

THE SUPREME COURT OF CANADA

on

EXCLUDING EVIDENCE UNDER

S-s. 24(2) OF THE CHARTER

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2006

PREFACE

The Supreme Court of Canada rendered its first decisions on s.24(2) in 1985. In the years since, it has rendered approximately seventy more. In *R. v. Orbanski; R. v. Elias* 2005 SCC 37 at paragraph 87, LeBel J. said:

It is likely that few *Charter* provisions have generated so much academic comment, conflicting jurisprudential developments, media rhetoric or just plain uneasiness as s.24(2). Since the *Charter* came into force, our court has returned on many occasions to the interpretation and application of this provision. It has developed and refined methods of analysis and application. Despite all these efforts, doubts and misunderstandings remain.

In the following pages I have attempted to provide a useful digest of the law on s.24(2) as revealed by the Supreme Court jurisprudence of the past twenty years. I hope it will prove helpful to law students, lawyers and judges.

I thank my assistant Sheila Gallant for the invaluable assistance she gave me with this project.

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- United States v. Leon**, 468 U.S. 897 (1984).
- Weeks v. United States**, 232 U.S. 383 (1914).

ROPER: So now you'd give the Devil benefit of law?

MORE: Yes, what would you do? Cut a great road through the law to get after the Devil?

ROPER: I'd cut down every law in England to do that!

MORE: And when the last law was down, and the Devil turned around on you--where would you hide, Roper, the laws all being flat? This country is planted thick with laws, from coast to coast--man's laws, not God's and if you cut them down--and you're just the man to do it--d'you really think that you could stand upright in the winds, that would blow then? Yes I'd give the Devil benefit of law, for my own safety's sake.

Robert Bolt

A Man for All Seasons

It is a deeply ingrained value in our democratic system that the ends do not justify the means. In particular, evidence or convictions may, at times, be obtained at too high a price.

Antonio Lamer C.J.C.
R. v. Mack, [1988] 2 S.C.R.
903 at p. 938.

Section 24 of the **Canadian Charter of Rights and Freedoms**

English Text

French Text

Enforcement

Recours

24.(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

24.(1) Toute personne, victime de violation ou de négation des droits ou libertés qui lui sont garantis par la présente charte, peut s'adresser à un tribunal compétent pour obtenir la réparation que le tribunal estime convenable et juste eu égard aux circonstances.

(2) Lorsque, dans une instance visée au paragraphe (1), le tribunal a conclu que des éléments de preuve ont été obtenus dans des conditions qui portent atteinte aux droits ou libertés garantis par la présente charte, ces éléments de preuve sont écartés s'il est établi, eu égard aux circonstances, que leur utilisation est susceptible de déconsidérer l'administration de la justice.

Introduction

As former Chief Justice of Canada Antonio Lamer once remarked, “evidence may at times be obtained at too high a price¹.” That is why s-s. 24(2) of the **Canadian Charter of Rights and Freedoms**, directs Canadian Courts to exclude evidence obtained through violation of constitutional rights if its admission could bring the administration of justice into disrepute. Previous to 1982, illegally obtained evidence generally had to be admitted if it met the test of relevancy. The only exceptions related to involuntary statements made to persons in authority, illegal wire-taps, and a narrow judicial discretion to exclude evidence of trifling probative value compared to its prejudicial effect on the accused.

In 1970 the Supreme Court of Canada held in **R. v. Wray** that our courts had no general discretion to exclude otherwise admissible evidence derived or obtained through improper means.² In 1981 the Supreme Court ruled in **R. v. Rothman** that a confession obtained by a police trick could not be excluded.³ The

¹ **R. v. Mack**, [1988] 2 S.C.R. 903 at p.938.

² (1970), 4 C.C.C. 1, 11 C.R.N.S. 235, [1971] S.C.R. 272. (See: Appendix B.)

³ (1981), 59 C.C.C. (2d) 30, 20 C.R. (3d) 97, [1981] 1 S.C.R. 640. (See: Appendix C.)

Wray and **Rothman** decisions valued reliability above fairness or the integrity of the judicial system. Many in the legal community were disillusioned with this “end justifies the means” philosophy. In 1975 the Law Reform Commission of Canada recommended that judges be given power to exclude evidence in exceptional cases if its use in the proceedings would tend to bring the administration of justice into disrepute. Similar recommendations followed from the Ontario Law Reform Commission in 1976 and the MacDonald Inquiry concerning the R.C.M.P. misconduct in 1981.

Change finally came on April 17, 1982, when s-s. 24(2) of the Charter became law. It provides:

Where in proceedings under subsection (1)⁴, a court concludes that the evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

⁴ Subsection 24(1) provides:

Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

This provision gave Canadian courts the power and also the duty to exclude unconstitutionally obtained evidence regardless of its probative value, importance to the Crown's case, or reliability if, considering all the circumstances, its admission would bring disrepute upon the administration of justice.

This new mandate constituted a radical change of emphasis and direction from the **Wray** and **Rothman** approaches. McLachlin J. put it this way in **R. v. Hebert**:⁵

The Charter introduced a marked change in philosophy with respect to the reception of improperly or illegally obtained evidence. Section 24(2) stipulates that evidence obtained in violation of rights may be excluded if it would tend to bring the administration of justice into disrepute, regardless of how probative it may be. No longer is reliability determinative. The Charter has made the rights of the individual and the fairness and integrity of the judicial system paramount. The logic upon which **Wray** was based, and which led the majority in **Rothman** to conclude that a confession obtained by a police trick could not be excluded, finds no place in the Charter. To say there is no discretion to exclude a statement on grounds of unfairness to the suspect and the integrity of the judicial system, as did the majority in **Rothman**, runs counter to the fundamental philosophy of the Charter.

⁵ 57 C.C.C. (3d) 1 at pp. 36-7, 77 C.R. (3d) 145 at p. 184, [1990] 2 S.C.R. 151 at p. 178, (see: Appendix C); also see: **R. v. Burlingham**, [1995] 2 S.C.R. 206, at p. 238 (see: Appendix B).

The new remedy under s-s.24(2) has effectively opened another avenue of defence. Applications for the exclusion of evidence pursuant to s-s.24(2) have become commonplace in Canadian criminal proceedings. Cases formerly considered hopeless can now be won by the exclusion of key evidence. Thus, in many instances the crucial battle of the trial is the s-s.24(2) application.

Although s-s. 24(2) changed the law significantly, it does not provide for automatic exclusion of evidence obtained through Charter violations.⁶ Subsection 24(2) really represents a compromise between the next-to-automatic rule of the United States⁷ and the hard-line Canadian common law position taken in **Wray**. As Dickson C.J.C. stated in **R. v. Simmons**:⁸

... the Charter enshrines a position with respect to evidence obtained in violation of the Charter rights that falls between two extremes. Section 24(2) rejects the American rule that automatically excludes evidence obtained in violation of the Bill of Rights . . . It also shuns the position at common law that all relevant evidence is admissible no matter how it was obtained.

⁶ **R. v. Strachan**, 46 C.C.C. (3d) 479, 67 C.R. (3d) 87, [1988] 2 S.C.R. 980 per Dickson C.J.C. and **R. v. Grant**, [1993] 3 S.C.R. 223, per Sopinka J. at p. 256. However, exclusion is virtually automatic in the case of undiscoverable conscriptive evidence.

⁷ **Weeks v. United States**, 232 U.S. 383 (1914) and **Mapp v. Ohio**, 367 U.S. 643 (1961). "Next-to-automatic" because in **United States v. Leon** 468 U.S. 897 (1984) and **Mass. v. Sheppard** 468 U.S. 981 (1984) the Supreme Court of the United States recognized a good faith exception to the exclusionary rule.

⁸ (1989), 45 C.C.C. (3d) 296 at p. 323, 66 C.R. (3d) 297 at p. 324, [1988] 2 S.C.R. 495 at p. 523.

The result of this compromise is that in Canada evidence may be admitted despite having been obtained in a manner violating the accused's Charter rights so long as its admission would not bring the administration of justice into further disrepute.⁹

The focal point in s-s. 24(2) applications is the effect "admission" of the unconstitutionally obtained evidence would have on the repute of the administration of justice. The decision of whether or not to exclude under 24(2) always requires a balancing between the interests of truth on the one side and the integrity of the judicial system on the other.¹⁰ The immediate objective of the exclusionary remedy is to prevent the administration from being brought into "further disrepute" through the admission of improperly obtained evidence which would deprive the accused of a fair trial or have the effect of giving judicial condonation to unacceptable police or prosecutorial conduct.¹¹ The overall or long-term objectives in applying s-s. 24(2) are

⁹ **Hebert**, *supra*, at C.C.C. p. 40, C.R. p. 188, S.C.C. p. 183 per Sopinka J.

¹⁰ **Simmons**, *supra*, at S.C.R. p.534. **R. v. Mann**, 2004 SCC 52; [2004] S.C.J. No. 49 at [para.57].

¹¹ **R. v. Collins**, 33 C.C.C. (3d) 1 at p. 16, 56 C.R. (3d) 193 at p. 208, [1987] 1 S.C.R. 265 at pp. 280-1, **R. v. Calder**, [1996] S.C.J. No. 1, [1996] 1 S.C.R. 660 at [para. 29] and [para. 33].

the preservation of the integrity of the criminal justice system and the promotion of decent investigatory techniques¹² in the locale where the court operates.¹³

The Charter acts as constraint on state action¹⁴. Subsection 24(2) comes under the heading "Enforcement." Accordingly, it is intended to provide support for, and to enable the courts to give effect to the rule of law and the guarantees expressed in s. 1. This constitutional enhancement of judicial power by s-s. 24(2) is attested to by Sopinka J. in **Hebert**¹⁵ where he said:

The enforcement mechanisms available to judges at common law do not compare to those granted by s. 24 of the Charter, particularly the power to exclude under 24(2). Thus, it is no answer to a violation of the right to remain silent to say that the resulting confession, or the derivative evidence would have been admitted at common law: we are not here applying the common law. Admissibility is now governed by s. 24(2) of the Charter.

The power of exclusion in s-s. 24(2) is, by virtue of s-s. 52(1) of the **Constitution Act, 1982**, part of the supreme law of Canada. The presence of such a mighty enforcement sanction enhances the Charter as a whole by demonstrating that the rights

¹² **Burlingham**, supra, at p. 242.

¹³ **R. v. Buhay**, [2003] 1 S.C.R. 631, 2003 S.C.R. 30 at [para.70].

¹⁴ **Hunter v. Southam Inc.** (1984), 14 C.C.C. (3d) 97 at 106, 41 C.R. (3d) 97 at p.111, [1984] 2 S.C.R. 145 at p.156.

¹⁵ Supra, at C.C.C. p. 14, C.R. p. 160, S.C.R. p. 199.

it guarantees are part of the supreme law of the country and that they are not defined only according to the effectiveness of their common law antecedents.

Court of Competent Jurisdiction

Only courts of "competent jurisdiction" have authority to grant remedies under s. 24 of the Charter including exclusion of evidence under s-s. 24(2)¹⁶. A court of competent jurisdiction within the meaning of s. 24 is a court or tribunal that has:

- (1) jurisdiction over the person;
- (2) jurisdiction over the subject matter; and
- (3) jurisdiction to grant the remedy.¹⁷

Determining whether a court or tribunal has jurisdiction to grant the remedy usually causes the greatest difficulty. It is a question of whether Parliament or the Legislature intended to empower the court or tribunal to make rulings on Charter violations that arise incidentally to their proceedings, and to grant the remedy sought as a remedy for such violation.¹⁸ Absent express empowerment, the test is whether the court or tribunal is suited by its function and structure to grant the requested remedy.¹⁹

¹⁶ **R. v. Hynes**, [2001] 3 S.C.R. 623, 2001 SCC 82 at [para. 15].

¹⁷ *Ibid.*, at [para. 17] and [para. 26].

¹⁸ *Ibid.*, at [para. 26].

¹⁹ *Ibid.*, at [para. 27].

In **R. v. Hynes** a 5-4 majority of the Supreme Court held that although a preliminary inquiry judge had jurisdiction over the person and subject matter, he or she did not have express power to grant a s-s. 24(2) remedy and a preliminary inquiry forum was not suited by its function and structure to do so. Accordingly, the Court ruled a preliminary inquiry is not a court of competent jurisdiction to exclude evidence under s.-s. 24(2) of the Charter. In **Mooring v. Canada (National Parole Board)**²⁰, the Supreme Court held that the National Parole Board is not a court of competent jurisdiction for the purpose of excluding evidence under s-s. 24(2). The majority found that the Parole Board's structure, function, and the language of its constituting statute indicated it was not empowered to grant the remedy sought.

Trial courts are courts of competent jurisdiction and the preferred fora for resolving Charter issues and s-s. 24(2) applications in particular.²¹ In the criminal law context superior courts are always courts of competent jurisdiction to dispense s. 24 remedies. Non-superior trial courts are also courts of competent jurisdiction for s. 24 purposes where they have jurisdiction over the person and the offence. Superior trial courts have concurrent original jurisdiction with non-superior trial courts to deal with

²⁰ [1996] 1 S.C.R. 75.

²¹ **Hynes supra**, at [para. 40].

applications for remedies under s.24. However, the superior court has jurisdiction to decline to exercise its jurisdiction when the non-superior court provides a more appropriate forum. Thus, a superior court will normally only exercise its authority under s. 24 in cases where the trial is or will be actually proceeding before it.²²

²² **R. v. Mills** (1987), 26 C.C.C. (3d) 481, 52 C.R. (3rd) 1, [1986] 1 S.C.R. 863.

Procedure

The Charter itself contains no procedural directions. This led McIntyre J. in **Mills** to declare:²³

The absence of jurisdictional provisions and directions in the Charter confirms the view that the Charter was not intended to turn the Canadian legal system upside down. What is required is that it be fitted into the existing scheme of Canadian legal procedures. There is no need for special procedures and rules to give it full and adequate effect.

Thus, in criminal cases, the procedures provided in the **Code** must be adapted and utilized for s-s. 24(2) applications.²⁴

The s-s. 24(2) remedy can only issue in proceedings under s-s.24(1).²⁵ A person whose Charter rights have been infringed or denied may apply to a court of competent jurisdiction for such remedy as the court considers appropriate and just in the circumstances under s-s. 24(1). Subsection 24(2) specifically directs the court hearing an application under s-s. 24(1) to exclude evidence it concludes was obtained in a manner that infringed or denied Charter rights if it has been established

²³ *Supra*, at C.C.C. p. 492, C.R. p. 18, S.C.R. at p. 953.

²⁴ *Ibid*, at C.C.C. p. 494, C.R. p. 20, S.C.R. pp. 956-7.

²⁵ **Hynes** *supra*, at [para.15].

that, having regard to all the circumstances, its admission would bring the administration of justice into disrepute.

The judges of the Supreme Court who heard **Mills** appear to consider a pre-trial motion analogous to those provided for in the **Criminal Code**, as the most appropriate procedure for invoking s. 24. But, it should be noted that **Mills** did not involve an issue concerning the admission of evidence. It appears from the cases coming before the Supreme Court that most applications for exclusion are made during the trial. That is not surprising because questions about the admissibility of evidence do not affect the validity of the proceedings, and in the Canadian system of criminal justice evidence is not usually challenged until it is actually tendered. However, it is very important to make the application for a s-s. 24(2) remedy before the evidence is actually admitted. There would have to be some unusual circumstances to justify an **ex post facto** application. It is also, at least, desirable that the trial judge and the Crown be given reasonable notice of an intended s-s. 24(2) application. The decisions of the Ontario Court of Appeal in **R. v. Kutynec**²⁶ and the

²⁶ (1992), 70 C.C.C. (3d) 289.

Alberta Court of Appeal in **R. v. Dwernychuk**²⁷ provide useful guidance in respect of appropriate 24(2) procedure.

²⁷ (1992), 77 C.C.C. (3d) 385. Also see: **R. v. McKarris**, [1995] 1 P.E.I.R. 17 (P.E.I.S.C.-A.D.).

4**Standing**

"Anyone" whose rights or freedoms guaranteed by the Charter have been infringed or denied may apply for a remedy under s. 24, including the exclusion of evidence under s-s. 24(2). The term "anyone" does not seem limited to Canadian citizens, Canadian residents, or persons within Canadian territory. In **R. v. Cook**²⁸, although status was not an issue, a non Canadian citizen who was also a nonresident was able to successfully invoke s-s.24(2) on the basis that his Charter right to counsel was violated by Canadian authorities during an interrogation in the U.S. while he was in custody there awaiting extradition for a murder alleged to have been committed in Canada. The case of **R. v. Dairy Supplies Ltd**²⁹ may indicate that the term "anyone" as used in s.24 also includes corporations. Exclusion was denied in that case but not on the basis of lack of status.

Two more problematic concerns regarding status in relation to s-s. 24(2) were raised but not resolved by Lamer J. in **Collins**³⁰. The first was whether an

²⁸ **R. v. Cook**, [1998] 2 S.C.R. 597; [1998] S.C.J. No.68.

²⁹ (1987), 40 C.C.C. (3d) 382, [1988] 1 S.C.R. 665 affirming the Manitoba Court of Appeal at (1987), 33 C.C.C. (3d) 253.

³⁰ *Supra*, at C.C.C. p. 12, C.R. p. 205, S.C.C. pp. 276-7.

appellant could claim s-s. 24(2) relief on the grounds that the evidence was obtained in a manner that infringed or denied the Charter rights of a third party. The second was whether the applicant could be someone other than an accused. After raising these questions, Lamer J. did not go on to answer them because in **Collins** the alleged violation was to the accused's rights, and she was the applicant for relief under s-s. 24(2). The first question seemed to be answered by Sopinka J. a couple of years later when writing for the Court in **Borowski v. Attorney General of Canada**³¹, he held Mr. Borowski did not have standing under s. 24 because his claim was not based on an infringement or denial of his own Charter rights. But then, in **R. v. Thompson**³² Sopinka J. took a position which appears at odds with what he had held in **Borowski**. The British Columbia Court of Appeal had held in **Thompson** the accused had no standing to raise the infringement of the rights of third parties in support of an application for the exclusion of evidence obtained by the interception of communications through public pay phones. Sopinka J., who wrote for the majority of the Supreme Court, disagreed with the British Columbia Court. He said:³³

³¹ [1989] 1 S.C.R. 342 at p. 367.

³² 59 C.C.C. (3d) 225, [1990] 2 S.C.R. 1111.

³³ Ibid, at C.C.C. p. 272, S.C.R. p. 1143.

In my view, the extent of invasion into the privacy of third parties is constitutionally relevant to the issue of whether there has been an 'unreasonable' search or seizure.

This appeared to open the door at least a crack to s-s. 24(2) claims based on a violation of third party's Charter rights but that perception proved incorrect. Subsequent to **Thompson**, Cory J. in writing a unanimous decision of the full nine-member panel of the Supreme Court in **R. v. Wijesinha** said:

...I find it difficult to see how the appellant can claim a constitutional remedy pursuant to s. 24(2) based upon the alleged violation of the Charter rights of third parties ... This section of the Charter provides a remedy only to the individual whose Charter rights have been violated. That is a sufficient basis for dismissing this ground of appeal.³⁴

And later in **R. v. Edwards**, Cory J. said ". . . s. 24(2) provides remedies only to applicants whose own Charter rights have been infringed."³⁵ Thus, although, as **Thompson** indicates, a violation of the constitutional rights of a third party may be relevant as evidence in relation to the reasonableness of a search, it cannot be the foundation of the claim for exclusion under s-s. 24(2). A claim for s-s. 24(2) relief must be based on a violation of the applicant's own Charter rights. An accused does

³⁴ 42 C.R. (4th) 1 at p. 21.

³⁵ [1996] S.C.J., No. 11, [1996] 1 S.C.R. 128, at paragraph 55. Note, however, the opinion of La Forest J. concurring in the result but certainly not the reasons of the majority. Cory J. reiterated this statement in **R. v. Belnavis**, [1997] S.C.J. No. 81, [1997] 3 S.C.R. 441, at [para.19] and [para.20]. The dissent of La Forest J. is worthy of note.

not automatically have s. 24(2) standing just because he or she was the target of the investigation or is charged with possession of seized contraband.

The right to challenge the legality of a search depends upon the accused establishing that his or her personal right to privacy has been violated. To meet the threshold the accused must establish on an assessment of the totality of the circumstances that he or she had a reasonable expectation of privacy in the place searched or the item seized. If the accused cannot establish such a personal reasonable expectation of privacy, he or she cannot obtain a s-s.24(2) remedy.³⁶

The question of whether someone other than an accused can claim a s-s. 24(2) remedy remains unanswered.

³⁶ **Belnavis**, supra, at [para. 20]. Some of the factors to be considered in determining whether a reasonable expectation of privacy existed are also set out in [para. 20].

Interpretation

The proper approach to the interpretation of s-s. 24(2) of the Charter is a purposive one.³⁷ In **Law Society of Upper Canada v. Skapinker**³⁸ Estey J. acknowledged that consideration of the section headings is a valid step in the constitutional interpretative process. Accordingly, in discerning the purpose of s-s. 24(2), it is appropriate to consider the headings "Enforcement" and "Recours" that appear respectively above the English and French versions of the text of s. 24. These headings indicate the purpose of s-s.24(2) is to support the rights and freedoms contained in the Charter and to enable the Court to give effect to the dominance of the Rule of Law as expressed in the preamble and to the guarantees contained in s.1.

In interpreting the Charter, it is always important to compare the English and French texts. That is because, by virtue of s. 57 of the **Constitution Act, 1982**, the English and the French texts are equally authoritative. The significance of this

³⁷ **Collins**, supra, at C.C.C. p. 22, C.R. pp. 213-4, S.C.R. 287. The purposive approach to Charter interpretation is more fully discussed in the decisions of Dickson C.J.C. in **Hunter v. Southam Inc.**, supra, and **Big M Drug Mart Ltd.** (1985), 18 C.C.C. (3d) 385, [1985] 1 S.C.R. 295.

³⁸ (1984), 11 C.C.C. (3d) 481 at pp. 495-6, [1984] 1 S.C.R. 357 at pp. 376-7.

in the context of s-s. 24(2) is highlighted by the decision in **Collins** where the Supreme Court gave effect to the less onerous but equally official French test rather than the more demanding English one. The English version of s-s. 24(2) provides for exclusion where the tainted evidence "would" bring the administration of justice into disrepute. However, the French text is significantly different. It speaks of the admission of tainted evidence which "est susceptible de deconsiderer l'administration de la justice" which translates as "could bring the administration of justice into disrepute." Lamer J. writing for the majority in **Collins** chose to apply the French version because it was the more beneficial to the purposes of s. 24. The result is that the word "would" in the English text of s-s. 24(2) should now be read as synonymous with the English word "could."³⁹ Another example of how the dual official texts influence the interpretation of s-s. 24(2) is found in the judgment of Le Dain J. in **Therens** where he says:

In my opinion the words 'obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter,' particularly when they are read with the French version, obtenus dans des conditions qui portent atteinte aux droits et libertés

³⁹ **Collins**, supra, at C.C.C. pp. 21-2, C.R. pp. 213-4, S.C.R. pp. 287-8.

garantis par la présente charte, do not connote a relationship of causation.⁴⁰ ...

⁴⁰ **R. v. Therens**, 18 C.C.C. (3d) 481 at p. 509, 45 C.R. (3d) 97 at p. 130, [1985] 1 S.C.R. 613 at p. 649.

Prerequisites and Discretion

Lamer J. in **Collins**⁴¹ and again in **R. v. Manninen**⁴² pointed out that there are three prerequisites for the exclusion of evidence under s-s. 24(2). First, the applicant's rights or freedoms guaranteed by the Charter must have been infringed or denied. Second, the evidence in question must have been obtained in a manner that infringed or denied that right or freedom. Third, the circumstances must be such that admission of the evidence could bring the administration of justice into disrepute. Unless all three of those conditions are present, the evidence cannot be excluded under s-s.24(2). However, evidence that does not meet the requirements under s-s.24(2) may nevertheless be excluded by operation of the common law or through s-s.24(1) if its admission at trial would impair a legal right set out in the Charter.⁴³ On the other hand, if all three conditions are present, the wording of s-s. 24(2) would seem to preclude any other option but exclusion. Subsection 24(2) directs that the court "shall" exclude the evidence when the conditions precedent are

⁴¹ Ibid, at C.C.C. p. 13, C.R. pp. 204-5, S.C.R. p. 276.

⁴² (1987), 34 C.C.C. (3d) 385 at p. 390, 58 C.R. (3d) 97 at pp. 102-3, [1987] 1 S.C.R. 1233 at p. 1241.

⁴³ See: **R. v. Harrer** (1995), 101 C.C.C. (3d) 193, [1995] 3 S.C.R. 562 and **R. v. White** (1999), 135 C.C.C. (3d) 257, [1999] 2 S.C.R. 417; **Buhay**, *supra* at [para. 40].

met. This does not mean there are no discretionary elements in a s-s.24(2) analysis.⁴⁴ A court does exercise some discretion under s-s. 24(2) but only in respect of one aspect. The limited nature of this discretion is described by Wilson J. in **Thompson Newspapers Ltd. et al v. Director of Investigation and Research Combines Investigation Act**⁴⁵ when she said:

The judge's discretion under s. 24(2) . . . is one which is required to be exercised on a very specific basis, namely, whether or not the admission of the evidence would bring the administration of justice into disrepute.

This discretion is grounded in community values and involves the trial judge's appreciation and evaluation of the evidence.⁴⁶ The administration of justice does not have to be brought into disrepute on a national scale before a court can exclude evidence.⁴⁷ Once the court reaches its conclusion on the issue of disrepute, its

⁴⁴Ibid at [para.42].

⁴⁵ 76 C.R. (3d) 129 at p. 179, [1990] 1 S.C.R. 425 at p. 483. Also see: **Therens**, Supra, at S.C.R. p. 654 per Le Dain J.

⁴⁶ **Buhay, supra**, at paras. 43 and 44.

⁴⁷ Ibid, at [para. 70].

discretion is spent. It must exclude the evidence if it finds that its admission could bring the administration of justice into disrepute.⁴⁸

⁴⁸ **Collins**, *supra*, at C.C.C. p. 16, C.R. p. 208, S.C.R. p. 280, **R. v. Pohoretsky**, (1987), 33 C.C.C. (3d) 398 at p. 401, 58 C.R. (3d) 113 at p. 115, [1987] 1 S.C.R. 945 at p. 948.

Charter Violations Justified Under s.1

Charter rights are not absolute. According to s.1 of the Charter they are subject to “such reasonable limitations prescribed by law as can be demonstrably justified in a free and democratic society.” Police actions and investigatory procedures that are incompatible with Charter rights but meet the standard of s.1 do not engage s-s.24(2) because there really is no Charter violation.⁴⁹

⁴⁹See: **R. v. Thomsen**, [1988] 1 S.C.R. 640; **R. v. Hufsky**, [1988] 1 S.C.R. 621; **R. v. Ladouceur**, [1990] 1 S.C.R. 1257; and **R. v. Orbanski**; **R. v. Elias** 2005 S.C.C. 37.

Relationship: Causative or Temporal

Evidence obtained before or in the absence of a Charter violation does not qualify for s-s. 24(2) relief.⁵⁰ If evidence is to be excluded under s-s. 24(2), it must have been "obtained in a manner that infringed or denied" a Charter right or freedom. Meeting this prerequisite requires establishing some connection or relationship between the violation and the evidence in question.⁵¹

In **Therens** Le Dain J. expressed the view that the relationship did not have to be one of causation. He considered that it would be sufficient if the violation preceded or occurred in the course of obtaining the evidence.⁵² However, Lamer J. disagreed. He did not think that a temporal connection would suffice.⁵³ When the Supreme Court handed down its decision in **R. v. Upton**⁵⁴, it appeared as though the position taken by Lamer J. had prevailed. However, this support for a causal requirement did not last long. Less than seven months after **Upton**, the Supreme

⁵⁰ **R. v. Harper**, [1994] 3 S.C.R. 343, 33 C.R. (4th) 61.

⁵¹ **Therens**, supra, at C.C.C. p. 509, C.R. p. 129, S.C.R. p. 648.

⁵² *Ibid*, at C.C.C. p. 509, C.R. p. 130, S.C.R. p. 649.

⁵³ *Ibid*, at C.C.C. p. 499, C.R. p. 109, S.C.R. pp. 623-4.

⁵⁴ [1988] 1 S.C.R. 1083.

Court in **Strachan**⁵⁵ expressly rejected the need for a causal relationship. Dickson C.J.C. writing for the majority dismissed the causation requirement as too narrow and difficult to apply. He established a broader test which he described as follows:

In my view, all the pitfalls of causation may be avoided by adopting an approach that focuses on the entire chain of events during which the Charter violation occurred and the evidence was obtained. Accordingly, the first inquiry under s. 24(2) would be to determine whether a Charter violation occurred in the course of obtaining the evidence. A temporal link between the infringement of the Charter and the discovery of the evidence figures prominently in this assessment, particularly where the Charter violation and the discovery of the evidence occur in the course of a single transaction. The presence of a temporal connection is not, however, determinative. Situations will arise where evidence though obtained following the breach of a Charter right will be too remote from the violation to be 'obtained in a manner' that infringed the Charter. In my view, these situations should be dealt with on a case by case basis. There can be no hard and fast rule for determining when evidence obtained following the infringement of a Charter Right becomes too remote.⁵⁶

⁵⁵ Supra.

⁵⁶ Ibid, at C.C.C. pp. 498-9, C.R. pp. 106-7, S.C.R. pp. 1005-6.

Lamer J. wrote a brief judgment concurring with Dickson C.J.C. and repudiating the position he had taken earlier in **Therens**.⁵⁷ Later writing for the majority in **R. v. Brydges**⁵⁸ he said:

... s. 24(2) is implicated as long a Charter violation occurred in the course of obtaining the evidence.

Subsequently, Sopinka J., writing for the unanimous nine-member panel in **Grant**, put a somewhat finer point on it. According to him, a sufficient relationship exists to trigger s-s. 24(2) if the violation occurred in the course of carrying out some "integral component in a series of investigative tactics which led to the unearthing of the evidence in question."⁵⁹ Thus, so long as there is a sufficient temporal and tactical linkage, evidence can be considered for exclusion under s-s. 24(2) despite the fact that the police misconduct was not directly involved in its acquisition. For example, evidence acquired with the aid of a valid search warrant could nevertheless be considered for exclusion if there was a sufficient temporal and tactical connection between a Charter violation (e.g., a previous warrantless perimeter search) and the

⁵⁷ Ibid, at C.C.C. p. 501, C.R. pp. 109-10, S.C.R. p. 1009.

⁵⁸ 53 C.C.C. (3d) 330 at p. 346, 74 C.R. (3d) 129 at p. 145, [1990] 1 S.C.R. 190 at p. 210., also see: **R. v. Bartle**, 33 C.R. (4th) 1 at p.31, [1994] 3 S.C.R. 175 at p. 209 where Chief Justice Lamer writing for the majority directed courts to take a "generous approach" to the proof of this aspect of the 24(2) inquiry.

⁵⁹ **Grant**, supra, at p. 255, also see: **R. v. Wiley**, [1993] 3 S.C.R. 263, **R. v. Plant**, [1993] 3 S.C.R. 281, and **R. v. I. (L.R.) and T.(E.)**, 26 C.R. (4th) 119, [1993] 4 S.C.R. 504.

obtaining of the evidence. A Charter right violation (e.g., unlawful entry) is not corrected nor would its seriousness be diminished simply because the police subsequently obtained a warrant so that the unlawful act is followed by a lawful one. Where the two are "intertwined in time and in their nature," the unlawful conduct taints the lawful⁶⁰. Lamer C.J.C. summed up the situation by saying in **Bartle**, supra:

Generally speaking, so long as it is not too remotely connected with the violation, all the evidence obtained as part of the "chain of events" involving the **Charter** breach will fall within the scope of s. 24(2).⁶¹

Moreover, the subsequent decision of the Supreme Court in **Burlingham** demonstrates that even evidence which is only remotely connected to unconstitutional conduct may be excluded if its admission would have the same effect as admitting more proximate excluded evidence.⁶² The Crown should not be allowed to introduce evidence to do indirectly what it cannot do directly because of an exclusion order under s-s. 24(2).

⁶⁰ **R. v. Silveria**, [1995] 2 S.C.R. 297, at p. 363.

⁶¹ Supra, at S.C.R. pp. 208-9.

⁶² Supra, at S.C.R. pp. 235-39.

Although the presence of a causal connection is not necessary for the invocation of the exclusionary remedy, that does not mean the existence and strength of a causative relationship has no relevance. As Wilson J. points out in **R. v. Black**⁶³ former Chief Justice Dickson in **Strachan** was not precluding the use of a causal connection to determine if evidence was obtained in a manner that infringed Charter rights. While he was establishing a broader one, the "causal connection" test can still be used in cases where such a link is obviously present and the evidence is clearly derivative. Furthermore, as Sopinka J. in **I.(L.R.) and T.(E.)**⁶⁴ and Lamer C.J. in **Bartle**⁶⁵ indicate, the presence and strength of a causal connection have relevance to the issue of remoteness. The Supreme Court gave some indication of when the nexus would be considered too remote in **R. v. Goldhart**, a case where Sopinka J. said:

if both the temporal connection and the causal connection are tenuous the Court may very well conclude that the evidence was not obtained in a manner that infringes a right or freedom under the Charter.⁶⁶

⁶³ 50 C.C.C. (3d) 1 at p. 19, 70 C.R. (3d) 97 at p. 115, [1989] 2 S.C.R. 138 at p. 163.

⁶⁴ Supra.

⁶⁵ Supra, at C.R. p. 31.

⁶⁶ [1996] S.C.J. No. 76 at [para. 40], [1996] 2 S.C.R. 463 at [para. 40].

Some see the Supreme Court's decision in **Goldhart** (involving an application for the exclusion of testimony from a witness who was discovered in the course of an illegal search of a premises) as a turning back to a causal connection test, but more likely it is merely an instance of the Court concluding that the evidence in that particular case, though obtained following the Charter breach, was too remote from the violation to be 'obtained in a manner' that infringed the Charter. The Supreme Court's decision in **Goldhart** is consistent with the earlier statement of Dickson C.J.C. in **Strachan**⁶⁷. Indeed, the witness's testimony in **Goldhart** was much more the product of his own decision to testify than of his being discovered on the premises in the course of the illegal search. Thus **Goldhart** is just an instance of what Dickson C.J.C. was referring to in **Strachan** when he said:

Situations will arrive where evidence though obtained following the breach of a Charter right will be too remote from the violation to be obtained in a manner that infringed the Charter. In my view, these situations should be dealt with on a case by case basis. There can be no hard and fast rule for determining when evidence obtained following the infringement of a Charter right becomes too remote.⁶⁸

⁶⁷ See footnote 55.

⁶⁸ Ibid.

9**Test**

The focal point in s-s. 24(2) cases ought to be the effect of the "admission" of the illegally obtained evidence. If the admission of the evidence in the proceedings would not bring the administration of justice into disrepute, it cannot be excluded under s-s. 24(2) even though it may have been obtained through a Charter violation. The fact that there is police misconduct during the investigative stage which brings the administration of justice into disrepute is not, by itself, sufficient to warrant exclusion. Before it can exclude, the Court must be satisfied that the admission of the evidence would bring even further disrepute to the administration of justice than has the police misconduct.⁶⁹ The further disrepute will result from the admission of evidence that would deprive the accused of a fair hearing or from judicial condonation of unacceptable conduct by the investigatory and prosecutorial agencies.⁷⁰

It is the courts, not public opinion, which must decide on the effect admission of the evidence would have on the repute of the administration of justice.

⁶⁹ **Collins**, supra, at C.C.C. pp. 16-7, C.R. p. 208, S.C.R. pp. 280-1, **Calder**, supra, [para. 29] and [para. 33].

⁷⁰ Ibid, at S.C.R. 281, **Buhay**, supra, at [para. 70].

The Supreme Court in **Collins** rejected the use of opinion polls as proof of whether the admission of illegally obtained evidence would, in a particular case, bring the administration of justice into disrepute. Lamer J. writing for the majority declared that "the Charter is designed to protect the accused from the majority so the enforcement of the Charter must not be left to the majority."⁷¹ This coincides with the view expressed earlier in **Therens** by Le Dain J. that the issue of whether the admission of evidence would bring the administration of justice into disrepute was a question of law to be determined by a Court without evidence of the effect of the admission on public opinion.⁷²

Although it is up to the courts to determine whether the admission of the evidence in question would bring the administration of justice into disrepute, the judge does not have uncontrolled discretion. The concept of "disrepute" in s-s. 24(2) requires the Court to refer to what it perceives as the views of the community at large. This is not to be done by polling public opinion or by trying to determine the effect on the system's repute by the same method as has been used to assess the level of community tolerance in obscenity cases. Instead, the Supreme Court has devised

⁷¹ Ibid, at C.C.C. p. 17, C.R. p. 209, S.C.R. p. 282. Subsequently, in **Burlingham** the majority reaffirmed this position.

⁷² *Supra*, at C.C.C. p. 513, C.R. pp. 133-4, S.C.R. pp. 653-4.

what has been called a "reasonable people in normal times" test. A Court applying this test must ask itself: Given long-term community values, would the regular admission of the type of evidence in question bring the administration of justice into disrepute in the eyes of the reasonable person, dispassionate and fully apprised of the circumstances of the case?⁷³ In **R. v. Greffe**, Lamer J. emphasized that "it is the long-term consequences of regular admission of the evidence on the repute of the administration of justice that must be considered."⁷⁴ The "disrepute" being referred to is "disrepute" in the local community. The administration of justice does not have to be brought into disrepute on a national scale before courts may interfere to protect the integrity of the process within which they operate.⁷⁵

It should also be noted that the threshold for exclusion under s-s. 24(2) is lower than the "community shock" test advanced by Lamer J. in his dissenting opinion in **Rothman**. That is because s. 24 involves consideration of a breach of the supreme law of the land and because the French version, which is equally official,

⁷³ **Collins**, *supra*, at C.C.C. pp. 17-8, C.R. pp. 209-10, S.C.R. pp. 281-3, **Calder**, *supra*, at [para. 34].

⁷⁴ 55 C.C.C. (3d) 161 at p. 183, 75 C.R. (3d) 257 at p. 280, [1990] 1 S.C.R. 755 at p. 784, also see: **Bartle**, *supra*, at C.R. p. 38 and **R. v. Borden**, (S.C.C.) 33 C.R. (4th) 147 at p. 163.

⁷⁵ **Buhay**, *supra* at [para. 68].

only requires that the evidence "could" bring the administration of justice into disrepute.⁷⁶

⁷⁶ **Collins**, supra, at C.C.C. p. 23, C.R. p. 213, S.C.R. pp. 286-7, and **Hebert**, supra, at C.C.C. p. 44, C.R. p. 192, S.C.R. p. 187.

The Administration of Justice

In **Therens** Le Dain J. said:

The central concern of s. 24(2) would appear to be the maintenance of respect for and confidence in the administration of justice, as that may be affected by the violation of constitutional rights and freedoms."⁷⁷

The Supreme Court to date has not tried to give a comprehensive definition to what is included in the expression "the administration of justice." Estey J. stated in **Therens**.⁷⁸

I am strongly of the view that it would be most improvident for this court to expatiate the meaning of the expression 'administration of justice' and particularly its outer limits. There will no doubt be, over the years, a gradual build-up in delineation and definition of the words in s. 24(2).

It would appear from the Supreme Court jurisprudence since **Therens** that the expression at least includes the judicial system⁷⁹ the criminal justice system and the Charter itself.⁸⁰ We also know that the administration of justice referred to in s-

⁷⁷ Supra, at C.C.C. pp. 511-2, C.R. p. 132, S.C.R. p. 652.

⁷⁸ Ibid, at C.C.C. p. 489, C.R. p. 108, S.C.R. p. 622.

⁷⁹ **Simmons**, supra, at C.C.C. p. 324, C.R. p. 325, S.C.R. p. 534, **Burlingham**, supra, at S.C.R. p. 238.

⁸⁰ **Grefe**, supra, at C.C.C. p. 194, C.R. p. 292, S.C.R. p. 799.

s.24(2) is local. In **Buhay**, Arbour J., writing for the unanimous court, states “the administration of justice does not have to be brought into disrepute on a national scale before courts may interfere to protect the integrity of the process in which they operate.”⁸¹

⁸¹ Supra at [para.70].

11**Burden**

An applicant has the onus of establishing the existence of the three prerequisites for exclusion of evidence under s-s. 24(2) of the Charter.

First, an applicant seeking the exclusion of evidence under s-s. 24(2) bears the burden of persuading the Court, on a balance of probabilities, that his or her rights have been infringed.⁸² However, as Lamer C.J.C. points out in **R. v. Cobham**, this does not mean that an applicant must formally prove every single fact upon which his or her claim of a violation is based, including those not in dispute between the parties and those matters of common knowledge amongst members of the Bench and Bar of which judicial notice should therefore be taken.⁸³

Secondly, an applicant has to establish that an adequate relationship exists between the Charter violation and the evidence he or she wants excluded to bring it within the domain of s-s. 24(2). Since **Strachan**⁸⁴ it seems safe to infer that the applicant only bears the burden of persuading the Court that the violation occurred

⁸² **Collins**, supra, at C.C.C. pp. 13-4, C.R. p. 205, S.C.R. p. 277.

⁸³ 33 C.R. (4th) 73 at p. 81.

⁸⁴ Supra.

in the course of obtaining the evidence. Ordinarily, that should not be difficult. In **Bartle** Chief Justice Lamer urged courts to take a "generous approach" toward what will suffice as a connector between the evidence and the Charter breach so that generally, so as long as it is not too remote, all the evidence obtained as part of the chain of events involving the Charter breach will fall within the scope of s-s. 24(2).⁸⁵

Thirdly, the use of the phrase "if it is established that" in s-s. 24(2) places the burden of persuading the Court that admission of the evidence could bring the administration of justice into disrepute on the applicant.⁸⁶ Again, the standard of persuasion is the civil one: a balance of probabilities.⁸⁷

Although the applicant bears the ultimate burden of persuasion under s-s. 24(2), that does not mean that he or she has that onus at every turn of the inquiry. For example, it has been recognized by the Supreme Court in **Burlingham** that while theoretically the onus is on the accused to show that the impugned evidence would not have been found but for the unconstitutional conduct, in practice that

⁸⁵ Supra, at C.R. p. 31.

⁸⁶ **Collins**, supra, at C.C.C. p. 16, C.R. p. 208, S.C.R. p. 280, **Bartle**, supra, at C.R. p. 31.

⁸⁷ Ibid.

burden will often fall on the Crown because it possesses superior knowledge and therefore it must satisfy the Court on a balance of probabilities that the police would have discovered the evidence regardless of the information arising from the unconstitutional conduct.⁸⁸ In **R. v. Stillman**⁸⁹ the Supreme Court held that, if unconstitutionally obtained evidence is conscriptive, it should generally be excluded unless the Crown demonstrates, on a balance of probabilities, that it would have discovered the evidence by alternative non conscriptive means. Thus it can be seen the onus on any relevant issue will shift back and forth between the Crown and the applicant, depending on what the particular contested issue is, which party is seeking to rely on it, and the nature of the Charter right which has been violated. Once an applicant proves certain facts in relation to a particular issue, a presumption will sometimes arise which the Crown has to rebut. When the burden of persuasion shifts to the Crown, the standard to discharge it is also a balance of probabilities.⁹⁰

In **Bartle** former Chief Justice Lamer identifies two other such instances where the onus shifts to the Crown in s-s. 24(2) applications. They are: (1) In cases

⁸⁸ **Burlingham** supra, at S.C.R. pp. 234-35.

⁸⁹ [1997] S.C.J., No. 34, [1997] 1 S.C.R. 607.

⁹⁰ **R. v. Pozniak**, 33 C.R. (4th) 49 at p. 56, **Stillman**, supra, at [para. 119].

involving a breach of s. 8 of the Charter where evidence has been obtained as a result of an unreasonable search and seizure there is a presumption that the violation is a serious one. However, the Crown can overcome the presumption if it can show that the police had reasonable and probable grounds to act as they did, or that there were compelling and urgent circumstances. (2) In cases of s. 10(b) violations the Crown has the burden of establishing, on the evidence, that the s-s. 24(2) applicant would not have acted any differently had his or her s. 10(b) rights been fully respected, and that as a consequence, the evidence would have been obtained irrespective of the breach. There is no legal onus on the applicant to prove that the unconstitutional act caused the discovery of the evidence in question. On the contrary, if the Crown claims there was no causal link between a Charter breach and the obtaining of evidence, it must prove this assertion. Furthermore, the former Chief Justice makes it clear that the Crown cannot satisfy the onus that shifts to it in s. 10(b) cases by engaging the Court in speculation about whether the applicant would have sought legal advice or the nature of the advice he would have received had his right not been violated.⁹¹ Nevertheless, applicants for exclusion cannot

⁹¹ **Bartle**, *supra*, at C.R. pp. 32-33.

afford too much smugness about the onus on the Crown because as Lamer C.J. notes

in **Bartle**:

... once there is positive evidence supporting the inference that an accused would not have acted any differently had his or her s.10(b) rights been fully respected, a s. 24(2) applicant who fails to provide evidence that he or she would have acted differently (a matter clearly within his or her particular knowledge) runs the risk that the evidence on the record will be sufficient for the Crown to satisfy its legal burden (the burden of persuasion).⁹²

Chief Justice Lamer in both **R. v. Schmautz**⁹³ and **Harper**⁹⁴ drew inferences adverse to the accused from their failure to testify at the s-s. 24(2) *voir dire* that they would have sought advice or acted differently if their right to counsel had not been violated.

⁹² Supra, at C.R. pp. 33-34.

⁹³ 53 C.C.C. (3d) 566. 75 C.R. (3d) 129, [1990] 1 S.C.R. 398.

⁹⁴ [1994] 3 S.C.R. 343, 33 C.R. (4th) 61.

12**Circumstances**

In determining whether admission of impugned evidence could bring the administration of justice into disrepute, s-s. 24(2) directs the Court to have "regard to all the circumstances." According to former Chief Justice Lamer, the circumstances affecting the repute of the administration of justice can be separated into three groups:

- (1) factors affecting the fairness of the trial;
- (2) factors relating to the seriousness of the violation; and
- (3) factors relating to the disrepute that exclusion of the evidence might cause.⁹⁵

However, a Court is not to make its decision by simply balancing all the various factors in the three groups arguing for or against admission.⁹⁶ The first two are alternative grounds for exclusion of the evidence, not for its admission.⁹⁷ Factors affecting the fairness of the trial are the most important and should be given the most

⁹⁵ **Collins**, supra, at C.C.C. pp. 19-20, C.R. pp. 211-13, S.C.R. pp. 284-6; **Law**, supra at [para. 33]; **Buhay**, supra at [para.41].

⁹⁶ **R. v. Elshaw**, 67 C.C.C. (3d) 97 at p. 129, 7 C.R. (4th) 333 at p. 350, [1991] 3 S.C.R. 24 at p. 45.

⁹⁷ **Hebert**, supra, at C.C.C. p. 20, C.R. p. 167, S.C.R. pp. 207-8 per Sopinka J. Also see: **Bartle**, supra, at C.R. p. 38.

weight.⁹⁸ If the admission of the evidence would render the trial unfair, the Court will, as a general rule, exclude the evidence without considering factors relating to the seriousness of the breach or the effect of exclusion on the repute of the administration of justice.⁹⁹ The second and third groups of factors are of equal importance in relation to each other. Therefore, if it concludes that admitting the evidence would not adversely impact on the fairness of the trial, the Court should then resolve the issue by weighing the factors relating to the seriousness of the violation against those going to the disrepute that is likely to be caused by exclusion.¹⁰⁰ The Supreme Court has identified a couple of factors that should not be given any weight in determining whether admission of the evidence would bring the administration of justice into disrepute. In **Burlingham** the Supreme Court held that the fact the impugned evidence may not be too important to the outcome of a trial cannot be used as a consideration to support its admission.¹⁰¹ Another factor that has been declared irrelevant is the existence of other remedies. The availability

⁹⁸ **R. v. Mellenthin**, 76 C.C.C. (3d) 481 at pp. 489-90, 16 C.R. (4th) 273 at p. 282, [1992] 3 S.C.R. 615 at p. 626, **Burlingham**, supra, at S.C.R. p. 232.

⁹⁹ **Stillman**, supra.

¹⁰⁰ **Grant**, supra, **Belnavis**, supra.

¹⁰¹ Supra, at S.C.R. p. 241.

of another remedy would not lessen the disrepute that could fall on the administration of justice from the Court's acceptance of illegally obtained evidence.¹⁰²

¹⁰² **Collins**, *supra*, at C.C.C. p. 21, C.R. p. 213, S.C.R. p. 286.

13**Fairness of the Trial**

Fair trials for those charged with criminal offences are vital to the integrity of our system of justice and the respect it enjoys. As Cory J. put it in the leading case of **Stillman**:

A fair trial for those accused of a criminal offence is a cornerstone of our Canadian democratic society. A conviction resulting from an unfair trial is contrary to our concept of justice. To uphold such a conviction would be unthinkable. It indeed would be a travesty of justice.¹⁰³

Thus, an unfair trial undoubtedly brings the administration of justice into disrepute. Accordingly, evidence obtained through a Charter violation should usually be excluded if its admission adversely affects the fairness of the trial.¹⁰⁴ A fair trial has been defined as one which satisfies the public interest in getting at the truth while preserving basic procedural fairness to the accused.¹⁰⁵ Trial fairness factors include the nature of the evidence obtained as a result of the Charter breach and the nature

¹⁰³ **Stillman**, supra, at [para 72].

¹⁰⁴ **Collins**, supra, at C.C.C. p. 19, C.R. p. 211, S.C.R. p. 284, and **R. v. Evans (Wesley)**, 63 C.C.C. (3d) 289 at p. 309, 4 C.R. (4th) 144 at p. 166, [1991] 1 S.C.R. 869 at pp. 898-899, **Burlingham**, supra, at S.C.R. p. 233.

¹⁰⁵ **Harrer**, supra, at S.C.R. 562, per McLachlin J.

of the right violated but not the manner in which the right was violated. The latter is a factor that goes to the seriousness of the breach.

In **Stillman**, the Supreme Court of Canada set out a two-stage approach for determining whether the admission of the evidence in question would affect the fairness of the trial. The first step requires the Court to classify the evidence as conscriptive or non conscriptive. If it is the former, the second step requires the crown to prove on a balance of probabilities that the evidence could have been discovered by alternative, non conscriptive means.

The primary objective in considering trial fairness factors in the s-s. 24(2) analysis is to prevent an accused person, whose Charter rights have been violated, from being forced to provide evidence in the form of confessions, statements, or bodily samples for the benefit of the state. It is because the accused is compelled as a result of a Charter breach to participate in the creation or discovery of self-incriminating evidence in such forms that the admission of that evidence would generally tend to render the trial unfair.¹⁰⁶

¹⁰⁶ **Stillman**, supra, at [para 73].

As already mentioned, the first step in the trial fairness analysis is to classify the evidence as either conscriptive or non conscriptive. If the accused is not compelled to participate in the creation or discovery of the evidence (i.e. the evidence existed independently of the Charter breach in a form usable by the state), the evidence will be classified as non conscriptive.¹⁰⁷ The admission of such evidence will rarely render a trial unfair.¹⁰⁸ Evidence will be conscriptive when an accused, in violation of his or her Charter rights, is compelled to incriminate himself or herself at the behest of the state by means of a statement, the use of the body or the production of bodily substances.¹⁰⁹ However, it should be noted from **R. v. Fliss**¹¹⁰ and **Wijesinha** that not every unconstitutionally obtained statement will be classified as conscriptive. In **Fliss**, Bennie J., writing for the majority, said at para.78:

¹⁰⁷ Ibid, at [para.75].

¹⁰⁸ Ibid.

¹⁰⁹ Ibid., at [para.80].

¹¹⁰ [2002] 1 S.C.R. 535, 2002 SCC 16.

The proper focus at this [classification] stage is therefore on the actions involved in obtaining the evidence rather than on the form in which the evidence exists.¹¹¹

The **Stillman** decision by identifying three specific types, seems to leave open the possibility of admitting some evidence that might otherwise be classified as conscriptive. However, it remains to be seen whether the Supreme Court intended conscriptive evidence to be limited to the three types it specifically identified. It must be noted the Court in **Stillman** did not disapprove of or overrule its earlier discussion in **Mellenthin**.¹¹² In the latter case, the Supreme Court ruled in favour of excluding the contents of a gym bag (drugs) that would not have been discovered without the compelled participation of the accused. The Court held that the admission of this evidence would render the trial unfair. The gym bag contents would not fall into one of the categories specifically set out in **Stillman**.

Evidence found as the result of other conscriptive evidence may itself be considered as conscriptive. Characterization of such derivative evidence as conscriptive is appropriate where the initial conscriptive evidence is a necessary

¹¹¹ Supra.

¹¹² Supra.

cause of the obtaining of the derivative evidence. Derivative evidence is not conscriptive unless it would not have been obtained but for the antecedent conscriptive evidence. In analyzing whether the “but for” test has been met, it is not relevant whether the means by which the evidence would have been discovered in the absence of conscription are constitutional. Where the derivative evidence (usually real) would have been discovered in any event, even by unlawful methods, the evidence is not conscriptive.

The content of the evidence or the use to which it is put does not change its character for the purpose of classifying it as conscriptive or non constrictive. Thus, a statement that is exculpatory should still be considered as conscriptive if the accused was compelled, in breach of his Charter rights, to provide it.¹¹³ If the evidence is conscriptive, the Court should treat it the same for purposes of the s.24(2) analysis whether the Crown proposes to use it for the truth of its contents or for the more limited purpose of challenging the credibility of the accused on cross-examination.¹¹⁴

¹¹³ **Cook**, supra, at [para.71].

¹¹⁴ *Ibid.*, at [para.77].

If evidence is conscriptive and the Crown fails to demonstrate on a balance of probabilities that it would have been discovered by alternative non conscriptive means that would comply with the Charter, the Court, as a general rule, will exclude it without considering the seriousness of the breach or the effect of exclusion on the repute of the administration of justice. On the other hand, if the evidence is non conscriptive, or the Crown demonstrates that it would have discovered the evidence by non conscriptive constitutional means, its admission would not likely render the trial unfair, so the Court should proceed to consider the seriousness of the breach and the effect exclusion would have on the repute of the administration of justice.¹¹⁵

Trial fairness will often be adversely affected by the admission of evidence obtained through a violation of s-s. 10(b) Charter rights. Breaches of s-s. 10(b) tend to impact directly on adjudicative fairness because conscriptive evidence thereby obtained may infringe an accused's privilege against self-incrimination, one of the fundamental tenets of a fair trial, and a right that might have been protected had the

¹¹⁵ Ibid at [para. 73-119], **R. v. Feeney** (1997), 115 C.C.C. (3d) 129, [1997] 2 S.C.R. 13 [para. 67-72].

accused been given a proper opportunity to consult counsel.¹¹⁶ Trial fairness can also be adversely affected by the admission of conscriptive evidence obtained through violations of ss. 7 and 8 of the Charter. For example, evidence obtained through a significant compelled intrusion of the body without consent or statutory authority will have an adverse impact on the fairness of the trial and therefore should generally be excluded.¹¹⁷ In fact, the admission of any conscriptive evidence obtained through any violation of an accused's Charter rights would render the trial unfair and should generally be excluded unless the Crown demonstrates on a balance of probabilities that it would have been discovered by alternative non conscriptive means.¹¹⁸ The exclusion should extend to any derivative evidence that would not have been discovered but for the accused's compelled assistance. On this basis, the Supreme Court of Canada in **Burlingham** excluded all the derivative evidence, both real and testimonial (including a voluntary statement made to a person not in authority), resulting (even though not necessarily directly) from information

¹¹⁶ **Bartle**, supra at C.R. 32-34.

¹¹⁷ **Stillman**, supra, at [para. 93].

¹¹⁸ **R. v. Ross**, 46 C.C.C. (3d) 129 at p. 139, 67 C.R. (3d) 209 at p. 220, [1989] 1 S.C.R. 3 at p. 16, and **R. v. Genest**, 45 C.C.C. (3d) 385 at p. 403, 67 C.R. (3d) 244 at p.244, [1989] 1 S.C.R. 59 at p. 83, **Burlingham**, supra, per Iacobucci J.

obtained through a violation of the accused's right to counsel.¹¹⁹ On the other hand, if the evidence, although in some respects derivative from a Charter breach, would have been discovered or located without the compelled assistance of the accused, its admission would not render the trial unfair.¹²⁰

If the admission of the impugned evidence would render the trial unfair, it should generally be excluded regardless of whether: the offence is serious; the evidence establishes guilt; the accused was under a **Criminal Code** duty to provide such evidence; or that the authorities acted in good faith.¹²¹ Indeed, it has been said that the more serious the offence, the more important it is to have a fair trial.¹²² However, exclusion is not quite automatic; there are rare exceptions. The Supreme Court ruled against exclusion, in spite of the fairness of the trial rationale, in **R. v.**

¹¹⁹ **Burlingham**, supra, at S.C.R. pp. 235-40.

¹²⁰ **Mellenthin**, supra, at C.C.C. pp. 489-91, C.R. pp. 282-4, S.C.R. p. 627, **Black**, supra, **R. v. Wise**, 70 C.C.C. (3d) 193, 11 C.R.(4th) 253, [1982] 1 S.C.R. 527.

¹²¹ **R. v. Clarkson**, 25 C.C.C. (3d) 207, 50 C.R. (3d) 289, [1986] 1 S.C.R. 383; **Manninen**, supra, at C.C.C. p. 394, C.R. pp. 106-7, S.C.R. p. 1246, **R. v. Jacoy**, 45 C.C.C. (3d) 46 at p. 54, 66 C.R. (3d) 336 at p. 345, [1988] 2 S.C.R. 548 at p. 559, **Black**, supra, **Brydges**, supra, **Hebert**, supra, at C.C.C. p. 20 and pp. 44-5, C.R. p. 167 and pp. 192-3, S.C.R. pp. 188-9 and p. 207, **Evans (Wesley)**, supra, **Elshaw**, supra, at C.C.C. p. 127, C.R. pp. 348-9, S.C.R. p. 43, **R. v. Broyles**, 68 C.C.C. (3d) 308 at pp. 325-6, 9 C.R. (4th) 1 at pp. 21-2, [1991] 3 S.C.R. 595 at pp. 618-9, **Pozniak**, supra, at C.R. p. 56, **Cobham**, supra, at C.R. p. 82, **R. v. Prosper**, 33 C.R. (4th) 85 at p. 118, **Bartle**, supra, at C.R. pp. 34-38, **Borden**, 33 C.R. (4th) 147 at pp. 162-163.

¹²² **Collins**, supra at C.C.C. p. 21, C.R. p. 212, S.C.R. 286.

Tremblay¹²³, a case where the constitutional violation was caused by the accused's unreasonable and obnoxious behaviour, and in **R. v. Mohl**¹²⁴, a case where the accused's incapacity to exercise his constitutional right was brought on by his own voluntary conduct and that incapacity was itself an element of the offence in respect of which the evidence in question was relevant. In **R. v. Dewald**¹²⁵, the Supreme Court concluded that the admission of conscriptive breath test evidence would not render the trial unfair as the breach was technical and the officer acted in good faith. In **Feeney**, Sopinka J. indicated that where an arrest is unlawful due to a technicality, fingerprints taken as an incident of the arrest might nevertheless be admissible under s.24(2).¹²⁶ In **Bartle**, supra, after pointing out that a review of past decisions of the Supreme Court demonstrates that exclusion of self-incriminatory evidence will not slavishly follow every breach of the right to counsel, Lamer C.J.C. says:

If the party resisting admission of the evidence is unable to establish in an overall sense that its admission would bring the

¹²³ 37 C.C.C. (3d) 514, 45 C.R. (3d) 137, [1985] 1 S.C.R. 435.

¹²⁴ (1989), 47 C.C.C. (3d) 575, [1989] 1 S.C.R. 1389.

¹²⁵ [1996] 1 S.C.R. 68.

¹²⁶ Supra, at [para. 60].

administration of justice into disrepute, the evidence should be admitted.¹²⁷

However, as Sopinka J. points out in **Feeney**, exceptional circumstances must exist in order for the admission of conscriptive, undiscoverable evidence not to render the trial unfair.¹²⁸

Something to watch for is whether the 2005 dissenting opinion of LeBel J. in **Orbanski** foreshadows a turn by the Supreme Court toward more tolerance for the admission of unconstitutionally obtained conscriptive evidence where there has been substantial Charter compliance and the non-compliance is the result of a good-faith error. LeBel J. expressed the view that the exclusion of conscriptive evidence should not be automatic as not every Charter breach leading to its discovery goes to trial fairness. He found the Charter infringement in that case was minor and did not go to the fairness of the trial even though the evidence was conscriptive. He was of the view that, in the circumstances, excluding the evidence would bring the administration of justice into disrepute. The majority did not address s-s. 24(2) because they found the infringement was justified under s.1.

¹²⁷ **Bartle**, supra, at p. 34.

¹²⁸ Supra, [para. 65] and [para. 71].

14**Seriousness of the Violation**

Unconstitutionally obtained evidence which does not adversely affect the fairness of a trial may nevertheless be excluded under s-s. 24(2) if its admission would constitute judicial condonation of unacceptable police or prosecutorial conduct.¹²⁹ In **R. v. Law**¹³⁰, **Buhay**, and **R. v. Mann**¹³¹ the Supreme Court of Canada upheld a trial judge's decision to exclude non conscriptive evidence essential to the Crown's case even though its admission would not have rendered the trial unfair. The purpose of considering factors relating to seriousness is to assess the disrepute that the administration of justice would suffer as a consequence of judicial acceptance of evidence obtained through a Charter violation.¹³² Although s-s. 24(2) is not intended as a remedy for police misconduct, one of its purposes is to prevent the administration of justice from being brought into further disrepute by the admission of evidence obtained through serious abuse of Charter rights by the

¹²⁹ **Collins**, supra, at C.C.C. pp. 16-7, C.R. p. 208, S.C.R. pp. 280-1.

¹³⁰ [2002] 1 S.C.R. 227, 2002 SCC 10.

¹³¹ 2004 SCC 52; [2004] S.C.J. No. 49.

¹³² **R. v. Kokesch**, 61 C.C.C. (3d) 207 at p. 226, 1 C.R. (4th) 62 at p. 67, [1990] 3 S.C.R. 3 at p. 27.

authorities.¹³³ The measure of seriousness is a function of the deliberate or non-deliberate nature of the violation, circumstances of urgency and necessity, and other aggravating or mitigating factors.¹³⁴ Therefore any assessment of the seriousness of a Charter violation must take into account the reasons for the police conduct as well as the conduct itself. The following are some specific factors that have been recognized by judges of the Supreme Court of Canada as appropriate to consider in assessing the seriousness of a Charter breach:

1. The presence or absence of good faith;¹³⁵
2. Whether the police acted out of urgency or necessity to prevent the loss or destruction of evidence, to stabilize an uncertain situation or to deal with a real threat of violent behavior;¹³⁶

¹³³ **Collins**, supra, at C.C.C. p. 16, C.R. p. 208, S.C.R. p. 281.

¹³⁴ **Elshaw**, supra, at C.C.C. p. 125, C.R. p. 346, S.C.R. p. 40.

¹³⁵ **R. v. Hamill**, 33 C.C.C. (3d) 110 at p. 115, 56 C.R.(3d) 220 at p. 224, [1987] 1 S.C.R. 301 at p. 308, **R. v. Sieben**, 32 C.C.C. (3d) 574 at p. 576, 56 C.R. (3d) 225 at p. 228, [1987] 1 S.C.R. 295 at p. 299, **Simmons**, supra, at C.C.C. p. 325, C.R. p. 326, S.C.R. pp. 534-535, **Jacoy**, supra, at C.C.C. p. 54, C.R. p. 345, S.C.R. p. 559, **R. v. Duarte**, 53 C.C.C. (3d) 1, 60 C.R. (3d) 142, [1990] 1 S.C.R. 30, **R. v. Wiggins**, 53 C.C.C. (3d) 476, [1990] 1 S.C.R. 62, **Thompson**, supra, **R. v. Wong**, 60 C.C.C. (3d) 460, 1 C.R. (4th) 1, [1990] 3 S.C.R. 36, **R. v. Genereux**, 70 C.C.C. (3d) 1, [1992] 1 S.C.R. 259, **Grant**, supra, **Plant**, supra, and **Wiley**, supra, **R. v. Colarusso**, [1994] 1 S.C.R. 20, **Wijesinha**, supra, **R. v. Evans (Cheryl and Robert)**, [1996] 1 S.C.R. 8, **Feeney**, supra, **Belnavis**, supra, **Buhay**, supra, **Mann**, supra.

¹³⁶ **Therens**, supra, at C.C.C. p. 512, C.R. pp. 132-3, S.C.R. p. 652, **Manninen**, supra, at C.C.C. p. 394, C.R. p. 106, S.C.R. p. 1245, **R. v. Debot**, 52 C.C.C. (3d) 193 at pp. 221-2, 73 C.R. (3d) 129 at p. 157, [1989] 2 S.C.R. 1140 at pp. 1176-7, **Strachan**, supra, at C.C.C. p. 500, C.R. p. 108, S.C.R. p. 1007, **Genest**, supra, at C.C.C. p. 407, C.R. pp. 244-51, S.C.R. p. 89, **Grant**, supra, **Silveria**, supra, **Buhay**, supra.

3. The availability of other investigative options;¹³⁷
4. Whether the violation was part of a pattern of police conduct or just an isolated incident;¹³⁸
5. The duration and intensity of the violation;¹³⁹
6. The intrusiveness of the search;¹⁴⁰
7. The degree of force used or harm done and the reasons for it;¹⁴¹
8. The existence or nonexistence of reasonable and probable grounds;¹⁴² or at least a subjective belief in the existence of reasonable grounds;¹⁴³

¹³⁷ **Collins**, supra, at C.C.C. p. 20, C.R. p. 212, S.C.R. p. 285, **Grant**, supra, **Stillman**, supra, **Law**, supra, **Buhay**, supra.

¹³⁸ **Strachan**, supra, **Genest**, supra, **Grefe**, supra, **Belnavis**, supra at [para. 41].

¹³⁹ **R. v. Duguay**, 46 C.C.C. (3d) 1, 60 C.R. (3d) 142, [1990] 1 S.C.R. 30, per L'Heureux-Dubé J. dissenting, **Wise**, supra, at C.C.C. p. 226, C.R. p. 269, S.C.R. p. 545, **Belnavis**, supra, at [para. 41].

¹⁴⁰ **R. v. Caslake**, [1998] 1 S.C.R. 51 at [para.34], **Buhay**, supra, **Mann**, supra.

¹⁴¹ **Collins**, supra, at C.C.C. p. 23, C.R. p. 214, S.C.R. p. 288, **Hamill**, supra, at C.C.C. p. 115, C.R. p. 225, S.C.R. p. 301. **Genest**, supra, at C.C.C. p. 408, C.R. 249, S.C.R. p. 89, **Feeney**, supra, **Caslake**, supra, at [para.34].

¹⁴² **Jacoy**, supra, **Grefe**, supra, **Wise**, supra, **Mellenthin**, supra, **Grant**, supra, **Feeney**, supra, **Belnavis**, supra, **Caslake**, supra, **Buhay**, supra.

¹⁴³ **Feeney**, supra, **Belnavis**, supra.

9. The degree of expectation of privacy involved. Whether the violation related to a person, dwelling, office, locker or vehicle;¹⁴⁴
10. Whether in the course of an otherwise valid investigative detention a search went beyond what was required to protect the officer's safety in the circumstances.¹⁴⁵
11. Whether the police tried to aid the accused in the exercise of his or her rights or took advantage of his or her misunderstanding or ignorance of them;¹⁴⁶ For police to lie or mislead individuals with regard to their Charter rights is fundamentally unfair and demeaning of those Charter rights. Therefore, to countenance such would bring the administration of justice into disrepute.¹⁴⁷
12. Whether the violation occurred or continued after the accused asserted a Charter right;¹⁴⁸
13. Whether the accused acted diligently in the exercise of his or her rights once advised of them;¹⁴⁹

¹⁴⁴ **Pohoretsky**, supra, **R. v. Dymont**, 45 C.C.C. (3d) 244, 66 C.R. (3d) 348, [1988] 2 S.C.R. 417, **Greffe**, supra, **Hamill**, supra, **Sieben**, supra, **Genest**, supra, **Simmons**, supra, **Kokesch**, supra, **Wise**, supra, **Grant**, supra, **Silveria**, supra, **Stillman**, supra, **Belnavis**, supra, **Caslake**, supra at [para.34], **Buhay**, supra.

¹⁴⁵ **Mann**, supra.

¹⁴⁶ **Ross**, supra, at C.C.C. p. 140, C.R. p. 222, S.C.R. pp. 17-18, **R. v. Smith (Joey)**, 50 C.C.C. (3d) 308 at p. 322, 71 C.R. (3d) 129 at p. 144, [1989] 2 S.C.R. 368 at p. 381, **Broyles**, supra, at S.C.R. p. 618, **Brydges**, supra, at C.C.C. p. 346, C.R. p. 146, S.C.R. p. 210.

¹⁴⁷ **Cook**, supra, at [para.60].

¹⁴⁸ **Manninen**, supra, **Ross**, supra, **Black**, supra, **Hebert**, supra.

¹⁴⁹ **Tremblay**, supra.

14. Whether the police were responding appropriately to protect the community from a danger of violence.¹⁵⁰
15. Whether the evidence would have been obtained apart from the breach.¹⁵¹ (This is where the presence and strength of a causal connection between discovery of the evidence and the Charter breach become an important consideration.)
16. Whether the Charter breach by the police resulted in their taking advantage of improper conduct in respect of an accused by health care professionals.¹⁵²
17. Whether the accused was a young offender.¹⁵³
18. The vulnerability of the accused at the time of the breach.¹⁵⁴

Obviously, there is some overlap in these factors, and there is no reason to suppose that the list is closed. Suffice it to say, if a Charter violation, viewed in the light of all the circumstances, can fairly be characterized as casual, gratuitous, blatant,

¹⁵⁰ **Wise**, supra.

¹⁵¹ **Black**, supra, at C.C.C. p. 20, C.R. pp. 116-7, S.C.R. p. 164, **Duarte**, supra, at C.C.C. p. 23, C.R. p. 303, S.C.R. p. 60, **Bartle**, supra, at p. 30.

¹⁵² **R. v. Dersch**, 85 C.C.C. (3d) 1, [1993] 3 S.C.R. 768, and **Dyment**, supra.

¹⁵³ **Stillman**, supra.

¹⁵⁴ **Cook**, supra at [para.61].

deliberate, willful, or flagrant as opposed to merely inadvertent, technical or trivial, the evidence thereby obtained will generally be excluded. The decision of the Supreme Court in **Belnavis** stresses the importance of taking into consideration the “totality of the circumstances” before reaching a conclusion as to the seriousness of the breach.¹⁵⁵

Evidence may be saved from exclusion if the police relied in good faith on the validity of a law, policy, or procedure that up to the time of the violation had not been declared as unconstitutional by a court having jurisdiction over the law in the province or territory where the Charter violation occurred.¹⁵⁶ As well, violations which are unintentional or of a merely technical nature are generally considered as less serious.¹⁵⁷ Thus, a violation caused by an oversight may not result in exclusion, especially if the consequences for the accused are not grave.¹⁵⁸ On the other hand, the decision in **Buhay** indicates that police must not take a casual approach to an accused’s Charter rights. The police cannot successfully plead good faith if they

¹⁵⁵ *Supra*, at [para. 41-43].

¹⁵⁶ **Grant**, *supra*, **Wijesinha**, *supra*.

¹⁵⁷ **Strachan**, *supra*, at C.C.C. p. 499, C.R. p. 108-9, S.C.R. p. 1006.

¹⁵⁸ **R. v. Smith (Norman)**, [1991] 1 S.C.R. 714 at p. 732.

have proceeded carelessly¹⁵⁹, without reasonable grounds¹⁶⁰, or have not acted diligently to make themselves aware of judgments circumscribing their powers.¹⁶¹

Good faith cannot be claimed where a Charter violation is committed on the basis of a police officer's unreasonable error or ignorance as to the scope of his authority.¹⁶² In **Silveria**, Cory J. stated:

...s. 24(2) of the **Charter** should not be used as a matter of course to excuse conduct which has in the past been found unlawful.¹⁶³

He went on to say that after the Court's decision in that case, the police must know that exigent circumstances do not provide an excuse for failing to obtain a warrant before conducting a search of a dwelling-house.¹⁶⁴

The availability of other investigative techniques and the fact that the police could have obtained the evidence without violating the Charter adds to the

¹⁵⁹ **Dyment**, supra, **Genest**, supra.

¹⁶⁰ **Feeney**, supra, at [para. 73-75].

¹⁶¹ **Kokesch**, supra.

¹⁶² **Buhay**, supra at [para. 159]; **Mann**, supra at [para.55].

¹⁶³ [1995] 2 S.C.R. 297 at p. 374.

¹⁶⁴ *Ibid*, at p. 376.

seriousness of a breach.¹⁶⁵ But, even if no constitutionally permissible means are available, that does not justify or excuse resorting to unconstitutional techniques.¹⁶⁶ Although circumstances of urgency or necessity may sometimes mitigate the seriousness of a breach, they do not license the police to employ unconstitutional means to acquire evidence.¹⁶⁷ In fact, in **Silveria**, the Supreme Court warned police officers that to enter a dwelling-house without a warrant, even in exigent circumstances, constitutes such a serious breach of Charter rights that the evidence thereby obtained will likely be excluded.¹⁶⁸ Cory J. writing for the majority said:

The Police must now know that exigent circumstances do not provide an excuse for failing to obtain a warrant.¹⁶⁹

Furthermore, to mitigate, the urgency must be genuine, not artificial or contrived.¹⁷⁰ The fact that the evidence was obtained soon after the commission of a crime does not mean there were exigent circumstances so as to mitigate the seriousness of a

¹⁶⁵ **Collins**, supra, at C.C.C. p. 20, C.R. p. 212, S.C.R. p. 285, **Grant**, supra, **Feeney**, supra.

¹⁶⁶ **Kokesch**, supra, at C.C.C. p. 227, C.R. pp. 67-8, S.C.R. pp. 28-9.

¹⁶⁷ Ibid; **Mann**, supra.

¹⁶⁸ Supra, at S.C.R., p. 369. However, it should be noted that the evidence was not excluded in **Silveria**.

¹⁶⁹ Ibid, at S.C.R., p. 374.

¹⁷⁰ **Burlingham**, supra, at S.C.R., p. 240.

Charter breach.¹⁷¹ Finally, urgency or necessity is not a mitigating factor in respect of Charter violations going beyond the minimum required by the situation. The fact that the police may have an urgent reason to detain someone does not provide any mitigation to the seriousness of their violating the detainee's right to counsel.¹⁷²

In the course of a valid investigative detention where an officer has reasonable grounds to believe his safety or that of others is at risk, he or she can do a protective pat down search for weapons but not a search of a detainee's pockets to satisfy a curiosity. The search must be grounded on discernible facts to prevent "fishing expeditions" on the basis of irrelevant or discriminatory factors.¹⁷³

The presence of reasonable and probable grounds¹⁷⁴ or at least objective articulable facts¹⁷⁵ to support an officer's suspicion tend to make an illegal search for real evidence less serious. On the other hand, the absence of these will aggravate the

¹⁷¹ **Feeney**, supra, at [para. 79].

¹⁷² **Elshaw**, supra, at C.C.C. p. 126, C.R. p. 348, S.C.R. p. 41.

¹⁷³ **Mann**, supra.

¹⁷⁴ **Jacoy**, supra, **Belnavis**, supra, **Caslake**, supra.

¹⁷⁵ **Simmons**, supra. In **Mann**, supra, Iacobucci J. writing for the majority, expressed preference for the term "reasonable grounds to detain" over the phrase "articulable cause."

seriousness of a violation.¹⁷⁶ A conclusory statement from an informer by itself does not constitute reasonable and probable grounds.¹⁷⁷ When the police have nothing but suspicion and no legal way to obtain evidence, they should leave the suspect alone rather than charge ahead and obtain evidence unconstitutionally.¹⁷⁸ The fruits of an illegal search cannot themselves be used as proof that reasonable and probable grounds existed.¹⁷⁹ If they are to provide mitigation, the reasonable and probable grounds or objective articulable facts must have been in the possession of the police before they took action.¹⁸⁰

In the context of an investigative detention, the police, on an objective view of the totality of circumstances, must have reasonable grounds in forming their suspicion that there is a clear connection between the person to be detained and a recent or ongoing criminal offence. The power to detain cannot be exercised on the basis of a hunch.¹⁸¹

¹⁷⁶ **Grefe**, supra, **Feeney**, supra.

¹⁷⁷ Ibid.

¹⁷⁸ **Kokesch**, supra, at C.C.C. p. 227, C.R. pp. 67-8, S.C.R. pp. 28-9.

¹⁷⁹ **Grefe**, supra.

¹⁸⁰ Ibid.

¹⁸¹ **Mann**, supra, at paras.34-35.

The degree of the seriousness of Charter violations involving searches and seizures will vary according to the expectation of privacy.¹⁸² Charter violations involving invasion of the privacy of a person's body are very serious¹⁸³ as are those involving intrusions of a home.¹⁸⁴ On the other hand, the expectation of privacy in a vehicle is not as high as that in one's physical person, home or office.¹⁸⁵ A "pat down" or "frisk" search is less intrusive and more easily justified than a search of a person's pockets.¹⁸⁶

In **Fliss** the majority of the Supreme Court of Canada held there was little expectation of privacy in a volunteered statement that was wrongfully recorded.¹⁸⁷ However, violations related to the misuse of information obtained by health care personnel belong in the very serious class.¹⁸⁸ In **Dersch** the Supreme Court decided

¹⁸² **Belnavis**, supra, at [para. 40], **Caslake**, supra at [para.34].

¹⁸³ **Dyment**, supra, **Grefe**, supra, **Stillman**, supra.

¹⁸⁴ **Silveria**, supra, **Feeney**, supra. However, in **Evans (Cheryl and Robert)** supra, the Supreme Court did not find a constitutionally impermissible "olfactory" search of a home "particularly grave" when the police acted in good faith and had a warrant, albeit invalid.

¹⁸⁵ **Wise**, supra, **Belnavis**, supra, at [para. 38-40], **Caslake**, supra, at [para.34].

¹⁸⁶ **Mann**, supra.

¹⁸⁷ Supra at [para. 85].

¹⁸⁸ **Dyment**, supra, **Dersch**, supra.

to exclude the evidence in question partially because of what it saw as "the importance of guarding against a free exchange of information between health care professionals and police." The seriousness of the Charter violation in that case was seen by the Supreme Court as aggravated by the fact that it had resulted in the police taking advantage of improper conduct by the accused's doctors.¹⁸⁹

Any excessive use of force by the police will aggravate the seriousness of a Charter breach.¹⁹⁰ The only instance in which the use of violence is not an aggravating factor is where the police at the time of the breach had reasonable and probable grounds to believe that the amount of force they used was necessary in order to prevent harm to themselves or a third party.¹⁹¹ The more the police depart from the standards of behavior required by the common law and the Charter, the heavier is the onus on them to show why they thought it was necessary.¹⁹² The police can only rely on the information they had at the time they took action. They

¹⁸⁹ **Dersch**, supra.

¹⁹⁰ **Genest**, supra.

¹⁹¹ Ibid.

¹⁹² Ibid.

cannot use what they learned after the fact to justify their use of force during the breach.¹⁹³

A violation becomes more serious if it occurs or continues after the accused has asserted his or her Charter right.¹⁹⁴ The police have a duty to fully inform accused persons of their rights to counsel.¹⁹⁵ Certainly they must not attempt to mislead¹⁹⁶ the accused or to undermine the exercise of Charter Rights.¹⁹⁷ On the other hand, a violation could be adjudged less serious if the police have supplied the accused with beneficial information¹⁹⁸ or if the accused did not diligently pursue his or her rights after being advised of them.¹⁹⁹

¹⁹³ Ibid.

¹⁹⁴ **Manninen**, supra, **Ross**, supra, **Black**, supra, **Hebert**, supra, **Stillman**, supra.

¹⁹⁵ **Brydges**, supra.

¹⁹⁶ **Evans (Wesley)**, supra, **Smith (Joey)**, supra.

¹⁹⁷ **Broyles**, supra, **Burlingham**, supra.

¹⁹⁸ **Ross**, supra, at C.C.C. p. 140, C.R. p. 222, S.C.R. pp. 17-8.

¹⁹⁹ **Tremblay**, supra.

Disrepute from Exclusion

Consideration of factors that relate to the effect of exclusion on the repute of the administration of justice is particularly important when the charge is serious, the circumstances surrounding the commission of the offence are aggravating, and the evidence in question is crucial to the obtaining of a conviction.²⁰⁰ The fact that the prosecution would have no case on a serious charge without the evidence weighs in favour of its admission²⁰¹. On the other hand in **Law**, the facts that the offence was of a regulatory or quasi-criminal nature and that it was a summary proceeding were factors that led the Supreme Court to conclude exclusion of the evidence in that case would not bring greater disrepute on the administration of justice than admission.²⁰²

It would be inconsistent with the purposes of s-s. 24(2) for a Court to refuse to admit evidence if its exclusion would bring greater disrepute to the

²⁰⁰ **Jacoy**, supra, at C.C.C. p. 54, C.R. p. 345, S.C.R. p. 559, **Grant**, supra, **Colarusso**, supra, **Evans (Cheryl and Robert)**, supra.

²⁰¹ **Caslake**, supra, at [para.35].

²⁰² **Supra**, at [para.39].

administration of justice than would its admission.²⁰³ Thus, generally speaking, evidence which is necessary to substantiate a serious charge should not be excluded where the breach is trivial, inadvertent, or technical. In **Belnavis**, Cory J. was critical of the fact the trial judge had not considered society's interest in the effective prosecution of crime nor the reliability or discoverability of the evidence before excluding it on account of his conclusion the breach was a serious one.²⁰⁴ However, in **Buhay** Arbour J. warned that 24(2) should not become an automatic inclusionary rule when the evidence is non conscriptive and essential to the Crown's case. At the end of the day the constitutional question is whether the admission of the evidence would bring the administration of justice into disrepute.²⁰⁵ In **Mann** Iacobucci J. made a similar comment to that of Arbour J. in **Buhay**²⁰⁶. Iacobucci J. said the focus of the inquiry as to whether exclusion would adversely affect the administration of justice should be to balance the interests of truth with the integrity of the justice system. In **Mann**, supra, although the offence was serious and exclusion would

²⁰³ **Collins**, supra, at C.C.C. p. 17, C.R. p. 208, S.C.R. p. 281.

²⁰⁴ Supra, at [para. 44].

²⁰⁵ **Buhay**, supra at paras. 71 and 72.

²⁰⁶ Para. 57.

probably mean the Crown had no case, the nature of the fundamental rights at issue and the lack of a reasonable foundation for the search indicated that inclusion not exclusion would adversely affect the administration of justice.²⁰⁷

While consideration of the factors relating to the effect of exclusion on the system's repute is particularly important when the charge is serious²⁰⁸ that doesn't mean the exclusory remedy of s-s. 24(2) should be reserved solely for cases where it would have no effect on the trial or which involve only minor offences.²⁰⁹ Admitting evidence which would adversely affect the fairness of the trial brings even greater disrepute to the administration of justice when the charge is a serious one.²¹⁰ In **Burlingham** Iacobucci J. says:

... I underscore that we should never lose sight of the fact that even a person accused of the most heinous crimes, and no matter the likelihood that he actually committed those crimes, is entitled to the full protection of the **Charter**. Short-cutting or short-circuiting those rights affects not only the accused, but also the entire reputation of the criminal justice system. It must be

²⁰⁷ Ibid.

²⁰⁸ Ibid, at S.C.R. p. 286, C.R. p. 212, C.C.C. p. 21, and **Jacoy**, supra, at C.C.C. p. 54, C.R. p. 345, S.C.R. p. 559.

²⁰⁹ **Genest**, supra, at C.C.C. p. 403, C.R. p. 243, S.C.R. p. 82, **Greffe**, supra, at C.C.C. p. 183, C.R. p. 280, S.C.R. pp. 797-8, **Feeney**, supra.

²¹⁰ **Collins**, supra, at C.C.C. p. 21, C.R. p. 212, S.C.R. p. 286, **Jacoy**, supra, at C.C.C. p. 54, C.R. p. 345, S.C.R. p. 559.

emphasized that the goals of preserving the integrity of the criminal justice system as well as promoting the decency of investigatory techniques are of fundamental importance in applying s. 24(2). These goals operate independently of the type of crime for which the individual stands accused.²¹¹

Thus if the admission of the evidence would result in an unfair trial the seriousness of the offence could not render that evidence admissible. On the other hand, although factors relating to the effect of exclusion on the system's repute may be more decisive in cases where the breach is minor, that is not the only situation in which they have been considered important. There have been cases where the breach was more than trivial but exclusion was denied because of the negative impact it would have on the reputation of the administration of justice.²¹²

Finally, s-s. 24(2) cannot be used to admit evidence that would otherwise be inadmissible. As Sopinka J. said in **R. v. Garofoli** "section 24(2) is an exclusionary and not an inclusionary rule."²¹³ Therefore, if a piece of evidence is rendered inadmissible by some rule of law it cannot be rehabilitated and admitted

²¹¹ Supra, at S.C.R., p. 242.

²¹² **Simmons**, supra, at C.C.C. p. 325, C.R. p. 327, S.C.R. p. 535, **Debot**, supra, at C.C.C. p. 222, C.R. p. 157, S.C.R. p. 1177, **Grant**, supra, and **Colarusso**, supra.

²¹³ (1991), 60 C.C.C. (3d) 161 at p. 189, 80 C.R. (3d) 317 at p. 345, [1990] 2 S.C.R. 1421 at p. 1453.

through s-s. 24(2) on the basis that to do so would not bring disrepute to the administration of justice.

16**Admission of Evidence Previously Excluded**

In some instances a Court may reconsider and admit, for a limited purpose, evidence that was excluded under s-s. 24(2) of the Charter when initially tendered. The Crown would first have to establish, on a *voir dire* that there has been a material change in circumstances such that admission of the evidence for the limited purpose would not bring the administration of justice into disrepute. This task is not easy.²¹⁴ Only in special and very rare circumstances would such an application be allowed.²¹⁵

²¹⁴ **Calder**, supra. In this case the police had obtained a statement of the accused in violation of his s. 10(b) Charter rights. The statement was excluded under s-s. 24(2) of the Charter when the Crown tendered it as part of its case in chief as substantive evidence of consciousness of guilt. The accused subsequently took the stand and in his testimony in chief he contradicted what he had said in the statement that had been excluded. The Crown thereupon sought to use the previously excluded statement to impeach his credibility during cross-examination. The Supreme Court of Canada by majority held that the lower courts were correct to rule against the application because the proposed use of the statement for impeachment of credibility was not a material change in circumstances which warranted a reconsideration of the finding that admission of the statement would bring the administration of justice into disrepute. Sopinka J., writing for the majority, nevertheless allowed, that under some "very limited circumstances", a change in proposed use would warrant reopening the issue even though the evidence had already been excluded under s-s. 24(2).

²¹⁵ **Cook**, supra, at [para.76].

Appeals

A trial judge's decision on an application for exclusion under s-s. 24(2) is often crucial to the outcome of a criminal case. Therefore, the party on the losing side of such an application sometimes wants to appeal the s-s. 24(2) decision even before the trial is completed. Lamer J. held in **Collins** that a trial judge's decision to exclude or not to exclude evidence under s-s. 24(2) is generally appealable as a question of law except, for instance, when it is based on the assessment of the credibility of a witness.²¹⁶ However, as McIntyre J. pointed out in **Mills**²¹⁷ and in **R. v. Meltzer**²¹⁸ s. 24 decisions in criminal cases cannot be appealed before the proceedings in the trial court have been completed. When an accused invokes a provision of the Charter in a criminal case, the question of its application and effect is clearly criminal law. Neither the Charter itself nor the **Criminal Code** provides a special right to appeal the granting or refusal of a remedy under s-s. 24(2). Therefore, the appeal has to follow the normal procedure for criminal appeals

²¹⁶ **Collins**, supra, at C.C.C. p. 12, C.R. p. 204, S.C.R. pp. 275-6.

²¹⁷ Supra, at C.C.C. pp. 495-500, C.R. pp. 21-6, S.C.R. pp. 958-64.

²¹⁸ 49 C.C.C. (3d) 453 at pp. 460-2, 70 C.R. (3d) 383 at pp. 390-1, [1989] 1 S.C.R. 1764 at pp. 1773-4.

established by the **Criminal Code** and the Rules of Court made pursuant to it. That is because the **Criminal Code** is exhaustive of all appellate jurisdiction in criminal matters and does not authorize interlocutory appeals. Accordingly, a party aggrieved by a ruling on a s-s. 24(2) application cannot appeal until the completion of the trial or at least until the proceedings are somehow effectively terminated by the trial judge.

Standard of Review:

The Supreme Court of Canada has indicated in no uncertain terms that courts of appeal should not readily second guess a trial judge's findings under s-s. 24(2) or substitute their view for the trial judge's just because they would have decided the matter differently in the first instance. In **R. v. Duguay**²¹⁹ the majority stated:

It is not the function of this court, though it has the jurisdiction to do so, absent some apparent error as to the applicable principles or rules of law or absent a finding that is unreasonable to review findings of the courts below under s. 24(2) of the Charter and substitute its opinion of the matter . . .

²¹⁹ Supra, at C.C.C. p. 4, C.R. p. 256, S.C.R. p. 98.

Lamer J. reiterated this position in **Grefe**²²⁰, and in **Mellenthin**²²¹ the Supreme Court held that the Alberta Court of Appeal erred in overturning a decision to exclude when it did not appear that "the trial judge made either an unreasonable finding of fact or an error in law."

Deference is especially due when the findings of the trial judge are based on an appreciation of the testimony of witnesses.²²² This is particularly true in respect to the assessment of the seriousness of the Charter breach which depends on factors generally established through testimony such a good faith and the existence of a situation of necessity or urgency.²²³

However, Iacobucci J., writing for the majority in **Borden**²²⁴, points out a court of appeal does not err by conducting the s-s. 24(2) analysis anew when it is clear that the trial judge, due to some error, has approached the matter from a fundamentally different standpoint than he or she should have. It is important, after

²²⁰ Supra, at C.C.C. 182, C.R. p. 279, S.C.R. p. 783.

²²¹ Supra, at C.C.C. p. 488, C.R. p. 282, S.C.R. p. 626. Also see: **Silveria**, supra, per Cory J, **Stillman**, supra, at [para. 68], **Belnavis**, supra, at [para. 35], and **Cook**, supra, at [para.65]; **Law**, supra at [para.32], **R. v. Goncalves**, [1993] 2 S.C.R. 3; and **Mann**, supra.

²²² **Mann**, supra. at [para.59].

²²³ **Buhay**, supra at [para. 46]; **Mann**, supra at [para.59].

²²⁴ Supra, at p. 16.

all, that the accused have the impugned evidence scrutinized in light of the proper principles.

A trial judge's decision should not be set aside just because it is brief, poorly expressed or does not contain a review of all the evidence.²²⁵ However, deficiencies in the scope of reasons must not be such as to foreclose meaningful appellate review.²²⁶ In **Feeney** the Supreme Court indicated that little deference would be paid to brief conclusory findings by courts below.²²⁷

Finally, it is interesting also to note that in **Belnavis** the Supreme Court of Canada found a trial judge's conclusion unreasonable even though the Ontario Court of Appeal had considered the matter and had not.²²⁸

²²⁵ **Buhay**, supra at paras. 54-55.

²²⁶ Ibid.

²²⁷ Supra, at [para. 84].

²²⁸ Supra at [para. 34] and [para. 37].

Curative Provision:

The Supreme Court of Canada has considered the availability of the curative provision contained in s-s. 686(1)(b)(iii) of the **Criminal Code** in appeals involving s-s. 24(2). In **Elshaw**²²⁹ Iacobucci J. stated:

... if the evidence in question should have been excluded under s. 24(2) of the Charter because its admission would put the administration of justice into disrepute, then generally its admission was such as to amount to a substantial wrong or miscarriage of justice thereby putting matters beyond the reach of s. 686(1)(b)(iii) which is available to cure errors of law where no substantial wrong or miscarriage of justice results.

Iacobucci J. went on to hold that s-s. 686(1)(b)(iii) could not cure the defect in that particular case, but he did allow that there might be other circumstances where the curative provision could apply notwithstanding that evidence should have been excluded under s-s. 24(2).²³⁰ Later, in **Burlingham**, Iacobucci J., writing for the majority, indicated that the "small" exception allowed for in **Elshaw** should be limited to cases in which it can be shown beyond any reasonable doubt that the excluded evidence did not contribute at all to the original verdict.²³¹ He further

²²⁹ Supra, at C.C.C. p. 130, C.R. pp. 351-2, S.C.R. p. 46.

²³⁰ Ibid.

²³¹ Supra, at S.C.R., p. 243.

stated in **Burlingham** that appellate courts should not retry cases to assess the worth of residual evidence after improperly adduced evidence has been extracted. The proper approach in such cases is to order a new trial rather than invoking s. 686(1)(b)(iii).²³² The most recent comment from the Supreme Court on whether the wrongful admission of evidence can be cured by s.686(1)(b)(iii) proviso comes from **Fliss** where Bennie J., writing for the majority, said at para.73:

The message of 24(2) of the Charter is that even if admission of the evidence obtained in breach of the Charter would not create a substantial wrong or miscarriage of justice to a particular accused, the Court must nevertheless consider whether ‘having regard to all the circumstances, the admission of it in the proceeding would bring the administration of justice into disrepute.’

Thus, in s-s.24(2) cases, there is very little scope for the application of the curative provisions.

²³² Ibid., at S.C.R. pp. 243-4.

The Factual Record

In **Orbanski** Charron J. observed that in most Charter cases, the factual context is of critical importance to the proper resolution of the questions before the court.²³³ This is certainly no less true in s-s.24(2) cases. In the opening paragraph of his judgment in **Silveria**, supra, Cory J. says:

At issue on this appeal is whether the evidence . . . should be excluded pursuant to the provisions of s. 24(2) of the **Canadian Charter of Rights and Freedoms**. As is so often the case, the factual background and the findings of the courts below will have a profound effect on the result.²³⁴

Three decisions of the Supreme Court, **Collins**, **Genest**, and **Grefe**, serve to illustrate the truth of what Cory J. said and to stress the importance of laying a proper evidential foundation for s-s. 24(2) issues at the trial court level. All of these cases were finally resolved on appeal to the Supreme Court of Canada, but they were decided by that court on the basis of the trial record. It is obvious from what the Supreme Court said and did in those cases that the facts are crucial in s-s. 24(2)

²³³ **Orbanski** supra, at para.23.

²³⁴ Supra, at S.C.R., p. 358.

cases and that it is crucial to establish them at trial. Lamer J. implied in **Collins** that the result might have been different in that case if the trial record had disclosed that the police had information which led them to believe that the accused was dangerous or handling drugs.²³⁵ Dickson C.J.C. left a similar impression in **Genest**. In that case the former Chief Justice acknowledged that fear for the safety of the searchers and the possibility of violence could constitute reason to use force in the execution of a search warrant. However, he pointed out, that at the trial the police had failed to lay a factual foundation for such a conclusion and went on to say that the Crown could not rehabilitate its case at the appeal stage.²³⁶ Writing for the majority in **Grefe**, Lamer J. makes it quite clear that the Charter violations in that case would not have been considered nearly so serious if the Crown had established at the trial that the police had reasonable and probable grounds to believe that the accused was in possession of heroin. Lamer J. considered the presence or absence of such reasonable and probable grounds as the key to determining the seriousness of the Charter violations in that case. He said it was necessary to refer to the record to

²³⁵ Supra, at C.C.C. p. 23, C.R. p. 214, S.C.R. p. 288.

²³⁶ Supra, at C.C.C. pp. 408-9, C.R. pp. 249-50, S.C.R. pp. 89-91.

assess whether such grounds existed. When he did so he found that the Crown, even though it was incumbent on it to do so:

... at no point in the trial established that those grounds existed or even led evidence in support of their existence.²³⁷

All that was on the record was a mere conclusory statement by the police. The Crown, even though it had the opportunity, did not elicit any evidence from the police by whom the trial judge could have assessed whether the confidential information the police had received gave rise to reasonable and probable grounds. The Court would not engage in speculation to fill the void left by the absence of evidence. Lamer J. held that the Crown had to bear the consequences of its failure. As a result, he found the police did not have reasonable and probable grounds to believe that the appellant had drugs in his possession when they violated his s. 8 and s. 10 rights. Lamer J. said this was the most determinative factor in the case and emphasized that he had reached his conclusion by "taking the record as it is given to us by the police and the prosecution."²³⁸ The absence of established reasonable

²³⁷ *Supra*, at C.C.C. p. 181, C.R. p. 284, S.C.R. p. 789.

²³⁸ *Ibid*, at C.C.C. p. 193, C.R. p. 291, S.C.R. p. 798.

and probable grounds ultimately led to a finding that the police had acted in bad faith and the exclusion of vital evidence regarding a serious charge.

If it is important for the Crown to introduce evidence at the trial level to justify the police action in question, it is even more important for the applicant to introduce all of the evidence that supports exclusion. After all, it is the person seeking exclusion that bears the ultimate burden of persuasion in s-s. 24(2) cases.²³⁹ In that regard, the decisions of the Supreme Court in **Schmautz**²⁴⁰ and **Harper**²⁴¹ pose some cause for concern among defence strategists because in both those cases Lamer J. drew an adverse inference from the failure of the accused to testify at the *voir dire* on the s-s. 24(2) application arising from the alleged breach of his right to counsel. Six of the seven judges who heard the **Schmautz** case dismissed the appeal because they found no violation of s-s. 10(b) rights. Only Lamer J. found that there had been a violation of s-s. 10(b), but he too voted to dismiss the appeal. He found that the applicant had not established sufficient grounds for exclusion. After discussing some other factors he said:

²³⁹ **Collins**, supra, at C.C.C. p. 16, C.R. p. 208, S.C.R. p. 280.

²⁴⁰ Supra.

²⁴¹ Supra.

Finally, and perhaps most important, the appellant never testified on a *voir dire*, to the effect that he would have chosen to contact counsel had he been informed once again of his right upon detention.²⁴²

Then in **Harper**, writing for the majority in finding that the Crown had succeeded in establishing the accused would not have acted any differently if he had been given the full measure of his constitutional right to counsel, Chief Justice Lamer said:

The appellant never testified on the *voir dire*, nor did he tender any evidence showing that he would have contacted duty counsel had he been informed of their existence and how to access the service.²⁴³

As a result he classified the Charter breaches in both **Schmautz** and **Harper** as "minor" ones.

²⁴² Supra, at C.C.C. p. 563, C.R. p. 136, S.C.R. p. 423.

²⁴³ Supra, at C.R. p. 69.

S-s.24(2) and Evidence Gathered Outside Canada

Evidence gathered abroad by foreign authorities cannot be excluded under s-s.24(2) of the Charter.²⁴⁴ This is so even if the foreign authorities are acting at the request of, or as agents for, Canadian authorities.²⁴⁵ The same is true for evidence gathered abroad through a co-operative investigation involving the law enforcement agencies of the foreign country and of Canada²⁴⁶. However, evidence gathered abroad by Canadian authorities on their own may be subject to exclusion under s-s.24(2) provided the application of the Charter standards would not interfere with the sovereignty of the foreign state.²⁴⁷

²⁴⁴ **R. v. Harrer**, 101 C.C.C. (3d) 193, [1995] 3 S.C.R. 562, at C.C.C., pp. 199-200, S.C.R. 570-571.

²⁴⁵ **R. v. Terry**, [1996] S.C.J. No. 62, [1996] 2 S.C.R. 207.

²⁴⁶ *Ibid.*, supra, at [para.19], and **Cook**, supra, at [para.25].

²⁴⁷ **Cook**, supra, at [para.46].

20**Alternatives to S-s. 24(2)**

Subsection 24(2) is not an independent source of Charter rights. It is merely a remedy directed to the exclusion of evidence obtained in a manner that infringes a Charter right. It does not operate unless there has been a Charter breach.²⁴⁸ However, that does not mean evidence impairing a Charter right but obtained without violating the Charter cannot be excluded. Since the Charter has come into force, the **Wray** position does not prevail even in cases where the evidence in question was not obtained through a constitutional violation. The Supreme Court has held that a trial judge has power, apart from s-s. 24(2), to exclude evidence not obtained in a manner that violated the Charter but the admission of which would undermine the accused's constitutional right to a fair trial or not to be deprived of his liberty in a manner contrary to the principles of fundamental justice.²⁴⁹

²⁴⁸ **Terry**, supra, at [para. 23].

²⁴⁹ **R. v. Corbett**, [1988] 1 S.C.R. 670; **R. v. Potvin**, [1989] 1 S.C.R. 525; **Harrer**, supra, **Terry**, supra at [para. 25]; **White**, supra, at [para.89].

In **Harrer**, La Forest J., writing for seven members of the Court, held evidence, even though not obtained in a manner which violated the Charter, could nonetheless be rejected if it was necessary to do so in order to provide the accused a fair trial as guaranteed by s. 11(d) or to protect his or her right under s. 7 not to have their liberty interests violated in a manner contrary to the principles of fundamental justice. In such a case, La Forest J. would not reject the evidence under s-s. 24(1) or 24(2), but "on the basis of the trial judge's duty, now constitutionalized by the enshrinement of a fair trial in the Charter, to exercise properly his or her judicial discretion to exclude evidence that would result in an unfair trial."²⁵⁰ McLachlin J. (Major J. concurring), on the other hand, acknowledged that evidence obtained in breach of the Charter could only be excluded under s-s. 24(2), but she would use either the common law or s-s. 24(1) to reject evidence that could undermine the accused's right to a fair trial, even though it was not obtained in breach of the Charter.²⁵¹ Subsequently, in **White**²⁵², the majority of the Supreme Court sided with Madame Justice McLachlin's position in **Harrer**. They affirmed

²⁵⁰ Supra, at pp. 205-6.

²⁵¹ Ibid, at p. 211.

²⁵² Supra.

that evidence, although not obtained in a manner that violated Charter rights, but which, if admitted, would violate an accused's Charter rights, may be excluded pursuant to either the common law or s-s.24(1).²⁵³ In **Buhay** Arbour J. writing for a full nine-member panel, goes further and indicates trial judges have a common law discretion to exclude even non conscriptive evidence obtained without violating Charter rights when its admission would result in an unfair trial or if the prejudicial effect of its admission outweighs its probative value.²⁵⁴

²⁵³ Ibid, at [para.89].

²⁵⁴ Supra, at [para. 40].

21**S-s. 24(2) in Civil Cases**

There are no Supreme Court of Canada decisions on the application, if any, of s.24(2) of the Charter to civil actions. However, for an interesting article on this subject, see P. Sankoff, “**The Application of Section 24(2) of the Charter of Rights and Freedoms in a Civil Action**” (2004), 28 Advocate’s Quarterly 103.

What Critics Say

Critics of the Supreme Court's s-s. 24(2) jurisprudence make the following points:

1. That it is not faithful to the direction in s-s. 24(2) to have regard to "all the circumstances."
2. That classification of the evidence should not be so determinative of its admissibility.
3. That the conscriptive/non conscriptive dichotomy is too complex, technical, and formalistic. The language of s-s.24(2) suggests a more flexible, contextual approach is appropriate.
4. That trial fairness factors have become too dominant, often resulting in virtually automatic exclusion regardless of other circumstances.
5. That it sometimes leads judges to under define the scope of the right in order to avoid near automatic exclusion.
6. That it is not axiomatic that the admission of conscriptive evidence renders a trial unfair.
7. That it creates an unwarranted hierarchy among legal rights because a violation of s. 8 seldom results in exclusion whereas violations of s-s. 10(b) and s-s. 11(c) almost always do.
8. That the discoverability inquiry is too speculative.
9. That discoverability is used as a factor both for and against exclusion.

10. That good faith should not be a factor mitigating the seriousness of a *Charter* breach.
11. That more weight should be given to the concept of institutional bad faith even where the individual officer has done his or her best to comply with the law.
12. That the tests devised by the court include consideration of the effect of exclusion on the repute of the administration of justice whereas the text of s-s. 24(2) speaks only of the effect of admission.
13. That the third branch of the **Collins** test weakens s.8.
14. That consideration of the effect of exclusion runs counter to the rule of law, the importance of the Charter to all Canadians, and the need to have a remedy for the violation of rights.
15. That the current jurisprudence fails to give sufficient emphasis to the fact that s-s. 24(2) arises in the broader context of an application under s-s. 24(1) and that there should be some remedy for a breach even where the circumstances do not meet the standard requiring exclusion.
16. That there should be more room for the court to apply the curative provisions of s-s. 686(1)(b)(iii).

APPENDIX A
SUMMARY OF S. 24(2) CASES DECIDED
BY THE SUPREME COURT OF CANADA

NO.	NAME	OFFENCE	CHARTER	TYPE OF EVIDENCE	24(2) RESULT
1	Therens	Driving over .08	10(b)	Breathalyzer	Excluded
2	Rahn	Driving over .08	10(b)	Breathalyzer	Excluded
3	Trask	Driving over .08	10(b)	Breathalyzer	Excluded
4	Clarkson	Murder	10(b)	Statements	Excluded
5	Collins	Possession of drugs for the purpose of trafficking	8	Finding of drugs	Excluded
6	Hamill	Possession of drugs for the purpose of trafficking	8	Finding of drugs	Admitted
7	Sieben	Possession of drugs for the purpose of trafficking	8	Finding of drugs	Admitted
8	Pohoretsky	Driving over .08	8	Blood sample tests	Excluded
9	Manninen	Armed Robbery	10(b)	Statements	Excluded
10	Tremblay	Driving over .08	10(b)	Breathalyzer	Admitted
11	Dairy Products	Violation of Combines Investigation Act	8	Documents	Admitted
12	Upton	Possession of drugs for the purpose of trafficking	10(b)	Statement	Admitted
13	Dyment	Driving over .08	8	Blood test results	Excluded
14	Simmons	Importing Narcotics	8 and 10(b)	Narcotics	Admitted
15	Jacoy	Importing Narcotics	8 and 10(b)	Narcotics	Admitted
16	Strachan	Possession for purpose of trafficking	10(b)	Narcotics Drug Paraphernalia Money	Admitted
17	Ross	Break and Enter	10(b)	Line-up	Excluded
18	Duguay	Break, Enter & Theft	10(b)	Statements Fingerprints	Excluded
19	Genest	Possession of illegal weapons	8	Finding of illegal weapons	Excluded

NO.	NAME	OFFENCE	CHARTER	TYPE OF EVIDENCE	24(2) RESULT
20	Lamb	Possession of narcotics for purpose of trafficking	8	Narcotics, knives and scales	Admitted
21	Mohl	Driving over .08	10(b)	Breathalyzer results	Admitted
22	Leduc	Refusing Breathalyzer	10(b)	Refusal	Excluded
23	Black	Murder	10(b)	Statements A knife	Excluded Admitted
24	Joey Smith	Robbery	10(b)	Statement	Admitted Majority (4-3) found no violation of 10(b). Minority did and would have excluded.
25	Szlovak	Bank Robbery	9 & 10(a)	Money and Statement	Admitted
26	Debot	Possession of a controlled drug	10(b)	Drugs	Admitted
27	Duarte	Conspiracy to import narcotics	8	Recorded conversation	Admitted
28	Wiggins	Conspiracy to import narcotic	8	Recorded conversation	Admitted
29	Brydges	Murder	10(b)	Statement	Excluded
30	Greffe	Importing narcotics for the purpose of trafficking	8	Narcotics	Excluded
31	Hebert	Robbery	10(b)	Statement	Excluded
32	Thompson	Conspiracy to import narcotics	8	Intercepted conversations	Admitted
33	Kokesch	Cultivation of marihuana	8	Narcotics	Excluded
34	Wong	Operating a gaming house paraphernalia	8	Video Recording	Admitted
35	Norman Smith	Murder	10(a)	Statement	Admitted
36	Evans (W.)	Murder	10(a) and (b)	Statement	Excluded
37	Elshaw	Attempted sexual assault	10(a)	Statement	Excluded

NO.	NAME	OFFENCE	CHARTER	TYPE OF EVIDENCE	24(2) RESULT
38	Broyles	Murder	7	Tape recorded conversation	Excluded
39	Tessier	Impaired driving	8	Blood sample	Admitted
40	Genereux	Possession of drugs for the purpose of trafficking	8	Narcotics	Admitted
41	Wise	Mischief to Property	8	Evidence of whereabouts of accused, pieces of metal	Excluded
42	Duncanson	Possession of drugs for the purpose of trafficking	8	Drugs	Admitted
43	Mellenthin	Possession of marihuana	8	Marihuana	Excluded
44	Grant	Cultivation of marihuana	8	Indications of cultivating marihuana	Admitted
45	Plant	Cultivation of marihuana	8	Computer data	Admitted
46	Wiley	Cultivation of marihuana	8	Indications of cultivating marihuana	Admitted
47	Dersch	Criminal Negligence causing death	8	Blood test results	Excluded
48	Goncalves	Cultivation of marihuana	8	Indication of cultivation	Excluded
49	I. and T.	Murder	10(b)	Statement	Excluded
50	Colarusso	Impaired driving causing death	8	Blood test	Admitted
51	Bartle	Driving over .08	10(b)	Breathalyzer	Excluded
52	Cobham	Refusing Breathalyzer	10(b)	Refusal	Excluded
53	Prosper	Driving over .08	10(b)	Breathalyzer	Excluded
54	Ponziak	Driving over .08	10(b)	Breathalyzer	Excluded
55	Harper	Spousal assault	10(b)	Statement	Admitted
56	Borden	Sexual assault	10(b)	DNA	Excluded

NO.	NAME	OFFENCE	CHARTER	TYPE OF EVIDENCE	24(2) RESULT
57	Burlingham	Murder	10(b)	Statement, weapon, statement to 3rd party	Excluded
58	Silveria	Trafficking	8	Drugs, money	Admitted
59	Wijesinha	Obstructing justice	8	Affidavits & tapes	Admitted
60	Evans (C. and R.)	Cultivation of marihuana	8	Marihuana plants	Admitted
61	Calder	Attempting to purchase sexual services of person under 18	10(b)	Statement	Excluded
62	Dewald	Over 80	10(b)	Breathalyzer test results	Admitted
63	Martin	Cultivation of marihuana	8	Marihuana	Admitted
64	Goldhart	Possession and cultivation of Marihuana	8	Oral testimony of witness	Admitted
65	Keshane	Possession of Marihuana	8	Marihuana	Admitted
66	Stillman	Murder	8	Hair samples Buccal swabs, teeth impressions, discarded tissue	Excluded Admitted
67	Feeney	Murder	8, 10(b)	Statements, fingerprints, bloody shirt, shoes, cigarettes, cash	Excluded
68	Belnavis	Possession of stolen goods	8	Bags of clothing	Admitted
69	Caslake	Possession of drugs for trafficking purposes	8	Drugs	Admitted
70	Cook	Murder	10(b)	Statement	Excluded

NO.	NAME	OFFENCE	CHARTER	TYPE OF EVIDENCE	24(2) RESULT
71	Fliss	Murder	8	Illegal recording	Admitted
72	Law	Tax evasion	8	Business documents	Excluded
73	Buhay	Possession of Marihuana for purpose of trafficking	8	Bus depot locker contents	Excluded
74	Mann	Possession of	8	Contents of pants pockets	Excluded

Appendix B

R. v. Wray (pre-Charter)

Facts: On June 4th, 1968, after being interrogated at police headquarters for approximately nine hours, the accused finally signed a statement which, if admitted, would have been evidence on which the jury in his subsequent trial could have convicted him of murder. In the statement he indicated he had thrown the weapon, a gun, in a swamp and that he would show the police where. Subsequently, he directed the police to the locality of the gun. As a result, they found it the next day. During the afternoon of June 4th, while the accused was being interrogated, his lawyer had tried to get in touch with the police by telephone. However, the police did not return his calls because they feared the accused might not disclose the location of the gun if he talked to his lawyer.

S.C.C. result: The evidence relating to the involvement of the accused in the locating of the murder weapon was ruled admissible.

R. v. Burlingham (post-Charter)

Facts: In the course of a murder investigation, the police subjected the accused to an intensive and manipulative interrogation from January 1st to 4th, 1985. During the interrogation, the police constantly questioned the integrity of his lawyer and continually questioned the accused despite his expressed desire to remain silent until he spoke to counsel. During the interrogation the police offered the accused a deal. They told him he would only be charged with second degree murder if he told them the location of the gun and other ancillary information related to the murder. The police never consulted with the accused's counsel concerning the deal nor did they give the accused himself a chance to consult with his counsel. On the night of January 4th, 1985, as a result of the deal being offered, the accused gave a full confession and brought the police to the murder scene and told them where he had thrown the weapon. Later, the accused recounted the events of the day and the information he had given the police to his girlfriend. As it turned out, there had been an honest mistake by the police resulting in a misunderstanding about the deal. The accused understood that he would be allowed to plead not guilty to second degree murder whereas the Crown insisted that he would have to plead guilty to that charge. When he would not, he was charged with first degree murder.

S.C.C. result: All of the derivative evidence was excluded including what he told the girlfriend.

Appendix C

R. v. Rothman (pre-Charter)

Facts: The accused was charged with possession of hashish for the purposes of trafficking. Prior to being charged, the accused was read the police warning and taken to an Ottawa Police Station. He was asked by Officer Gervais if he was willing to give a statement, but declined to do so. He was subsequently put in a jail cell and charged. Early the next morning, while the accused was still in his cell, Constable McKnight, who was acting in an undercover capacity, was placed in the cell with the accused. Constable McKnight was dressed in blue jeans, a blue jacket and brown boots, and had a four or five day growth of beard. When Constable McKnight entered the cell, the accused stated he looked like a "nark". The Officer stated he was dressed like that because he had been fishing, and he told the accused he was in jail because of a traffic ticket. In a conversation that ensued between the two, the accused told Officer McKnight that he had sold some hashish and that he intended to sell the hashish he had in his possession. Afterwards, McKnight was released from his cell and made notes of what transpired.

S.C.C. result: The evidence obtained by Officer McKnight was admitted.

R. v. Hebert (post-Charter)

Facts: The accused was charged with robbery. When charged, he was read his rights and then taken to an R.C.M.P. Detachment. Once there, the accused contacted counsel and obtained advice from him regarding his right to refuse to give a statement. The police were of course aware that he had contacted counsel, and they knew the identity of his lawyer. The police subsequently took the accused to an interview room where they told him they wanted to know why he had done the crime. The accused said he did not want to make a statement. The accused was then placed in a cell with an Officer who was disguised and posing as a suspect under arrest. While in the cell, the Officer in disguise engaged the accused in conversation during which the latter made several incriminating statements implicating himself in the robbery.

S.C.C. result: The statements made by the accused to the disguised undercover Officer were excluded.

APPENDIX D

LIST OF ARTICLES ON S-S. 24(2) OF THE CHARTER*

Bhabha, Feroza: *The Exclusion of "Real" Evidence under S. 24(2) of the Charter* - (Mar. 1994) 1 Crown's Newsl. 54-73.

Brewer, Carole A.: *Stillman and Section 24(2): Much To-Do About Nothing* - (1997) 2 Can.Crim.L.R. 239.

Bolton, P. Michael and Chris Tollefson: *The Exclusion of Real Evidence under S-s. 24(2) of the Charter* - (May 1990) 48 Advocate (Van.) 343-355.

Brock, Kathy L.: *Polishing the Halls of Justice: Sections 24(2) and 8 of the Charter of Rights* - (Mar. 1993) 2 N.J.C.L. 265-303.

Bryant, Alan W. (et al.): *Public Attitudes Toward the Exclusion of Evidence: Section 24(2) of the Canadian Charter of Rights and Freedoms* - (Mar. 1990) 69 Can. Bar. Rev. 1-45.

Chasse, Ken: *Charter Exclusion: Causation, Nexus and Disrepute* - (1986) 21 C.R.R. 227-238.

Coughlan, Stephen G.: *Good Faith and Exclusion of Evidence Under the Charter* - (June 1992) 11 C.R. (4th) 304-312.

Coughlan, Stephen G.: *Search and Seizure, Exclusion of Evidence* (1998), 9 S.C.L.R. (2d) 293.

Davies, Michael: *Alternative Approaches to the Exclusion of Evidence under S.24(2) of the Charter* (April 2002) 46 Crim.L.Q. 21-39.

Davison, Charles B.: *Connecting Real Evidence and Trial Fairness: The Doctrine of "Discoverability"* - (Aug. 1993) 35 Crim. L.Q. 493-508.

Dawe, Jonathan: *Standing to Challenge Searches and Seizures under the Charter: The Lessons of the American Experience and their Application to Canadian Law* - (Fall 1993) 52 U.T. Fac. L. Rev. 39-72.

Delaney, William D.: *Exclusion of Evidence under the Charter* (Sept., 1997) 76 Can.Bar Review, 521.

DelBisio, Gregory P.: *The Final Word on the Interpretation of S.24(2)?* - 9 C.of R. Newsl. No.10, p.1.

Delisle, R.J.: *Collins: An Unjustified Distinction* - (1987) 56 C.R. (3d) 216-219.

*This list may not be complete, and it does not include French language articles.

- Delisle, R.J.: *Mellenthin: Changing the Collins Test* - (1993) 16 C.R. (4th) 286.
- Delisle, R.J.: *Excluding Evidence Under Section 24(2): Mellenthin Re-incarnated* - (1996) 42 C.R. (4th) 61.
- Deutscher, David: *Section 24(2) of the Charter in the Manitoban Court of Appeal* - (1990) 19 Man. L.J. 174-194.
- Donovan, Brian: *The Role of Causation under S. 24(2) of the Charter: Nine Years of Inconclusive Jurisprudence* - (Spring 1991) 49 U.T. Fac. L. Rev. 233-261.
- Elman, Bruce P.: *Further Jurisprudence on Section 24(2) of the Charter* - (1986/87) 25 Alta. L. Rev. 477-486.
- Fenton, Scott K.: *Recent Developments in S.24(2) Jurisprudence* - (1997), 39 C.L.Q. 279.
- Goddard, Tom: *Approaching Section 24(2) of the Charter in the Context of Evidence Obtained in a Manner that has Involved a Breach of Section 8 of the Charter* (November 1995) 3 Crown's Newsl. 66-94.
- Goddard, Tom: *Stillman: The Majority Could Not Have Intended to Exclude Alternative Conscriptive Means from Consideration under the "Discoverability" Principle* - (1997), 5 C.R. (5th) 110.
- Glover, Sylvia: *Exclusion of Evidence: Exclusion of Illegally Obtained Evidence From the Prosecution's Case-in-Chief Under the Canadian Charter of Rights and Freedoms* - (1988) 4 Can.-Am. L.J. 57-91.
- Godin, Paul Denis: *A Comparative Study of the Exclusionary Rule and its Standing Threshold in Canada, the United States, and New York State: the Relation of Purpose to Practice* - (Winter 1995) 53 U.T. Fac. L. Rev. 49-94.
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Kowal, Luba: *Exclusion of Evidence under S. 24(2) of the Charter: Recent Developments* - (Feb. 1993) 1 Crown's Newsl. 1-30.

MacDonnell, Ian: *Section 24(2) [Canadian Charter of Rights and Freedoms]: Recent Developments in Drinking and Driving Cases* - (March 1994) 48 M.V.R. (2d) 229-245.

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Pomerance, Renee M.: *Exclusion of Evidence Under the Charter* - (1996) Ontario, Crowns Newsletter Vol.3, p.79.

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Roach, Kent: *The Evolving Fair Trial Test Under Section 24(2) of the Charter* (1996) 1 Can.Crim.L.Rev. 117-134.

Sankoff, Peter: *Routine Strip Searches and the Charter: Addressing Conceptual Problems of Right and Remedy* - (1998) 16 C.R. (5th) 266.

Sankoff, Peter: *Calder Should not Preclude the Re-admission of "Real" Evidence* - (1998) 14 C.R. (5th) 289.

Sankoff, Peter and Hendel, Ursula: *The Fairness Beyond Self-Incrimination: The Impact of R. v. Calder on Section 24(2) of the Charter* (Nov. 1996) 1 Can. Crim. L. Rev. 339-360.

Sankoff, Peter: *The Application of Section 24(2) of the Charter of Rights and Freedoms in Civil Actions* (2004) 28 A.Q. 1003.

Stuart, Don: *Buhay: No Automatic Inclusionary Rule under 24(2) When Evidence is Non-conscripted and Essential to Crown's Case* (2003), 10 C.R. (6th) 233.

Stuart, Don: *Burlingham and Silveria: New Charter Standards to Control Police Manipulation and Exclusion of Evidence* - (Aug. 1995) 38 C.R. (4th) 386-396.

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