CITATION: R. v. Clothier, 2011 ONCA 27
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COURT OF APPEAL FOR ONTARIO

O'Connor A.C.J.O., Laskin and Gillese JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Matthew Clothier

Appellant

Paul Burstein, Lauren Cook and Clifford G. Proudfoot, for the appellant

Deanna Exner and Donna Glassman, for the respondent

Heard: June 3, 2010

On appeal from the decision of the Provincial Offence Appeal Court dated October 14, 2009 by Justice G. Mark Hornblower from the Ontario Court of Justice, dismissing the appeal from conviction entered on April 18, 2008 by Justice of the Peace Stewart A. Taylor.

Laskin J.A.:

A. Overview

[1] The broad question raised by this appeal is whether the defence of entrapment applies to a regulatory offence. The narrow question we must answer is whether government authorities can use random test shopping to monitor compliance with a particular regulatory statute – the *Smoke Free Ontario Act*, S.O. 1994, c. 10 – without a reasonable suspicion that the person monitored is engaged in illegal activity.

[2] Section 3(1) of the *Smoke Free Ontario Act* prohibits the sale of tobacco to any person under the age of 19. In October 2007, a 17-year-old "test shopper" employed by the Tobacco Enforcement Office of the County of Lambton went into a 7-Eleven store in Sarnia and asked to buy a package of cigarettes. The appellant, Matthew Clothier, then 19 years old, was working as a store clerk that day. He sold the test shopper the cigarettes without asking for identification. He was then charged with violating s. 3(1) of the Act.

[3] At his trial, Mr. Clothier relied on the defence of entrapment. He claimed that the charge against him should be stayed because the County of Lambton had engaged in test shopping without a reasonable suspicion that he or the store had previously sold tobacco to minors. The trial judge, Justice of the Peace Taylor, held that there had been no entrapment. Instead, he said that "test shoppers utilized in a bona fide inquiry is an appropriate investigative technique when we're dealing with regulatory offences". He convicted Mr. Clothier and fined him $50.

[4] On appeal, Justice Hornblower found no error in the reasons of the Justice of the Peace. He held that the County had conducted a bona fide inquiry, and was entitled to do so without reasonable suspicion. He dismissed the appeal. Doherty J.A. granted leave to appeal because "there is some conflict in the authorities and this court has not addressed the question of the availability of the defence of entrapment to the charge in issue."

[5] Mr. Clothier's position is that the doctrine of entrapment, which developed in the criminal law, applies to regulatory offences. Thus, entrapment will be made out, where, as in this case, the authorities offered an individual an opportunity to commit an offence without a reasonable suspicion that the individual was engaged in illegal activity.

[6] The Attorney General's position is that entrapment does not apply to regulatory offences. Government authorities may justifiably conduct bona fide inquiries without reasonable suspicion, to ensure compliance with a regulatory statute, such as the *Smoke Free Ontario Act*. Test shopping is one permissible form of a bona fide inquiry, and invariably more effective than other means of monitoring compliance with the prohibition on selling tobacco to minors. Finally, the Attorney General says that while test shopping in this case was done in good faith, inquiries done in bad faith or for improper motives may be controlled by the doctrine of abuse of process. Resort to the doctrine of entrapment is unnecessary.

[7] The parties have put their positions broadly, inviting a determination of whether the defence of entrapment is available for regulatory offences generally. However, my

reasons are limited to the question whether the entrapment defence is available for a charge under the *Smoke Free Ontario Act*, when that charge stems from a random compliance check. Whether the defence of entrapment is available in other circumstances or for an offence under another regulatory statute should be determined when that issue arises.

B. Background Facts

[8] Before his employment at the 7-Eleven store, Mr. Clothier had worked at an Esso station. There, too, he had sold tobacco products. At both places he was required to check the identification of potentially underage customers. Indeed, when he started working at 7-Eleven, he had been trained on the age restrictions for selling tobacco, and how to ask for identification. He had also been trained on age restricted merchandise and on 7-Eleven's policy on how to refuse to sell tobacco to minors. Mr. Clothier had no previous convictions for selling tobacco products to an underage person.

[9] On the date of the offence, the 7-Eleven store had been randomly chosen for a spot compliance check from a master list containing all the tobacco vendors in Lambton County. The County acknowledged that it had no reason to suspect Mr. Clothier had shown any disposition to sell tobacco to minors. The trial judge found, on conflicting evidence, that the 7-Eleven store had no previous record of violating the statute.

[10] A tobacco enforcement officer went to the 7-Eleven store together with the 17-year-old test shopper. The test shopper was employed by the Lambton Health Unit, Tobacco Strategy Team. Her job was to go around to different stores in the County, with an enforcement officer, and try to purchase tobacco products.

[11] The test shopper went into the 7-Eleven store and asked Mr. Clothier, who was behind the counter, for a package of Peter Jackson full flavoured cigarettes. He retrieved the package of cigarettes and asked the test shopper if she wanted a second package, as buying two packages together would save her one dollar. She said no because she didn't have enough money.

[12] Mr. Clothier scanned the package of cigarettes and received payment for it from the test shopper. The transaction took about 35 seconds. At no time did Mr. Clothier ask the test shopper for age identification. After the test shopper left the store, the enforcement officer entered, informed Mr. Clothier that he had sold tobacco to an underage person, and issued a certificate of offence.

C. Entrapment and the *Smoke Free Ontario Act*

(i) Entrapment

[13] The doctrine of entrapment in Canadian criminal law is an aspect of the broader abuse of process doctrine. Entrapment reflects judicial disapproval of unacceptable police or prosecutorial conduct in investigating crimes. The defence is extensively

discussed by Lamer J. in *R. v. Mack*, [1988] 2 S.C.R. 903, and in his later judgment in *R. v. Barnes*, [1991] 1 S.C.R. 449.

[14] In setting out the contours of the doctrine of entrapment, Lamer J. balanced two competing objectives. On the one hand, he recognized that the police must have considerable leeway in the techniques they use to investigate criminal activity. On the other hand, he also recognized that the power of the police to investigate crimes should not be untrammeled. The police should not be allowed to randomly test the virtue of citizens by offering them an opportunity to commit a crime without reasonable suspicion that they are already engaged in criminal activity; or worse, to go further and use tactics designed to induce citizens to commit a criminal offence. To allow these investigative techniques would offend our notions of decency and fair play.

[15] Lamer J. struck the balance between these two objectives by concluding that an accused will be entitled to rely on the defence of entrapment in either of two situations:

- First, when government authorities provide a person with an opportunity to commit a crime, unless they have a reasonable suspicion that the person is already engaged in criminal activity, or unless they are acting in the course of a bona fide investigation.

- Second, when government authorities, though they have a reasonable suspicion or are acting in the course of a bona fide investigation, go beyond providing an opportunity to commit a crime by inducing the commission of an offence.

[16] Typically, as in this case, when entrapment is alleged, the essential elements of the offence charged have been made out. However, if an accused proves an abuse of process because of entrapment, the court will not permit the Crown to maintain a conviction as doing so would offend our sense of fair play, and bring the administration of justice into disrepute. Instead, the court will stay the proceedings. As with other aspects of the abuse of process doctrine, a stay is granted only if an accused meets the "clearest of cases" standard.

[17] In the present appeal we are concerned only with the first branch of entrapment. Mr. Clothier does not suggest that anyone threatened him or induced him to sell cigarettes to the test shopper. This first branch of entrapment encompasses two kinds of cases. In one, the police, without reasonable suspicion a person is already engaged in criminal activity, provide that person with an opportunity to commit a crime: see *Mack*.

[18] In the other kind of case, the police undertake an investigation directed at a geographic area but without a reasonable suspicion criminal activity is occurring there: see *Barnes*. Conversely, where the police undertake a bone fide investigation targeting an area where criminal activity is reasonably suspected, there will be no entrapment. The police are entitled to provide any person in the area with the opportunity to commit the offence. If criminal activity is reasonably suspected, the investigation is bona fide.

[19] In either kind of case, under the first branch of the entrapment doctrine the police can lawfully act only on reasonable suspicion, either of an individual's or an area's

criminal activity. The requirement of reasonable suspicion in the criminal law context defines the debate on this appeal.

[20] The question is whether reasonable suspicion should be required for compliance checks under the *Smoke Free Ontario Act*. The Attorney General acknowledges that the County of Lambton acted without reasonable suspicion. Therefore, if the County was required to reasonably suspect that either Mr. Clothier or the stores in the area were engaged in illegal activity before sending a test shopper to the 7-Eleven store, then Mr. Clothier's entrapment claim ought to succeed. But if the County could undertake a bona fide investigation into whether stores in the area were selling tobacco to minors without a reasonable suspicion that was so, then the entrapment claim must fail. To put this debate in context, I will briefly review the statute in issue, the *Smoke Free Ontario Act*.

(ii) The *Smoke Free Ontario Act*

[21] Canadian jurisprudence has long distinguished between truly criminal conduct and conduct that, though not inherently wrong, is nonetheless prohibited for the protection of the public. Thus, we have distinguished between criminal statutes and regulatory statutes, and between criminal offences and regulatory offences. Cory J. discusses this distinction and the basis for it in *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154 at pp. 218-19:

> It has always been thought that there is a rational basis for distinguishing between crimes and regulatory offences. Acts or actions are criminal when they constitute conduct that is, in

> itself, so abhorrent to the basic values of human society that it ought to be prohibited completely. Murder, sexual assault, fraud, robbery and theft are all so repugnant to society that they are universally recognized as crimes. At the same time, some conduct is prohibited, not because it is inherently wrongful, but because unregulated activity would result in dangerous conditions being imposed upon members of society, especially those who are particularly vulnerable.
>
> The objective of regulatory legislation is to protect the public or broad segments of the public (such as employees, consumers and motorists, to name but a few) from the potentially adverse effects of otherwise lawful activity. Regulatory legislation involves a shift of emphasis from the protection of individual interests and the deterrence and punishment of acts involving moral fault to the protection of public and societal interest. While criminal offences are usually designed to condemn and punish past, inherently wrongful conduct, regulatory measures are generally directed to the prevention of future harm through the enforcement of minimum standards of conduct and care.

[22] The *Smoke Free Ontario Act*, formerly known as the *Tobacco Control Act, 1994*, is a regulatory statute, which has been enacted to promote public health and safety. It establishes a legislative regime for controlling the display, promotion, packaging, sale and use of tobacco, including when, how, where and to whom tobacco can be sold. The offences under the Act are strict liability offences, which means that due diligence is a defence but negligence is not. All offences are punishable by a fine, or, on multiple convictions, by a prohibition on the sale of tobacco for up to 12 months. No one can be imprisoned for a breach of the statute.

[23] One of the most important purposes of the legislation is to ensure that minors are not able to buy cigarettes. Section 3(1), the section in issue on this appeal, states:

> No person shall sell or supply tobacco to a person who is less than 19 years old.

[24] Section 3(2) reduces the danger of an inadvertent violation of s. 3(1) by requiring vendors to check for identification when the customer appears to be under 25 years old:

> No person shall sell or supply tobacco to a person who appears to be less than 25 years old unless he or she has required the person to provide identification and is satisfied that the person is at least 19 years old.

[25] In *R. v. Seaway Gas & Fuel Ltd.* (2000), 47 O.R. (3d) 458 (C.A.), at paras. 32-33, my colleague MacPherson J.A. emphasized this important purpose of the legislation:

> [32] Fifth, it needs to be recalled that the Act is an important public health statute. The Act and its regulations attempt to regulate in a strict and careful fashion the distribution of a dangerous product. In *RJR-Macdonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, the Supreme Court of Canada considered the federal *Tobacco Products Control Act*, R.S.C. 1985, c. 14, and some of the regulations promulgated pursuant to it. Referring to the general purposes of the regulations, Sopinka and Cory JJ. said, at p. 353:
>
>> These are clear indications that the government passed the regulations with the intention of protecting public health and thereby furthering the public good.
>
> Later in their reasons, the justices referred to "the undeniable importance of the public interest in health and in the prevention of the widespread and serious medical problems directly attributable to smoking" (at pp. 353-54).

> [33] In my view, this reasoning is entirely applicable to the Ontario *Tobacco Control Act* and suggests that the provisions of the Act and regulations should be interpreted with a judicial eye firmly focussed on the public health purposes of the legislation. *One of the most important purposes of the legislation is to make sure that minors are not able to buy cigarettes*. The legislation should be strictly interpreted to help achieve that purpose. [Emphasis added.]

[26] Against this background, I turn to the question on this appeal: whether government authorities can use random test shopping to monitor compliance with this important purpose of the statute, or whether doing so amounts to entrapment under the first branch of the doctrine discussed in *Mack* and *Barnes*.

D. The Availability of Random Test Shopping to Monitor Compliance with the Prohibition on Selling Tobacco to Minors

[27] As my colleague Doherty J.A. noted in granting leave to appeal, the case law is conflicting on whether entrapment is available as a defence to a charge of selling tobacco to a minor. In Ontario, most trial decisions and Ontario Court of Justice appeal decisions have held that entrapment is not available.

[28] The two main appeal decisions are *R. v. Donkersgoed*, 2007 ONCJ 467, which was relied on by Taylor J.P. in the present case, and *R. v. Cho*, [2000] O.J. No. 5354 (C.J.). In both cases the court held that random test shopping does not amount to entrapment. In other words, the authorities may engage in test shopping without a reasonable suspicion that either a particular store or stores in the area are selling tobacco to underage persons. In *Cho* Finlayson J.A. denied leave to appeal, and in so doing

baldly stated "the defence of entrapment is not available in regulatory offences": see [2001] O.J. No. 1041 (C.A.). His conclusion is instructive, but, of course, a decision of a judge of this court denying leave to appeal has no precedential value.

[29] As counsel for Mr. Clothier point out in their factum, courts in other provinces – notably Saskatchewan and Alberta – have held that "a bona fide inquiry does require some prior suspicion of the person or area being targeted by the state's test shopper", and they have stayed proceedings as an abuse of process resulting from entrapment: see, for example, *R. v. Myers*, 2000 SKQB 226 and *R. v. Tyzuk*, 2009 ABPC 282.

[30] No provincial court of appeal has directly considered the availability of the defence of entrapment to the regulatory offence of selling tobacco to a minor. In a different regulatory context, however, Cowan J. of the British Columbia Supreme Court held that random spot checks for compliance with the *Proceeds of Crime (Money Laundering) Act* did not amount to entrapment, and his conclusion and reasoning were approved by the British Columbia Court of Appeal: see *R. v. Au Canada Monetary Exchange Inc.*, [1999] B.C.J. No. 455 (S.C.), aff'd, 2000 BCCA 193, leave to appeal to the S.C.C. denied, [2000] S.C.C.A. No. 222.

[31] Section 80 of the *Provincial Offences Act*, R.S.O. 1990, c. P.33 preserves the applicability of common law defences, such as entrapment, to regulatory offences, such as selling tobacco to a minor:

> Every rule and principle of the common law that renders any circumstance a justification or excuse for an act or a defence to a charge continues in force and applies in respect of offences, except in so far as they are altered by or inconsistent with this or any other Act.

[32] However, the proviso in s. 80 – "except in so far as they are … inconsistent with … any other Act" – is significant. Doctrines developed in the criminal law context should not automatically be applied, or applied without modification, in the wholly different regulatory context.

[33] In my opinion, the reasonable suspicion requirement, which negates entrapment under the first branch of the doctrine set out in *Mack* and *Barnes*, does not apply to the offence of selling tobacco to a minor. Government authorities may use random test shopping to monitor compliance with the *Smoke Free Ontario Act*. They need not wait until they have a reasonable suspicion that a store or one of its employees is selling tobacco illegally. As long as random test shopping is done in good faith – that is, it is not done in a discriminatory way or for an improper purpose – it is a permissible investigative technique. This is because the two specific rationales underpinning the first branch of the entrapment doctrine in criminal law, as set out by Lamer J. in *Mack*, have no relevance to a charge under the *Smoke Free Ontario Act*.

[34] The first rationale is that to permit the state to offer a person an opportunity to commit a crime without a reasonable suspicion that the person is engaged in criminal activity amounts to random virtue testing and an unjustifiable invasion of individual

privacy. This rationale does not pertain to stores selling tobacco for several related reasons.

[35] First, these stores operate in a regulated commercial environment, and operating in this regulatory environment comes with consequences. As Cory J. said in *Wholesale Travel*, at p. 229: "… those who choose to participate in regulated activities have, in doing so, placed themselves in a responsible relationship to the public generally and must accept the consequences of that responsibility."

[36] Stores selling tobacco and their employees have this responsibility to the public. One important consequence of this responsibility is their deemed acceptance of an undertaking to exercise reasonable care to ensure that the harm identified in the regulatory statute – here selling tobacco to minors – does not occur. This entails a further consequence.

[37] Those who sell tobacco products must accept a greatly diminished expectation of privacy, as some form of monitoring will be necessary to ensure that they meet their due diligence responsibilities. The monitoring is done, not to punish past conduct, as would be the case for an offence under the criminal law, but to deter harmful conduct in the future – in other words, to prevent harm to the public from the illegal sale of tobacco to minors.

[38] These consequences, which the 7-Eleven store and Mr. Clothier must be taken to accept when they engage in the regulated activity of selling tobacco to the public, persuasively show that the first branch of the criminal law entrapment doctrine cannot be transported to a charge under the *Smoke Free Ontario Act.* We recognize entrapment as a defence in criminal law because of our concern that random virtue testing will result in too great an invasion of personal privacy. That rationale simply does not apply in this regulatory context.

[39] A second reason why the rationale does not apply is that in using random test shopping, the government is not engaged in virtue testing; it is engaged in compliance testing. "Virtue" is irrelevant to a charge under s. 3(1) of the *Smoke Free Ontario Act*. Section 3(1) is a strict liability offence. A person can be convicted for merely being negligent.

[40] A third reason for not applying the criminal law rationale is that the test shopping takes place at a store that sells tobacco to the public. Selling tobacco products is part of the store's ordinary business. Thus, the opportunity to commit an offence when the test shopper asks to buy a package of cigarettes is no different from the opportunity presented when any underage customer asks to buy cigarettes. Put the other way, the test shopper does not present the store or its employees with an opportunity to commit an offence that they would not otherwise encounter in the ordinary course of their business. Any invasion of the store owner's or employee's expectation of privacy is minimal at best.

[41] For these reasons, the first rationale underpinning the first branch of the entrapment doctrine has no bearing on the charge of selling tobacco to minors.

[42] The second specific rationale stems from the concern that if the police were permitted to offer a person an opportunity to commit a crime without a reasonable suspicion that the person had already engaged in criminal activity, then individuals who would not otherwise be involved in criminal activity may end up committing criminal offences. This rationale, too, has no relevance to a charge under s. 3(1) of the *Smoke Free Ontario Act*.

[43] As I have already said, the opportunity provided to the store clerk to violate s. 3(1) when the test shopper asks to buy cigarettes is exactly the same as the opportunity provided when any underage person comes into the store and asks to buy cigarettes. Test shopping does not provide an opportunity to the store clerk that is not routinely available in the course of the store's business.

[44] Because neither specific rationale underpinning the first branch of the entrapment doctrine applies to a charge of selling tobacco to a minor, government authorities may engage in random test shopping to monitor compliance with the statute. They need not have a reasonable suspicion of illegal activity before using this investigative technique.

[45] I add that on the evidence at trial, random test shopping is the most effective way to achieve the government's purpose of ensuring compliance with the statute and

deterring future illegal sales of tobacco. Surveillance, according to the testimony of the Tobacco Enforcement Officer, is largely ineffective. And expecting minors who have purchased tobacco to cooperate with the authorities by reporting an offence or giving them information is highly unrealistic. Prosecution for an offence may have some deterrent effect. But deterrence comes mainly from the threat of detection occasioned by random test shopping.

[46] This does not mean that government authorities' discretion to use test shopping is unfettered or unreviewable by the courts. Test shopping may be done randomly; but it must be done in good faith. It must be used for a proper purpose and carried out bona fide and without discrimination. If it is not, if it is done in bad faith, then courts retain jurisdiction to stay proceedings under the general abuse of process doctrine of which entrapment is one aspect.

[47] The overriding rationale of the abuse of process doctrine – a rationale that also underlies the entrapment doctrine – is that government should not be allowed to investigate possible illegal activity in a way that offends our sense of decency and fair play. This rationale applies as much to the regulatory charge of selling tobacco to an underage person as it does to a charge under the *Criminal Code*.

[48] Suppose, for example, a government authority chooses to use test shopping to check compliance with the Act, but decides to target only stores owned by a particular ethnic group. That discriminatory use of test shopping should not be condoned by the

courts. Whether characterized as an abuse of process or as entrapment under a very limited version of the first branch of the doctrine, is a matter of semantics, not substance. The result would be the same: proceedings would be stayed.

[49] In the case before us, the test shopping carried out by the County of Lambton was bona fide. The 7-Eleven store where Mr. Clothier worked was randomly chosen from a master list of stores in the area. The charge was made out. The test shopper was underage; Mr. Clothier did not ask her for identification; and he sold her the package of cigarettes she requested.

[50] I would dismiss the appeal.

RELEASED: Jan. 13, 2011
"JL"

"John Laskin J.A"
"I agree D. O'Connor A.C.J.O."
"I agree E.E. Gillese J.A."