgeon-Myers*, the failure of the police to make notes of the critical phone conversation between the suspect and the undercover operator created evidentiary issues for determining the existence of entrapment. The real legal issue of *Turgeon-Myers* that ought to have received more attention from the court was the evidentiary question *underneath* the entrapment issue.

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