

Revisions to David M. Paciocco and Lee Stuesser,  
*The Law of Evidence*, 5th ed. (Toronto: Irwin Law, 2008)

On 17 July 2009, in the decisions in *R. v. Grant*, 2009 SCC 32 and *R. v. Harrison*, 2009 SCC 34, the Supreme Court of Canada conducted a large scale revision of its section 24(2) jurisprudence. The mode of analysis for judging disrepute for the purposes of the section 24(2) exclusion that had previously been in use, the “*Collins/Stillman* framework,” was reconsidered. *R. v. Stillman*’s “Two-box” approach to admissibility, as well as the “fair trial” theory, have been rejected. A new three-step analysis has been adopted, which, among other things,

- 1) treats statements and bodily samples differently for the purposes of admission,
- 2) reduces the importance of discoverability,
- 3) renders the seriousness of the offence almost immaterial under sections 24(2), and
- 4) discontinues the past practice of asking the pro-admissibility balancing question of whether exclusion will bring the administration of justice into disrepute, and replaces it with a consideration of the impact of exclusion on the public interest in the truth-seeking function of trials.

As a result, large swaths of Chapter 9 of the 5th edition of *The Law of Evidence* are obsolete. The chapter has therefore been rewritten, by including the decision of *R. v. Wittwer*, [2008] S.C.J. No. 235, into the “obtained in a manner” discussion, and by exploring the impact of *Grant* and *Harrison* on the discretion to exclude evidence to preserve the fairness of a trial, in the absence of a *Charter* violation.

© Irwin Law Inc., 2009

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, without the prior written permission of the publisher or, in the case of photocopying or other reprographic copying, a licence from Access Copyright (Canadian Copyright Licensing Agency), 1 Yonge Street, Suite 800, Toronto, ON, M5E 1E5.



# IMPROPERLY OBTAINED EVIDENCE

## 1. THE EVOLUTION OF THE INADMISSIBILITY OF SOME IMPROPERLY OBTAINED EVIDENCE

### 1.1) The Common Law

With the exception of involuntary statements, the probative value of evidence does not change because it was obtained illegally. If a court is interested in finding out whether the accused committed the crime charged, throwing out perfectly good evidence because of how it was discovered therefore seems self-defeating. For this reason, the notion that evidence should be excluded simply because it has been illegally obtained has always been controversial. The great American jurist Benjamin Cardozo captured this sentiment with his caustic paraphrase of the American exclusionary rule: “The criminal is to go free because the constable has blundered.”<sup>1</sup>

In order to avoid the loss of perfectly good proof and distorted factual findings the common law generally refused to reject evidence because of how it was obtained. Even statements obtained in violation of the voluntariness rule were traditionally excluded not because that rule had been violated but because of the concern that induced statements are unreliable. It was this thinking that led common law

---

1 *People v. Defore*, 150 N.E. 585 at 587 (N.Y.C.A. 1926).

courts to reject involuntary statements but to accept any real evidence that was discovered as a result of those statements. In the leading Canadian common law case of *R. v. Wray*,<sup>2</sup> for example, the Court excluded Wray's involuntary confession but admitted the firearm that Wray's statements permitted the police to find. Wray's protest that this was unfair and that judges should have the authority to exclude illegally obtained evidence was repudiated. The Supreme Court of Canada said that it was not unfair to admit the gun into evidence as it was reliable proof that would produce an accurate rather than unfair verdict. In taking this approach the common law courts were not saying that they did not care if police officers broke the law. They were saying that at the trial of the accused, the issue is not whether the police officers acted legally; the issue is whether the accused acted illegally, and relevant reliable evidence on that question should be admitted. The time to deal with the illegality of police conduct is in other legal proceedings about the police officer's conduct.

The reality, though, was that prosecution and disciplinary action against police officers were rare. As a result, police illegality was most often left unaddressed. Many believed that this harmed the repute of the administration of justice. Citizens were prosecuted for breaking the law, but police illegalities were ignored. The Law Reform Commission of Canada therefore recommended that judges have the discretion to exclude illegally obtained evidence,<sup>3</sup> but to no avail. It was not until 1982 that things changed with the proclamation of the *Charter* and the adoption, in section 24(2), of an exclusionary rule for unconstitutionally obtained evidence.

## 1.2) The *Charter*

Since the *Charter* will be violated by almost any illegal investigative technique, most evidence obtained illegally by state agents is now subject to potential exclusion under this provision; Canada's constitutional exclusionary rule.<sup>4</sup> This constitutional exclusionary rule, which

---

2 *R. v. Wray*, [1971] S.C.R. 272.

3 Law Reform Commission of Canada, *Report—Evidence* (Ottawa: Law Reform Commission, 1977) s. 15 of Draft Evidence Code.

4 All illegal searches contravene s. 8 of the *Charter* (*R. v. Collins*, [1987] 1 S.C.R. 265 [*Collins*]) and all illegal detentions violate s. 9 of the *Charter* (*R. v. Grant*, 2009 SCC 32 at paras. 54–57). The *Charter* imposes legal obligations relating to statements through s. 7 (see the discussion at chapter 8.5.6) where the right to silence is preserved, and s. 10 where the right to counsel is provided (see the discussion at chapter 8.7).

criminal lawyers have come to take for granted, was not easily born. Indeed, early drafts of the *Charter* would have perpetuated the common law position by providing expressly that the exclusion of evidence would *not* be a remedy for unconstitutional conduct. These early drafts reflected an aversion to an American style rule that excluded crucial evidence, even as a result of minor violations. At Parliamentary hearings, civil libertarians, offended by the empty promise of constitutional rights without remedy, fought against this thinking and lobbied for an exclusionary rule. After much debate, a compromise was reached. It was agreed that unconstitutionally obtained evidence would be excluded, but only in those cases where its admission would bring the administration of justice into disrepute.<sup>5</sup> As a result, the characteristic feature of the Canadian constitutional exclusionary rule is that some unconstitutionally obtained evidence is excluded, while other unconstitutionally obtained evidence will be admitted. It all depends on whether the admission of the unconstitutionally obtained evidence in question will bring the administration of justice into disrepute.

Although this formula—whether admission of the evidence would bring the administration of justice into disrepute—achieved a compromise, on its own it offers little real guidance. Canadian courts have therefore struggled with when to exclude evidence. This struggle has produced an unstable jurisprudence. Back in 1995 Justice Sopinka described the “incremental evolution in the jurisprudence in this area.”<sup>6</sup> That incremental evolution culminated recently, in July of 2009, in significant changes to the analytical framework for exclusion. This incremental evolution is likely to continue.

The earliest lower court cases rendered after the proclamation of the *Charter* tended to be slow to exclude unconstitutionally obtained evidence. Most judges reasoned that the exclusion of illegally obtained evidence would have to be highly exceptional, given the long history of admitting it. Things began to change after the first few Supreme Court of Canada *Charter* decisions, which left no doubt that the highest Court’s position was that the *Charter* had ushered in a new era.<sup>7</sup> In its earliest decisions, however, the Court offered little technical guidance. That

---

5 “August 28, 1980 Draft.” See Roy Romanow, John Whyte, & Howard Lesson, *Canada . . . Notwithstanding* (Toronto: Carswell/Methuen, 1984) at 256.

6 *R. v. Burlingham*, [1995] 2 S.C.R. 206 at para. 154, Sopinka J.

7 *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, adopted an aggressive, purposive interpretation of the *Charter* and imposed high standards for police searches, while *R. v. Therens*, [1985] 1 S.C.R. 613, rejected established and narrow notions of detention and, over the strong objection of Justice McIntyre, excluded the results of alcohol testing in an impaired driving case.

changed in 1987 with the important decision in *R. v. Collins*.<sup>8</sup> The *Collins* decision organized the factors to be considered in a section 24(2) application according to the effect that the admission of the illegally obtained evidence would have. Most importantly, the Court introduced a “fair trial” theory, holding that the admission of unconstitutionally obtained, *self-incriminatory* evidence would render the trial unfair and should be more prone to exclusion than real evidence, the admission of which would not tend to undermine trial fairness.

At that time the self-incrimination concept was confined to statements. In the next few years, however, the Supreme Court of Canada’s conception of when admission of the evidence would undermine trial fairness became more aggressive. From the outset the Supreme Court of Canada was always predisposed to exclude other forms of evidence obtained by “conscripting” the accused into the investigative process, including forcing the accused to participate in a police lineup,<sup>9</sup> or by securing bodily samples from the accused,<sup>10</sup> but by 1997 it was equating these forms of compulsion with self-incrimination. The important decision in *R. v. Stillman*<sup>11</sup> imposed a highly technical analytical structure that saw the creation of separate tests for the exclusion of compelled conscriptive evidence and non-conscriptive real evidence. Compelled conscriptive evidence was subject to almost automatic exclusion unless the Crown could prove it was “discoverable,” (i.e., it would have been discovered even without the *Charter* breach) while a more flexible balancing test was to be used for non-conscriptive real evidence.<sup>12</sup> Paradoxically, in the aftermath of *Stillman*, many courts were quick to admit unconstitutionally obtained, non-conscriptive real evidence. In 2003, in *R. v. Buhay*, the Supreme Court of Canada responded by discouraging this thinking, affirming that even non-conscriptive real evidence should be excluded where the *Charter* breaches are serious enough.<sup>13</sup> Section 24(2) jurisprudence had achieved its zenith in excluding unconstitutionally obtained evidence.

The Supreme Court of Canada’s aggressive approach to compelled conscriptive evidence provoked objection. Growing resistance among

---

8 Above note 4.

9 *R. v. Leclair* (1989), 67 C.R. (3d) 209 (S.C.C.).

10 *R. v. Pohoretsky*, [1987] 1 S.C.R. 945; *R. v. Dyment*, [1988] 2 S.C.R. 417.

11 *R. v. Stillman* (1997) 5 C.R. (5th) 1 (S.C.C.) [*Stillman*].

12 In explaining this approach, earlier editions of this book refer to it metaphorically as a “two-box” approach, with the evidence being put into one box or the other according to its nature and its discoverability, and with each box providing for a different mode of analysis. More will be said about this below.

13 *R. v. Buhay* (2003), 10 C.R. (6th) 205 at para. 71 (S.C.C.).

commentators, in some appellate courts,<sup>14</sup> and in the concurring decision of Justice Lebel in *R. v. Orbanski*<sup>15</sup> led the Supreme Court of Canada, in June 2009, to “revisit” this “important and contentious” area of criminal law, and take a “fresh look at the frameworks [it had] developed for the resolution” of exclusionary issues.<sup>16</sup> This occurred in the ground-breaking decision of *R. v. Grant*, which, along with its companion decision in *R. v. Harrison*,<sup>17</sup> rejected the *Collins/Stillman* framework the Supreme Court of Canada had built in its prior decisions. It is not too much to say that these decisions have rewritten the law, leaving it perilous for lawyers and judges to rely on early decisions without viewing them carefully through the lens of what *R. v. Grant* and *R. v. Harrison* now say.

### 1.3) A Complex of Theories for Exclusion under Section 24(2)

There is no doubt that the evolving conceptions of the exclusionary rule found over time in Canadian jurisprudence reflect different levels of tolerance for the rejection of probative proof. Yet this is not the sole reason for the instability in the authority. Courts have also struggled because the *Charter* is ambiguous as to its underlying exclusionary theory. Specifically, section 24 empowers courts to grant “remedies” for *Charter* violations. This suggests that we exclude in order to compensate the accused for the wrong done to him. At the same time, section 24(2) is found among the “enforcement” provisions of the *Charter*, suggesting that exclusion is done to impel future compliance by deterring the police. Meanwhile, section 24(2) focuses not on the original violation but on the effect that admitting the evidence would have on the trial, including arguably, whether admission would undermine trial fairness. For its part, the triggering test for exclusion seems aimed at protecting the reputation of courts by empowering judges to avoid the harm that may occur if they are seen to condone unconstitutional acts by accepting the fruits of *Charter* violations. In other words, the test seems to reflect a “condonation theory” for exclusion.<sup>18</sup>

---

14 See *R. v. Richfield* (2003), 14 C.R. (6th) 77 (Ont. C.A.); *R. v. Petri* (2003), 171 C.C.C. (3d) 553 (Man. C.A.), and *R. v. Dolnychuk* (2004), 184 C.C.C. (3d) 214 (Man. C.A.).

15 *R. v. Orbanski*, [2005] 2 S.C.R. 3.

16 *R. v. Grant*, above note 4 at para. 3.

17 *R. v. Harrison*, 2009 SCC 34.

18 *R. v. Buhay*, above note 13 at para. 70, quoting *R. v. Collins*, above note 4 at 208.

It is not surprising that this complex net of apparent exclusionary objectives has confused the authority, since, in law, purpose can and does drive outcomes, and each of these objectives suggest different approaches to exclusion. For example, a remedial rationale emphasizes causation and de-emphasizes the negative impact that exclusion might have on the process and the blameworthiness of the police. An enforcement rationale, on the other hand, would highlight blameworthiness of the police, and be relatively disinterested in causation. Meanwhile, a fair trial theory would focus on the way evidence operates at trial, while a condonation theory would turn primarily on the seriousness and significance of the breach.

Not surprisingly, as the jurisprudence has matured, the emphasis given to the exclusionary rationales has vacillated. Over the years, the Supreme Court of Canada has claimed that section 24(2) operates to “oblige law enforcement authorities to respect the exigencies of the *Charter*,”<sup>19</sup> yet said that section 24(2) is not intended to punish illegal police conduct.<sup>20</sup> For more than two decades the jurisprudence emphasized the goal of preventing “improperly obtained evidence from being admitted to the trial process when it impinges upon the fairness of the trial.”<sup>21</sup> Now, with the decision in *R. v. Grant*, that “fair trial” theory has been pushed aside. Currently, the “main concern” behind exclusion is seen to be the need to “preserve public confidence in the rule of law and its processes.”<sup>22</sup> The key concept that drives the present law is therefore “condonation theory.” The more serious the violation and the more significant the consequences are, the greater the need for courts to distance themselves from the violation by excluding the evidence. As for the deterrence of improper police conduct, it is not now an operative goal that drives exclusionary decisions. To the extent that excluding evidence inspires compliance with the *Charter*, this is nothing more than a happy side-effect.<sup>23</sup>

## 2. THE CURRENT LAW INTRODUCED

### 2.1) The Law Summarized

Subsection 24(2) provides:

---

19 *R. v. Burlingham* above note 6 at para. 25; *R. v. Buhay*, *ibid.* at para. 71.

20 *R. v. Grant*, above note 4 at para. 70.

21 *R. v. Burlingham*, above note 6 at para. 25.

22 Above note 4 at para. 73.

23 *Ibid.*

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.

This provision is the primary basis for excluding evidence under the Charter.<sup>24</sup> A party seeking exclusion on the basis that evidence has been obtained unconstitutionally must therefore satisfy the court on the balance of probabilities that each of the components of subsection 24(2) have been met. Where those preconditions are satisfied, the evidence must be excluded. Where they are not, it cannot be excluded by way of a Charter remedy, even though the evidence may have been obtained unconstitutionally. In propositional form, the law provides that

*Accused persons must apply to the trial court to have unconstitutionally obtained evidence excluded. Before a court can even consider whether to exclude the evidence, the applicant must establish, on the balance of probabilities, that her Charter rights have been breached by a state agent. If the accused is successful, the court will go on to consider whether each of the two exclusionary requirements has been met:*

The First Requirement: “*obtained in a manner*”

*Evidence can be excluded under subsection 24(2) solely where it has been “obtained in a manner” that breached the Charter rights*

---

24 In *R. v. Therens*, above note 7 at 647, Le Dain J. (dissenting on another point), described s. 24(2) as the sole exclusionary remedy. It has since been recognized that judges have discretion to exclude evidence under s. 24(1) to remedy abuses of process, where a stay of proceedings is not appropriate: *R. v. Caster* (2001), 159 C.C.C. (3d) 404 at 412 (B.C.C.A.). Section 7, which guarantees that life, liberty or security of the person will only be deprived in accordance with the principles of fundamental justice, can also produce the exclusion of evidence. In *R. v. White*, [1999] 2 S.C.R. 417, for example, the Supreme Court of Canada held that the admission of statutorily compelled statements made by the accused would violate s. 7 because the use of the evidence by the Crown at trial would contravene fundamental self-incrimination principles. The evidence was excluded not to remedy a Charter breach but rather to prevent a Charter breach from occurring. See the discussion in chapter 8, section 5.6(b), “Statutorily Compelled Statements.”

of the applicant. Although a non-remote causal connection between the breach and the discovery of the evidence will satisfy the “obtained in a manner” requirement, a causal connection is not strictly required. Instead a generous approach is to be taken. Courts should examine whether there is a sufficient connection, given temporal, contextual, and/or causal factors, for it to be said that the breach and the discovery are part of the same transaction or course of conduct. Where this is so, the evidence has been tainted by the Charter breach, satisfying the “obtained in a manner” requirement.

The Second Requirement: “The admission of the evidence in all of the circumstances [c]ould bring the administration of justice into disrepute”

Where evidence has been obtained in a manner that violates the Charter, a court will exclude it if (1) the breach is serious enough and (2) the impact on the Charter-protected interests of the accused is significant enough to (3) outweigh society’s interest in the adjudication of the case on its merits. In conducting this balancing exercise, the Court is to assess each of these three factors to determine whether a reasonable person, fully informed of the all of the circumstances and the values underlying the Charter, would conclude that the admission of the evidence could bring the administration of justice into disrepute. When asking this question, the focus is on the damage that condoning the Charter violation by accepting its fruits for admission could do to the long-term interest in maintaining the integrity and public confidence in the justice system.

The seriousness of the breach—Gauging the seriousness of the Charter-infringing state conduct involves assessing the blameworthiness of the conduct. This focuses most intently on the state of mind of the officer about Charter compliance, but extends to include systemic or institutional failures in Charter compliance. Moreover, the Charter-infringing state conduct will be more serious where it is part of a larger pattern of Charter violations committed during the investigation of the accused.

The significance of the impact—The measure of the significance of the impact of the violation on the accused is gained by examining the nature and degree of intrusion of the Charter breach into the Charter-protected interests of the accused. The way the impact is assessed varies with the kind of evidence sought to be admitted:

- a. Statements—Generally speaking, the degree of intrusion that occurs when statements are unconstitutionally obtained is high.

Unless there is a sound basis for concluding that the accused would have spoken in any event, or the breach is so technical as to have no real effect on the important, Charter-protected interest of the accused to make an informed choice or whether to speak to the authorities, unconstitutionally obtained statements are presumptively inadmissible.

- b. *Bodily Samples*—The degree of intrusion caused when bodily samples are secured depends upon the extent to which privacy, bodily integrity, and human dignity are compromised given the nature of the samples and the manner in which they are secured.
- c. *Non-bodily physical evidence*—The significance of the impact of the violation where non-bodily physical evidence is obtained turns primarily on the manner of discovery and the degree to which the manner of discovery undermines the Charter-protected privacy interests of the accused, although privacy interests related to the nature of the non-physical evidence also fall to be considered.
- d. *Derivative evidence*—For “derivative evidence,” typically real evidence that is discovered as a result of unconstitutionally obtained statements, the significance of the impact of the violation will turn on the Charter breach used to obtain the statement that led, in turn, to the derivative evidence. Since “derivative evidence” comes from unconstitutionally obtained statements, that degree of intrusion will generally be significant, unless
  - i. the breach had no real impact on the Charter-protected interest of the accused to make an informed choice about whether to speak to the authorities;
  - ii. it can confidently be said that the statement in question would have been made notwithstanding the Charter breach; or
  - iii. it can confidently be concluded that there is a likelihood that the derivative evidence would have been discovered even had there been no Charter violation. Where this conclusion can be made, the significance of the intrusion varies with the degree of likelihood that discovery would have occurred in any event.

*Society’s Interest in Adjudication on the Merits*—The weight to be accorded to society’s interest in the adjudication of the case on its merits varies according to (1) the reliability of the evidence and (2) the importance of that evidence to the case for the

*Crown. While the seriousness of the offence is also a “valid consideration,” it in fact contributes little to the outcome since both society’s interest in deciding a case on its merits and its vital interest in having a justice system that is above reproach, are heightened, effectively neutralizing the importance of the seriousness of the offence as a factor material to the exclusionary decision.*

## 2.2) The Law Illustrated

In *R. v. Grant*<sup>25</sup> police officers who engaged in “neighbourhood policing” in a high-crime school area stopped, obstructed his path, and questioned Mr. Grant because he stared at them and fidgeted with his coat and pants in a way that made them suspicious. This constituted a “detention” because a reasonable person in Mr. Grant’s position would conclude by reason of this police conduct that he had no choice but to comply with their requests or demands. That detention was unlawful and therefore unconstitutional contrary to section 9 of the *Charter* because the police lacked reasonable grounds to suspect that Mr. Grant had committed an offence—the operative standard for investigative detentions and for detentions conducted during neighbourhood policing. Moreover, the informational obligations under section 10(b) of the *Charter* were breached since the officers did not advise Mr. Grant upon detaining him of his right to counsel. The Court nonetheless ruled that a handgun—“derivative evidence” obtained “temporally and causally” as a result of Mr. Grant’s unconstitutionally obtained statements—was admissible in evidence. The Court found it admissible in evidence because the breach was not serious enough to undermine public confidence in the administration of justice, in part because the officers believed they were acting lawfully and the law of detention in neighbourhood policing situations was unclear at the time and called for close judgment. Moreover, the police conduct was not abusive, nor was there any basis for a finding of racially discriminatory practices, notwithstanding that Mr. Grant was a person of colour. However, the impact of the section 9 breach on Mr. Grant’s *Charter*-protected interests, while not severe, was more than minimal. Specifically, the detention did not involve physical coercion and was not carried on in an abusive manner. Meanwhile the impact of the section 10(b) breach was significant. Mr. Grant was deprived of the advice necessary to make an informed choice whether to speak, while the police officers were probing for answers to justify a search. The gun would not have been

---

25 *R. v. Grant*, above note 4.

discovered had Mr. Grant not admitted to possessing the weapon. On the other hand, the gun was highly reliable evidence essential to a determination of the case on its merits. While the impact of the breach on Mr. Grant's *Charter*-protected interests weighed strongly in favour of exclusion, the public interest in the adjudication of the case on its merits weighed strongly in favour of admission. Since the facts did not support a clear outcome, the Supreme Court of Canada deferred to the trial judge's decision to admit the gun into evidence.

In *R. v. Harrison*,<sup>26</sup> a police officer on highway patrol stopped a vehicle that initially attracted his attention because it did not have a front licence plate as required by Ontario law. After the police officer turned to pursue and stop the oncoming vehicle he noticed that it was an Alberta vehicle, which did not require a front licence plate. He testified that he nonetheless chose to pull the vehicle over because abandoning the detention might have affected the integrity of the police in the eyes of observers, an explanation that the trial judge disbelieved. The police officer ran a computer check on the licence and determined it was rented in British Columbia. Aware that drug couriers often use rental vehicles; and because the vehicle was traveling at the posted speed limit in an area where traffic customarily exceeded the speed limit (a mode of driving the officer interpreted as suspicious) the police officer had a hunch that the vehicle was carrying drugs. On approaching the vehicle he determined that the driver had a suspended licence. He arrested the driver and then searched the vehicle, ostensibly as a search "incidental to arrest," which he claimed to have conducted to find the missing driver's licence. This claim was incredible given that the discovery of the licence itself was irrelevant to the charge of driving with a suspended licence. The officer then discovered boxes in the cargo area, containing 35 kilograms of cocaine. This evidence was obtained in a manner that violated the *Charter* because the detention that occurred when the police officer directed the vehicle to stop was arbitrary, contrary to section 9 of the *Charter*, as it was not a routine, random traffic stop but was done unlawfully as an investigation in the absence of reasonable grounds to believe that an offence had occurred. Moreover, the search of the vehicle was illegal and therefore contrary to section 8 of the *Charter*, as it was not a valid search incidental to the arrest. These breaches led directly to the discovery of the evidence.

The breaches were serious and not to be condoned lightly. The officer's conduct showed a reckless and blatant disregard for *Charter* rights, aggravated by the officer's misleading in-court testimony. More-

---

26 *R. v. Harrison*, above note 17.

over, the departure from *Charter* standards was “major in degree” since “reasonable grounds for the stop were entirely non-existent.”

The impact on the *Charter*-protected interests of the accused was significant, although not egregious, interfering with the expectation accorded to all drivers to be left alone subject to valid highway traffic stops or other lawful detentions.

The evidence was highly reliable and crucial to the Crown case, which favoured admissibility. In applying section 24(2), the trial judge erred in principle in admitting the evidence by giving undue emphasis to this third factor while neglecting the importance of the other inquiries, which strongly supported exclusion. The Supreme Court of Canada therefore gave the trial judge’s decision no deference. The Court came to the conclusion that the stop and search of the vehicle without any semblance of reasonable grounds, aggravated by the misleading testimony, was so reprehensible, and the impact of the breach was significant enough to require the Court to dissociate the justice system from these flagrant *Charter* breaches, notwithstanding the public interest in the truth-seeking function of the criminal trial process. The evidence was therefore excluded.

The process that led to these decisions, and the law that was applied in deciding whether to exclude the evidence, is explained below.

### 3. THE APPLICATION FOR EXCLUSION

#### 3.1) The Technical Components Introduced

*Accused persons must apply to the trial court to have unconstitutionally obtained evidence excluded. Before a court can even consider whether to exclude the evidence, the applicant must establish, on the balance of probabilities, that his Charter rights have been breached by a state agent.*

The phrase in subsection 24(2), “Where, in any proceedings under subsection (1),” makes it clear that the exclusionary remedy operates only after the preconditions of subsection 24(1) have been complied with. Subsection 24(1) requires:

- (i) an application to,
- (ii) a court of competent jurisdiction,
- (iii) brought by “anyone whose rights or freedoms, as guaranteed by the *Charter*, have been infringed or denied.

### 3.2) The Application

A number of appellate courts have supported the proposition that impromptu *Charter* applications should not be made.<sup>27</sup> Still, practices vary. Some courts require formal notices of motion to be served and filed. Others allow mere submissions to suffice. Often these applications are dealt with during a *voir dire* conducted at the start of the trial, particularly in jury cases. Sometimes the *voir dire* is held during the trial, at the time the evidence is presented.

Whatever procedure is in use in the jurisdiction or court in question, it remains true that criminal courts have traditionally been reluctant to deny relief because of procedural flaws. This is because substance is generally considered to be more important than form when it comes to the rights of accused persons.<sup>28</sup> It also happens occasionally that the *Charter* breach does not become apparent before the evidence in the case unfolds. Hence, the “application” requirement is not always applied rigorously. Indeed, it has been held that where “uncontradicted” evidence discloses a significant *Charter* violation, the trial judge is obliged to enter into an inquiry to determine whether that infringement occurred, even in the absence of an application by the aggrieved individual.<sup>29</sup> This is particularly so where the accused is unrepresented.<sup>30</sup>

### 3.3) A Court of Competent Jurisdiction

The application must be made to “a court of competent jurisdiction.” “[A] court of competent jurisdiction . . . is a court that has jurisdiction over the person and the subject matter and has, under the criminal or penal law, jurisdiction to grant the remedy.”<sup>31</sup> For the purposes of the remedy of exclusion of unconstitutionally obtained evidence, this will be the trial court. Even though any superior court can be a court of competent jurisdiction for the purpose of granting *Charter* relief, subsection 24(2) applications are brought before the trial court, typically at the time the impugned evidence is being offered for admission. Canadian courts have disapproved of holding “suppression hearings” before the start of a trial.

27 See, for example, *R. v. Kutynec* (1992), 70 C.C.C. (3d) 289 (Ont. C.A.); *R. v. Loveman* (1992), 71 C.C.C. (3d) 123 (Ont. C.A.); *R. v. Dwornychuk* (1992), 77 C.C.C. (3d) 385 (Alta. C.A.), leave to appeal to S.C.C. refused, [1993] 2 S.C.R. vii.

28 See, for example, *R. v. Blom* (2002), 167 C.C.C. (3d) 332 (Ont. C.A.).

29 *R. v. Arbour* (1990), 4 C.R.R. (2d) 369 (Ont. C.A.).

30 *R. v. Travers* (2001), 154 C.C.C. (3d) 426 (N.S.C.A.).

31 *R. v. Mills* (*sub nom. Mills v. R.*) (1986), 52 C.R. (3d) 1 at 42 (S.C.C.).

The significant limitation that is posed by the “court of competent jurisdiction” requirement is that judges conducting preliminary inquiries cannot exclude evidence as a subsection 24(2) remedy.<sup>32</sup> The jurisdiction of preliminary inquiry judges is derived exclusively from statute and does not include the power to grant *Charter* relief. Hence, accused persons are sometimes committed to stand trial at a preliminary inquiry after the admission of unconstitutionally obtained evidence that will not be admissible at their trials. Similarly, judicial officers conducting bail hearings and parole board panels are not courts of competent jurisdiction that can refuse to consider information on the basis that it has been obtained unconstitutionally.<sup>33</sup> Unconstitutionally obtained evidence can therefore be used without regard to section 24(2) during bail hearings and parole board panels. Adjudicators, however, are now recognized to have discretion outside of the *Charter* to exclude evidence that would undermine the fairness of the proceeding, a point that will be returned to below.<sup>34</sup>

### 3.4) The Applicant’s *Charter* Rights Are Violated

Before an accused can seek to have evidence excluded under subsection 24(2), she first must establish on the balance of probabilities that her *Charter* rights have been infringed or denied. Apart from the need to marshal sufficient evidence to meet that standard of proof, this raises two related obstacles. First, it is the accused’s own *Charter* rights that must be violated.<sup>35</sup> In *R. v. Paolitto*, the accused could not rely on subsection 24(2) to exclude handwriting samples that had been obtained from an accomplice in violation of the accomplice’s right to counsel.<sup>36</sup> Most often this limitation arises in search cases. In *R. v. Edwards*,<sup>37</sup> for example, the accused did not have a reasonable expectation of privacy in his girlfriend’s apartment because he was merely a frequent visitor who did not contribute to accommodation costs and had no right to exclude others from the premises. As a result, he could not rely on subsection 24(2) to seek to exclude evidence that was discovered dur-

---

32 *R. v. Hynes* (2001), 159 C.C.C. (3d) 359 (S.C.C.).

33 *Mooring v. Canada (National Parole Board)* (1996), 45 C.R. (4th) 265 (S.C.C.).

34 See the discussion below in this chapter at section 7, “Excluding Unfairly Obtained Evidence in the Absence of a *Charter* Violation.”

35 *R. v. Edwards* (1996), 45 C.R. (4th) 307 (S.C.C.); *R. v. Belnavis*, [1997] 3 S.C.R. 341.

36 (1994), 91 C.C.C. (3d) 75 (Ont. C.A.).

37 Above note 35.

ing a search of the apartment, even though that search contravened his girlfriend's constitutional rights.

Second, the *Charter* right must be violated by a state agent. In *R. v. Harrer*,<sup>38</sup> the accused claimed that a statement she made to American authorities should be excluded because the American authorities did not respect the requirements of subsection 10(b), the *Charter's* right to counsel provision. The court held that even if this were so, subsection 24(2) could not be relied upon because the American authorities whose conduct was being impugned were not Canadian state agents.<sup>39</sup> Similarly, the conduct of private individuals, which would have been contrary to the *Charter* had they been acting on behalf of the state, will not amount to a *Charter* breach and cannot support a subsection 24(2) application. In *R. v. Shafie*,<sup>40</sup> for example, a private investigator hired by the employer of a person suspected of theft was not required to provide a subsection 10(b) right to counsel warning before questioning the suspect because the investigator was not a state agent. Hence, subsection 24(2) could not be used to exclude the "uncautioned" statement.

In some cases it will be possible to extend access to the exclusionary remedy beyond those cases where police officers have violated directly the *Charter* rights of individuals. A medical doctor who took a vial of blood from a suspect at the request of the police has been held to be a state agent.<sup>41</sup> The test for whether a civilian will be treated as a state agent, thereby enabling a section 24(2) application to be brought, is whether the act said to be a *Charter* violation would have taken place in the form and in the manner which it did but for the involvement of a state agent. In *R. v. M.(M.R.)* it was held, using this test, that a school principal was not a state agent when he searched a student for drugs

---

38 (1995), 42 C.R. (4th) 269 (S.C.C.) [*Harrer*].

39 Since *Harrer*, *ibid.*, was decided, the Supreme Court of Canada held in *R. v. Hape* (2007), 220 C.C.C. (3d) 161 (S.C.C.) that the *Charter* does not apply to Canadian state agents operating in a foreign jurisdiction unless that foreign jurisdiction consents to the application of Canadian law. The thinking is that since Canada is helpless to enforce its standards in foreign legal jurisdictions, it would be impractical to expect Canadian officers conducting joint investigations to insist on Canadian standards during those joint investigations. The Court does, however, reserve the right to exclude evidence obtained in foreign jurisdictions where, given the way in which it was obtained, its admission would affect the fairness of the trial. A relevant consideration is whether foreign legal standards have been respected. See the discussion below in this chapter at section 7, "Excluding Unfairly Obtained Evidence in the Absence of a *Charter* Violation."

40 (1989), 68 C.R. (3d) 259 (Ont. C.A.).

41 *R. v. Pohoretsky*, above note 10.

after requesting a police officer to be present because the principal would have searched the student in the form and manner he did even if the police had not been present. It was important that the principal initiated the search and was acting under his authority to maintain discipline and security in the school.<sup>42</sup> A private citizen will also be acting as a state agent if their primary purpose in acting is to discover evidence with a view to criminal charges.<sup>43</sup> It has also been held that the arrest of a citizen is a governmental function, whether that arrest is conducted by a police officer or a private citizen. The private citizen exercises his powers of arrest on behalf of the state and, therefore, an unreasonable search pursuant to such an arrest may lead to the exclusion of the evidence found.<sup>44</sup>

#### 4. WHERE THE APPLICANT'S *CHARTER* RIGHTS HAVE BEEN VIOLATED

Where the applicant succeeds in establishing that her *Charter* rights have been infringed or denied by a state agent, two further preconditions must be met before the evidence is excluded. First, the applicant must establish that the evidence she wants the court to exclude has been “obtained in a manner that infringed or denied” her *Charter* rights. Second, the applicant must persuade the court that “in all of the circumstances, the admission of the evidence in the proceedings would bring the administration of justice into disrepute.”

#### 5. REQUIREMENT 1: “OBTAINED IN A MANNER”

*Evidence can be excluded under subsection 24(2) solely where it has been “obtained in a manner” that breached the Charter rights of the applicant. Although a non-remote causal connection between the breach and the discovery of the evidence will satisfy the “obtained in a manner” requirement, a causal connection is not strict-*

---

42 *R. v. M.(M.R.)* (1998), 129 C.C.C. (3d) 361 at 376 (S.C.C.), and see *R. v. Buhay*, above note 13.

43 *R. v. Chang* (2003), 180 C.C.C. (3d) 330 at paras. 14–16 (Alta. C.A.).

44 *R. v. Lerke* (1986), 49 C.R. (3d) 324 (Alta. C.A.). The Supreme Court of Canada expressly reserved on this point in *R. v. Asante-Mensah*, [2003] S.C.J. No. 38 at para. 77.

ly required. Instead, a generous approach is to be taken. Courts should examine whether there is a sufficient connection, given temporal, contextual, and/or causal factors, for it to be said that the evidence has been tainted by the Charter breach.

## 5.1) “Obtained in a Manner” and the Sufficiency of the Connection

The phrase “obtained in a manner” requires that the applicant establish a connection between the *Charter* breach and the discovery of the evidence. The purpose of this requirement is to ensure that evidence will be excluded under subsection 24(2) only if the discovery of the evidence can be linked in a meaningful way to the *Charter* violation.<sup>45</sup> “[T]he sufficiency of the connection between the *Charter* breach and the subsequent obtaining of the evidence . . . can only be determined by a case-specific factual inquiry.”<sup>46</sup> The “decisive question” is whether the evidence has been tainted by the *Charter* breach. As the Supreme Court of Canada explained in *R. v. Wittwer*:<sup>47</sup>

In considering whether a statement is tainted by an earlier *Charter* breach, the courts have adopted a purposive and generous approach. It is unnecessary to establish a strict causal relationship between the breach and [the evidence. The evidence] will be tainted if the breach and the impugned [evidence] can be said to be part of the same transaction or course of conduct. The required connection between the breach and the [evidence] may be “temporal, contextual, casual or a combination of the three.”

While such fact-specific inquiries invariably produce a complicated jurisprudence, in the overwhelming majority of cases the “obtained in a manner” requirement does not become a real issue because a causal link between the breach and the discovery of evidence is obvious.

## 5.2) Causal Connection

A “causal connection” is established where the unconstitutional investigative technique leads to the discovery of the evidence. For example, items found with an unconstitutional warrant meet the test. So, too, do statements that are made during an interview that is being conducted

---

45 *R. v. Goldhart* (1996), 48 C.R. (4th) 297 (S.C.C.).

46 *R. v. Simon*, [2008] O.J. No. 3072 at para. 69 (C.A.).

47 *R. v. Wittwer*, [2008] 2 S.C.R. 235 at para. 21.

in breach of the right to counsel, or breath samples that are obtained during an arbitrary detention. “Derivative evidence” can also meet the test. Unconstitutionally obtained evidence is “derivative” when it is discovered as the result of finding other unconstitutionally obtained evidence, or where its relevance becomes apparent only because of the *Charter* breach. In *R. v. Burlingham*, for example, a gun that was discovered as a result of the confession made by the accused to the police after his right to counsel had been violated was derivative evidence that was ultimately excluded along with the confession.<sup>48</sup>

Even where there is a factual connection between the breach and the discovery of the evidence, where that connection is so remote or attenuated that the factual connection is not material, evidence will not be “obtained in a manner” that violated the *Charter* and therefore cannot be excluded under section 24(2). In effect, while the *Charter* breach is an antecedent to the discovery of the evidence, it is not the material cause of its discovery. In *R. v. Goldhart*,<sup>49</sup> for example, the police learned of a witness during an unconstitutional search. In a sense, the witness’s testimony was evidence that became available as a result of the *Charter* breach, yet no “causal connection” was found. The Supreme Court of Canada held that this factual connection was too remote given that simply finding the witness did not make the testimony available. What made the testimony available in a meaningful sense was the decision of the witness to co-operate and his agreement to provide testimony. Had the witness not done so, his discovery during the search would have led to no evidence.

### 5.3) Cases without a Causal Connection

“So long as a violation of [a *Charter* right] precedes the discovery of evidence,”<sup>50</sup> if the *Charter* violation and the discovery of the evidence can be characterized as “integral parts of the same transaction” the “obtained in a manner” test will be met even in the complete absence of a causal connection between the violation and the discovery of the evi-

---

48 Above note 6 at 286. Although derivative evidence is almost invariably “real” or physical evidence, such as the gun in *Burlingham*, *ibid.*, it need not be. In *R. v. Burlingham*, derivative evidence included a statement made by the accused to his girlfriend, which he would not have made had it not been for his unconstitutionally obtained confession.

49 Above note 45. And see *R. v. White* (2007), 47 C.R. (6th) 271 (Ont. C.A.), where the relevant breach, the failure to inform White of the reason for his detention, did not contribute to the seizure of the evidence.

50 *R. v. Strachan* (1988), 67 C.R. (3d) 87 at para. 45 (S.C.C.) [*Strachan*].

dence.<sup>51</sup> Temporal and contextual factors can make the necessary link. The decision in *R. v. Strachan*<sup>52</sup> is illustrative. In that case the police discovered narcotics at Strachan's apartment during the proper exercise of a valid warrant. While the search was being conducted, the police violated Strachan's right to counsel by refusing to allow him to call a lawyer. The Crown argued that even though there had been a breach of the right to counsel, the narcotics could not be excluded because that *Charter* violation had nothing to do with their discovery. It urged that in the absence of a causal connection between the breach and the discovery, it could not be said that the evidence was obtained in a manner that infringed the *Charter*. The Supreme Court of Canada disagreed. Chief Justice Dickson feared that to require a causal connection test to be satisfied in every case would make the law too rigid to respond to the varied circumstances in which the admission of evidence could bring the administration of justice into disrepute. The Court therefore held that so long as the discovery of the evidence is part of the "chain of events during which the *Charter* violation occurred," and the connection is not too remote, it can be said that the evidence was obtained in a manner that infringed the *Charter*. Both the breach (the section 10(b) violation) and the discovery of the evidence (the narcotics) were part of the same transaction: the search of the home. Similarly, in *R. v. Flintoff*,<sup>53</sup> a breath sample obtained from a suspected impaired driver met the test because the man had been needlessly strip-searched during the course of the detention that led to the production of that sample. Both the breach (the strip search) and the discovery of the evidence (the breath sample) were part of the same chain of events: the detention.

Although the *Strachan* case said that the breach must precede the discovery of the evidence, and this is the received view,<sup>54</sup> it is arguable that the temporal connection test can be met in some cases where this is not so. In *R. v. Therens*, in a passage cited in *Strachan*, LaForest J. said the temporal connection test could be met if the breach "preceded, or occurred in the course of, the obtaining of evidence."<sup>55</sup> The French text of subsection 24(2) appears to contemplate the power in courts to address breaches that are linked to the same event, but occur after the discovery of the evidence. There are also sound reasons of policy for leaving this door open. Assume that the police discover marijuana during a

51 *R. v. Goldhart*, above note 45 at 310.

52 Above note 50.

53 (1998), 16 C.R. (5th) 248 (Ont. C.A.) [*Flintoff*].

54 See, for example, *R. v. Pettit* (2003), 179 C.C.C. (3d) 295 at para. 20 (B.C.C.A.) and *R. v. LaChappelle* (2007), 226 C.C.C. (3d) 518 at paras. 45–47 (Ont. C.A.).

55 Above note 7 at 649 [emphasis added].

lawful and reasonable pat-down search, and then publicly and needlessly go on to strip search the suspect. Is a Court to be deprived of the power to exclude the evidence because of the sequence of events? To insist on the breach preceding the discovery of evidence as an absolute precondition to exclusion means that *ex hypothesi* evidence can be admitted even where its admission would bring the administration of justice into disrepute, just because of the order in which things happened to occur.

It is important to appreciate that a temporal connection between the breach and the discovery of the evidence will not suffice. There must also be a contextual connection. The test would not have been met in *Strachan* if the drugs had been discovered during an independent search at a bus station locker, even if the search was occurring at precisely the same time that Strachan was being deprived of his right to counsel at home. What is required is that there be a sufficiently important factual or contextual connection between the breach and the discovery of the evidence to make it possible to say that the breach and the discovery of the evidence are part of the same chain of events. In *Strachan*, the accused sought to enjoy his right to counsel precisely because of the search that eventually produced the evidence, hence the connection. In *Flintoff*, the police conducted the strip search while processing the accused for the breath test. In neither case could it be said that the breach led to the discovery of the evidence, but in each it was possible given the factual relationship between the breach and the discovery of the evidence to treat them as integral parts of the same transaction.

#### 5.4) An Overall Evaluation

As *R. v. Wittwer*<sup>56</sup> made clear, in applying the generous, purposive “obtained in a manner” test, the key inquiry is whether there is a sufficient connection that the evidence has been tainted by the breach. Even though “contextual” or “temporal” links can suffice, it remains true that the absence of causation can make the link between the breach and the evidence so attenuated that temporal and contextual factors are inadequate. For example, the Court in *Goldhart* found any temporal connection between the discovery of Mayer during the unconstitutional search and his testimony during the trial to be too remote to meet the “obtained in a manner” test. It was not the passage of time that made it so; any “temporal link between the illegal search and the testimony . . .

---

<sup>56</sup> Above note 47.

[was] greatly weakened by the intervening events of Mayer's voluntary decision to cooperate with the police, to plead guilty and to testify."<sup>57</sup>

At times the link is broken because events after the initial breach effectively make the breach immaterial, before the evidence is discovered. The New Brunswick Court of Appeal held in *Ouellette v. New Brunswick*<sup>58</sup> that there was no temporal connection between the breach that occurred when the police failed to read Ouellette his rights to counsel properly, and the breath sample Ouellette furnished shortly thereafter. The chain between the breach and the discovery of the evidence was broken when Ouellette in fact managed to speak to a lawyer before blowing into the breathalyzer. Although it is possible to argue that in *Ouellette*, as in *Flintoff*, the breach and the obtainment of the evidence were both part of the transaction or event in which Ouellette was detained in order to provide a sample, *Ouellette* is distinguishable. When Ouellette spoke to a lawyer, the failure by the police to properly advise Ouellette of his right to contact counsel became moot, denuding the breach of its status as an integral part of the detention transaction. In effect, any "taint" was gone.

Things were different in *R. v. Wittwer*.<sup>59</sup> Wittwer confessed before properly being given his right to counsel warning. When the police realized their error a few hours later, Wittwer was given a proper warning by a new officer. He then made a "new" statement, which the Crown wanted to present as evidence. The Court held that, even though Wittwer received a proper warning before this "new" statement, the fact that Wittwer said nothing incriminating until the new officer mentioned that he was aware of Wittwer's first statements, forged a causal link and left the temporal link intact between the initial breach and the ultimate statement.

Even though the absence of causation can and does influence some temporal or contextual connection decisions, the ability to rely on temporal and contextual connections serves to inject flexibility into the "obtained in a manner" inquiry. It increases the prospect of the "obtained in a manner" requirement being satisfied. As the Court said in

---

57 Above note 45 at 312.

58 (1996), 2 C.R. (5th) 223 (N.B.C.A.) [*Ouellette*]. *R. v. Simon*, above note 46, provides a particularly aggressive example of how subsequent events can break the link between the evidence and the breach. Simon was not given a proper right-to-counsel warning before furnishing a DNA sample. The court held that breach to be moot because the DNA consent form Simon signed gave him all of the information he needed to make an informed decision about whether to give the sample, even in the absence of legal advice.

59 Above note 47.

*Goldhart*, where “the temporal connection . . . [is] so strong that the *Charter* breach is an integral part of a single transaction . . . a causal connection that is weak or even absent will be of no importance.”<sup>60</sup> The temporal connection will be strong enough to accomplish this where, as in *Strachan* and *Flintoff*, there is a meaningful factual nexus other than causation between the breach and the discovery of the evidence.

## 6. REQUIREMENT 2: THE EFFECT OF ADMISSION ON THE REPUTE OF THE ADMINISTRATION OF JUSTICE

### 6.1) The Mode for Assessing Disrepute under the Current Law

*Where evidence has been obtained in a manner that violates the Charter, a court will exclude it if (1) the breach is serious enough and (2) the impact on the Charter-protected interests of the accused is significant enough to (3) outweigh society’s interest in the adjudication of the case on its merits. In conducting this balancing exercise, the Court is to assess each of these three factors to determine whether a reasonable person, fully informed of the all of the circumstances and the values underlying the Charter, would conclude that the admission of the evidence could bring the administration of justice into disrepute. When asking this question, the focus is on the damage that condoning the Charter violation by accepting its fruits for admission could do to the long-term interest in maintaining the integrity and public confidence in the justice system.*

The Court in *R. v. Grant* held that where the accused applies to exclude evidence that has been “obtained in a manner” that violates the *Charter*, courts must gauge (1) the seriousness of the *Charter*-infringing state conduct, (2) the impact of the *Charter* breach on the *Charter*-protected interests of the accused, and (3) society’s interest in the adjudication of the case on its merits.<sup>61</sup> “The evidence on each [of these three] line[s] of inquiry must [then] be weighed in the balance”<sup>62</sup> by the trial judge<sup>63</sup> to determine whether a reasonable person, fully informed of all of the circumstances and the values underlying the *Charter*, would conclude

60 Above note 45 at 310–11.

61 Above note 4 at para. 71.

62 Above note 17 at para. 36.

63 Above note 4 at para. 127.

that the admission of the evidence would<sup>64</sup> bring the administration of justice into disrepute,” based not on “the immediate reaction to the individual case,” but given the “long-term” interest in “maintaining the integrity of, and public confidence in, the justice system.”<sup>65</sup>

As the Supreme Court of Canada recognized in *R. v. Harrison*, this “balancing exercise” is “a qualitative one, not capable of mathematical precision.”<sup>66</sup> It is not a simple question of counting whether there are more “pro-exclusionary” than “pro-inclusionary” factors.<sup>67</sup> Although technically section 24(2) *oblige*s judges to exclude the evidence in any case where its admission could bring the administration of justice into disrepute (the section says that the evidence “shall be excluded”) the imprecision inherent in determining the impact of admission on the repute of the administration of justice requires trial judges to exercise discretion or judgment. As a result, “[p]rovided the judge has considered the correct factors considerable deference should be accorded to [the trial judge’s] decision.”<sup>68</sup> Where, however, the trial judge “has fallen into error in principle, a material misapprehension of the evidence relevant to the ruling [has occurred] or a clearly unreasonable conclusion [has been arrived at],” the appellate court may “perform the s. 24(2) calculation afresh and determine the admissibility of the evidence.”<sup>69</sup> As indicated above, in *R. v. Harrison* the trial judge “placed undue emphasis on the third line of inquiry” and inappropriately converted the inquiry into “a simple contest between the degree of police misconduct and the seriousness of the offence.”<sup>70</sup> This is what freed the appellate court, the Supreme Court of Canada, to conduct its own evaluation of whether section 24(2) required exclusion.

---

64 Prior to *R. v. Grant*, it was settled law that, although the English version of s. 24(2) asks whether admission “would” bring the administration of justice into disrepute, the word “would” must be read as if it said “could.” This is because “could” is a more accurate translation of the equally authoritative French version, and the interpretation that best advances the purpose of ensuring a fair process for the accused is to be preferred: *R. v. Collins*, above note 4 at 287–88. The *Grant* decision uses the word “would” without commenting on this point, but gives no reason to assume that it has rejected the overall standard for exclusion. For this reason the propositions contained in this chapter replace the word “would” with the legally conventional term “could.”

65 Above note 4 at para. 68.

66 Above note 17 at para. 36.

67 *Ibid.*

68 Above note 4 at para. 127.

69 *R. v. Harris* (2007), 49 C.R. (6th) 220 at para. 50 (Ont. C.A.).

70 Above note 17 at para. 37.

## 6.2) Rejected Practices

The *Grant* test applies to all kinds of evidence and regardless of the *Charter* breach. As indicated in the introduction to this chapter,<sup>71</sup> prior to *Grant* the law was otherwise. Courts, applying the “*Collins/Stillman* framework”<sup>72</sup> before *Grant* ultimately rejected it, took a markedly different approach to whether admission would bring the administration of justice into disrepute, depending on the kind of evidence at issue. In effect, evidence would notionally be put into one of two “boxes,” depending upon whether it was “compelled conscriptive” evidence or not. Compelled conscriptive evidence would go into Box 1 and would be excluded unless the Crown could prove that the evidence would have been discovered without breaching the *Charter*. No consideration would be given to how serious the breach was or how much damage exclusion would do to the reputation of the administration of justice. By contrast, non-compelled or non-conscriptive evidence would fall into Box 2 and be excluded only if, given the seriousness of the violation, more harm would be done to the repute of the administration of justice by admission than by exclusion.

This now obsolete “two-box” approach had been built on a “fair trial” theory that borrowed heavily from self-incrimination concepts. The Supreme Court of Canada reasoned in the *Collins/Stillman* line of cases that since a “fair trial” demands that the Crown prove its case without calling the accused as a witness, a trial would become unfair if the Crown could indirectly co-opt the accused as a witness by presenting out of court statements obtained from the accused in violation of the *Charter*. Since it will always damage the repute of the administration of justice to conduct unfair trials, such evidence would almost automatically be excluded. In time, this thinking expanded beyond “testimonial self-incrimination” (incrimination through the use of statements made by the accused) to include other forms of “conscripting” the accused to participate in the investigation against him. It came to be held that a trial would be rendered unfair by admitting samples taken unconstitutionally from the body of the accused; or by compelling the accused to act (to use his body) to create evidence, such as by participating in identification line-ups or doing re-enactments; or by using evidence derived from other conscriptive evidence, such as the gun found after the accused describes its location to the police in an unconstitutionally obtained statement. It was only when the Crown could prove “discoverability” (i.e., that the constitutionally obtained compelled conscriptive

71 See this chapter, section 1.1, “The Common Law.”

72 As it is called in *R. v. Grant*, above note 4 at para. 60.

evidence would have been discovered even without the *Charter* breach) that the admission of these kinds of evidence would not render a trial unfair.

The July 2009 decision in *R. v. Grant* made the “two-box,” *Collins/Stillman* framework obsolete by rejecting the fair trial theory upon which it was based. The Court reasoned that this fair trial theory is inconsistent with the fair trial concept used more generally in the law, which is a “multi-faceted and contextual concept,” meant to “satisfy the public interest in getting at the truth, while preserving basic procedural fairness to the accused.”<sup>73</sup> Moreover, the near-automatic exclusion of compelled conscriptive evidence was irreconcilable with section 24(2)’s command to judge the impact of admission on the repute of the administration of justice by “having regard to all the circumstances.”<sup>74</sup> Finally, it produced anomalous results.<sup>75</sup> It was more apt to cause the exclusion of a plucked hair than real evidence secured from a demeaning and objectionable body cavity or strip search.<sup>76</sup>

Care must therefore be exercised in relying on pre-*Grant* case law, as a number of its practices have now been rejected. The *Grant* court not only abolished the “two-box” approach and jettisoned the *Collins/Stillman* fair-trial theory, the Court has also:

- rejected the equation of self-incrimination and other conscriptive evidence;
- reduced the role “discoverability” plays; and
- marginalized the reliance that can be placed on the seriousness of the offence as a relevant factor in section 24(2) reasoning.

These changes will be as they arise for consideration in the detailed description provided below of the three step evaluation that section 24(2) requires before the balancing process is conducted.

### 6.3) Step 1 in Assessing Disrepute—Gauging the Seriousness of the *Charter*-infringing State Conduct

The seriousness of the breach—*Gauging the seriousness of the Charter-infringing state conduct involves assessing the blame-worthiness of the conduct. This focuses most intently on the state of mind of the officer about Charter compliance, but extends to*

---

<sup>73</sup> *Ibid.* at para. 65.

<sup>74</sup> *Ibid.* at para. 60.

<sup>75</sup> *Ibid.* at para. 106.

<sup>76</sup> *Ibid.* at para. 103.

*include systemic or institutional failures in Charter compliance. Moreover, the Charter-infringing state conduct will be more serious where it is part of a larger pattern of Charter violations committed during the investigation of the accused.*

This “first line of inquiry”<sup>77</sup> under the *Grant* test of gauging the seriousness of the *Charter*-infringing state conduct is undertaken to determine how important it is for Courts to dissociate themselves from the unconstitutional conduct. The underlying theory is that while, in some measure, a court will be seen to condone a *Charter* breach if it admits the fruits of that breach, the degree of harm caused will vary depending upon the seriousness of the breach. “The more severe or deliberate the state conduct that led to the *Charter* violation, the greater the need for courts to dissociate themselves from that conduct, by excluding evidence linked to that conduct . . . .”<sup>78</sup>

In this first line of inquiry the “seriousness of the breach” refers to the “gravity of the state conduct.”<sup>79</sup> The degree of harm the *Charter* breach does to the legitimate interests of the accused is dealt with separately, in the second line of inquiry. Essentially, there are three clear considerations that will colour the seriousness of the breach: (1) the blameworthiness of the conduct, and (2) the degree of departure from *Charter* standards, and (3) the presence or absence of “extenuating circumstances.” As will be described, while this “first inquiry concerns the police conduct in obtaining the [evidence],”<sup>80</sup> where the police conduct reflects institutional or systemic concerns, this will increase the seriousness of the violation.<sup>81</sup>

### 6.3) (a) Blameworthiness of the Conduct

#### *Officer Conduct*

The *Grant* Court has recognized that “good faith” by a police officer will “reduce the need for the court to dissociate itself from the police conduct,” while “willful or flagrant disregard of the *Charter* by those very persons who are charged with upholding the right in question may require the Court to dissociate itself from such conduct.”<sup>82</sup> Even before *Grant* “[t]he relative good faith or bad faith by the police [was]

77 *Ibid.* at para. 72.

78 *Ibid.*

79 *Ibid.* at para. 73.

80 *Ibid.* at para. 124.

81 See this chapter, section 6.3 (a), “Blameworthiness of the Conduct – Institutional and Systemic Conduct.”

82 *R. v. Grant*, above note 4 at para. 75.

one of the most important factors in determining the seriousness of a *Charter* breach.”<sup>83</sup> As a result, pre-*Grant* authority on the blameworthiness of the conduct continues to give guidance.

While some decisions have attempted to pigeonhole the actions of the police as either good or bad faith, it is more useful to place the actions of the police along a fault line.<sup>84</sup> This is because a lack of good faith cannot be equated with bad faith,<sup>85</sup> and both good faith and bad faith can be more or less unreasonable.

It is important to appreciate at the outset that where the police officer’s breach lands on this fault line relates to the officer’s belief in *Charter* compliance, not to her ulterior motives for violating the *Charter*. Good faith does not exist simply because an officer believes it is necessary to breach the *Charter* in order to catch a suspected criminal. In *R. v. Kokesch* the Court remarked that “the unavailability of other constitutionally permissible, investigative techniques is neither an excuse nor a justification for constitutionally impermissible investigative techniques.”<sup>86</sup> In all cases, to be a good faith breach, an officer must honestly but mistakenly believe that she is respecting the *Charter*. Moreover, that belief must be “reasonable.”<sup>87</sup> Where a particular case fits on that “good faith” spectrum depends on the circumstances that make the belief reasonable.

Since officers are not expected to anticipate or predict the outcome of *Charter* challenges yet to be taken, the most compelling cases of good faith are those where an officer relies on an existing legal rule that is yet to be declared unconstitutional. So, officers relying on writs of assistance<sup>88</sup> and upon warrantless wiretaps<sup>89</sup> were held to be acting in good faith even though the sections authorizing those investigative techniques were ultimately struck down.

A less pronounced form of good faith can exist where the law that was breached was obscure or highly technical, or involved the exercise of close judgment. In such cases, the finding of “good faith” is premised on a “reasonable misunderstanding of the law.”<sup>90</sup> In *R. v. Grant*

---

83 *R. v. Washington*, (2007), 52 C.R. (6th) 132 at para. 78 (B.C.C.A.).

84 *R. v. Kitaitchik* (2002), 166 C.C.C. (3d) 14 at para. 41. (Ont. C.A.).

85 *R. v. Smith* (2005), 199 C.C.C. (3d) 404 (B.C.C.A.).

86 *R. v. Kokesch*, (1990), 1 C.R. (4th) 62 at 67 (S.C.C.), a passage affirmed in *R. v. Stillman*, above note 11 at 49, and see *R. v. Buhay*, above note 13 at para. 36.

87 *R. v. Buhay*, *ibid.* at para. 59.

88 *R. v. Sieben* (1987), 56 C.R. (3d) 225 (S.C.C.); *R. v. Hamill* (1987), 56 C.R. (3d) 220 (S.C.C.).

89 *R. v. Sanelli* (1990), 74 C.R. (3d) 281 (S.C.C.).

90 *R. v. Wong* (1990), 1 C.R. (4th) 1 at 19 (S.C.C.).

the seriousness of the failure by the police to recognize that they had effectively detained Grant was mitigated because the point at which encounters become detentions is not always clear, and the officers did not have the guidance of the standards for detention that the *Grant* Court developed for situations such as the one the officers faced, namely, in the context of “neighbourhood policing” as opposed to investigating specific crimes.<sup>91</sup>

Of more controversy are cases where the officer’s honest mistake of law occurs where the law is not complex but where the legal question is open or unsettled. It has been held that it is possible for an officer to act in good faith even if his actions breach guidelines established in a subsequent authoritative decision,<sup>92</sup> but there is controversy about whether this should be considered good faith, or merely ignorance of the law.<sup>93</sup> If this is to be a form of “good faith” it must surely be at the lowest end of that spectrum.

One moves off the “good faith” spectrum where the officer *should have known* about the relevant *Charter* limit. The best that the Crown can hope for in such cases is a finding that there is an “absence of bad faith.”<sup>94</sup> This may be a fitting label in cases where the law is little known or controversial, but where the constitutional limit the officer is ignorant of is basic and settled, the breach moves unequivocally into the bad faith zone and is an aggravating factor. Where established judicial decisions from courts with jurisdiction in the relevant province settle constitutional questions,<sup>95</sup> or where the Supreme Court of Canada has settled a legal question,<sup>96</sup> it is manifestly unreasonable for the police to remain ignorant of them and this will increase the seriousness of the breach. In *R. v. Kokesch*, the Court refused to treat an inadvertent violation as being in good faith because the need for a search warrant to invade the privacy of a residence, even to conduct a perimeter search, should have been clear to the officers in light of established decisions

---

91 As a result of the guidance provided in *Grant*, the Court cautioned that similar conduct would not as justifiable in the future: above note 4 at para. 133, and see also paras. 40–42.

92 *R. v. B.(B.W.)* (2002), 4 C.R. (6th) 24 (B.C.C.A.).

93 See the debate between the judges in *R. v. Washington*, above note 83.

94 *R. v. Silveira*, [1995] 2 S.C.R. 297; *R. v. Wise* (1992), 11 C.R. (4th) 253 at 269 (S.C.C.).

95 In *R. v. Grant* (1993), 24 C.R. (4th) 1 (S.C.C.), the Court held that the police in British Columbia were entitled to rely on statutory authority that had been struck down in Ontario because it had not been struck down by the British Columbia Court of Appeal. Ontario officers could not have relied reasonably upon that same provision.

96 *R. v. Silveira*, above note 94.

requiring warrants to enter private property.<sup>97</sup> The more notorious and settled the limit is, the more aggravating. Indeed, the failure to adhere to obvious constitutional limits, such as by detaining a motorist without any reasonable grounds as occurred in *R. v. Harrison*, may betray a reckless disregard of *Charter* standards and be treated as “brazen” and “flagrant” violation falling at the “serious end of the spectrum.”<sup>98</sup> In *R. v. Feeney*, the decision of an officer to conduct a search in the absence of a subjective belief that there were reasonable and probable grounds to enter the residence was held to be “flagrant” because if the officer did not know about the law relating to warrantless searches, he should have known it.<sup>99</sup>

At the bad faith extreme of the fault line are cases where the violation is wilful. In *R. v. Burlingham*, in order to prevent the accused from benefiting from the right to counsel, the police purposefully required him to decide whether to accept a “deal” before his lawyer became available.<sup>100</sup> Similarly, in *R. v. Clarkson* the breach was particularly serious because the police insisted on interviewing the accused while she was impaired, knowing that if they waited for her to become sober, she would probably decide to consult counsel and then fail to provide a statement.<sup>101</sup> In *R. v. Buhay*, the officer showed “blatant disregard” for the accused’s *Charter* rights when he conducted a warrantless search after concluding that he did not have the grounds to obtain a warrant.<sup>102</sup> In *R. v. Grant*, the Court made it clear that “derivative evidence,” being real evidence discovered as a result of unconstitutionally obtained statements, must be excluded where there is reason to believe the police deliberately abused their power to get the statement in the hope it would lead to derivative evidence.<sup>103</sup> It is evident that wilful *Charter* violations will generally require exclusion.

Of interest, the assessment of the blameworthiness of the relevant conduct is not confined to the time of the breach but extends, as well, to the officer’s testimony about *Charter* compliance. The Court held in *R. v. Harrison* that the fact that a police officer attempted to mislead the Court about his *Charter* compliance “was properly a factor to consider

---

97 Above note 86 at 72, Sopinka J.; *R. v. Mann* (2004), 185 C.C.C. (3d) 308 at para. 55 (S.C.C.), and see *R. v. Calderon* (2004), 188 C.C.C. (3d) 481 at para. 96 (Ont. C.A.).

98 Above note 17 at paras. 23 & 24.

99 (1997), 115 C.C.C. (3d) 129 at 171 (S.C.C.).

100 Above note 6.

101 [1986] 1 S.C.R. 383.

102 Above note 13 at para. 60.

103 Above note 4 at para. 128.

as part of [the seriousness] inquiry.”<sup>104</sup> To admit unconstitutionally obtained evidence that an officer lies about directly undermines section 24(2)’s goals of preserving “the integrity of the judicial system and the truth-seeking function of the courts.”<sup>105</sup> This thinking no doubt extends as well to misleading information provided in search warrant or wire tap applications and other sworn investigative declarations.

### *Institutional and Systemic Conduct*

There is some confusion over whether the fault line should be drawn with sole reference to the investigating officer’s frame of mind. There are cases that find good faith on the part of officers who have complied with defective internal policy directives or have received bad legal advice before acting. In *R. v. Wong*,<sup>106</sup> for example, the admission of the evidence was aided by the fact that the police officers obtained legal advice before unlawfully installing video-surveillance cameras. In *R. v. Généreux*,<sup>107</sup> the decision to admit the evidence was assisted because the defective practice of establishing reasonable grounds for a warrant used by the police was standard in the province of Quebec. This line of authority is problematic. It is difficult to reconcile with the notion that where the law is settled, it is unreasonable to remain ignorant of *Charter* standards. Moreover, its perverse effect is to enable the Crown to reduce the seriousness of the violation by a police officer by relying on constitutional errors made by other, often more responsible, state agents. Fittingly, in *R. v. Stillman*, the majority found no mitigation for the *Charter* violation that occurred after the police relied on erroneous and incomplete legal advice from the Crown’s office.<sup>108</sup> We suggest that *Stillman* represents the better view. This is particularly so in light of the recent comment in *R. v. Harrison* that “evidence of systemic or institutional abuse will aggravate the seriousness of the breach and weigh in favour of exclusion, [while] the absence of such a problem is hardly a mitigating factor.”<sup>109</sup>

---

104 Above note 17 at para. 26. See also the judgment of Iacobucci J., albeit dissenting in the result, in *R. v. Belnavis*, above note 35 at para. 93.

105 *Ibid.*

106 Above note 90.

107 (1992), 70 C.C.C. (3d) 1 (S.C.C.).

108 Above note 11. See also *R. v. Schedel* (2003), 12 C.R. (6th) 207 (B.C.C.A.), and *R. v. Lau* (2003), 12 C.R. (6th) 296 (B.C.C.A.). The trial judges in these cases had found police officers who executed searches to be acting in good faith when following a Vancouver Police Policy to break down the door when warrants are being executed for “grow-ops.” The Court of Appeal held that the trial judges erred in mitigating the breaches in this way. The policy actually aggravated the breaches, as it was developed in flagrant disregard of the law and the *Charter*.

109 Above note 17 at para. 25.

The failure by law enforcement agencies as a whole to respond to *Charter* rules is therefore a relevant consideration. This being so, there is little that can be said for permitting individual police officers to invoke poor institutional advice or bad institutional practices in an effort to mitigate the seriousness of their breaches.

### *Pattern of Violations*

Just as systemic or institutional abuse will aggravate the seriousness of a *Charter* breach, so too will a pattern of illegality. The more violations there are, the more likely there will be disrepute caused by admission of the unconstitutionally obtained evidence.<sup>110</sup> This is because a pattern of violations, whether of constitutional or “non-constitutionalized” rights,<sup>111</sup> demonstrates a lack of respect for the rule of law, thereby exacerbating the seriousness of any constitutional violations that occur.<sup>112</sup>

### 6.3) (b) Degree of Departure from *Charter* Standards

According to *R. v. Grant*, section 24(2) exists so that “courts, as institutions responsible for the administration of justice, [do not] effectively condone state deviation from the rule of law by failing to dissociate themselves from the fruits of the unlawful conduct.”<sup>113</sup> That being so the more significant the deviation is, the more compelling the case for exclusion will be.

It is therefore important to determine whether the breach is substantial or merely technical. For example, it is a substantial violation of the right to counsel not to advise a detainee about the availability of legal aid when he has expressed concern about his ability to afford a lawyer,<sup>114</sup> but it is not as serious to fail to advise a person being searched incidental to arrest of his right to counsel before commencing that search.<sup>115</sup> In *R. v. Harrison* the Court held that the seriousness of the violation was “exacerbated” because the officer departed

---

110 *R. v. Chiasson* (2006), 37 C.R. (6th) 43 (S.C.C.).

111 In *R. v. Stillman*, above note 11 at 49, the pattern relied on to make the *Charter* breach more serious included disregard for the protection provided by the law to young offenders.

112 *R. v. Feeney*, above note 99 at 173. See also *R. v. Calderon*, above note 97 at para. 93.

113 *R. v. Grant*, above note 4 at para. 72.

114 *R. v. Brydges* (1990), 74 C.R. (3d) 129 (S.C.C.).

115 *R. v. Debot* (1989), 73 C.R. (3d) 129 (S.C.C.). This is because, while the police must give detainees immediate information about their *Charter* rights before conducting a search, the police may search the detainee before giving the detainee an actual opportunity to speak to counsel. If the opportunity to speak to counsel is in fact provided at the first reasonable opportunity after the search,

from *Charter* standards to a major degree. It was not simply a case of the officer misjudging whether reasonable grounds for the stop existed. Reasonable grounds were “entirely non-existent.”<sup>116</sup> By contrast, a departure from constitutional standards will be less major where the legal defect is simply technical in nature.<sup>117</sup> In *R. v. Wise*,<sup>118</sup> for example, the *Charter* violation was not considered to be serious because of its technical nature where the police installed an electronic tracking device, unaware that their warrant had expired. Still, some technical defects can be significant, as in *R. v. Genest*<sup>119</sup> where the officer who was to execute a warrant was not named, no times were listed for its execution, and it did not include a list of objects to be searched for.

The more general manner in which the police conducted themselves can also mark the breach as more or less a significant deviation from *Charter* standards. In *R. v. Grant* the seriousness of the violation would have been greater had the officers behaved abusively during the detention, or had the detention occurred because of racial profiling.<sup>120</sup>

The departure from *Charter* standards will also be more intense when the vulnerability of the accused is exploited. In *R. v. Evans*,<sup>121</sup> the right to counsel violation was rendered more serious because the accused was mentally challenged, while in *R. v. Clarkson* the vulnerability of the intoxicated detainee exacerbated the breach.<sup>122</sup>

### 6.3) (c) Extenuating Circumstances—Necessity and Emergency

In *R. v. Grant*, the Court recognized that “extenuating circumstances . . . may attenuate the seriousness of the police conduct that results in a *Charter* breach.”<sup>123</sup> Although no extenuating circumstances operated in either *Grant*, or its companion case, *R. v. Harrison*, previous case law that no doubt still applies demonstrates the “necessity” and “emergency” concepts.

Specifically, it has been held that “necessity” in breaching the *Charter* to preserve evidence can diminish the seriousness of the *Charter* violation. Perhaps the key factor enabling the Court in *R. v. Silveira* to

---

the failure to advise the suspect before the search that this will happen is a highly technical omission.

116 Above note 17 at para. 23.

117 *R. v. Caslake*, [1998] 1 S.C.R. 51; *R. v. Belnavis*, above note 35; *R. v. Feeney*, above note 99.

118 *R. v. Wise*, above note 94.

119 (1989), 67 C.R. (3d) 224 (S.C.C.).

120 Above note 14 at para. 133.

121 (1991), 4 C.R. (4th) 144 (S.C.C.).

122 Above note 101.

123 *R. v. Grant*, above note 4 at para. 75.

conclude that the serious home invasion by the police was sufficiently mitigated to allow for the admission of the evidence was the real risk that the evidence would have been lost or destroyed if the police had not acted as they did.<sup>124</sup> Two important points need to be made, however. First, as the Court stated in *R. v. Feeney*, more is needed than the simple fact that “[a]fter any crime is committed, the possibility that evidence might be destroyed is inevitably present.”<sup>125</sup> There must be some particular foundation for the belief in urgency or necessity in the case at hand, such as existed in *Silveira* after the very public arrest of the accused. The likelihood that *Silveira*’s co-conspirators knew of his arrest raised the realistic spectre that any contraband at his house would be destroyed or removed before the police could arrive. Second, the urgency of preserving evidence should not be understood as reducing the seriousness of intentional, as opposed to inadvertent, *Charter* violations. It is important, for example, that in *Silveira* the officers were not aware that they were violating the *Charter* by securing the home. The majority was careful to point out that after its decision, “[t]he police must now know that exigent circumstances do not provide an excuse for failing to obtain a warrant.”<sup>126</sup>

In “emergency” cases, where public or police safety is at stake, a more generous approach is taken. For example, in *R. v. Strachan*,<sup>127</sup> the fact that the initial delay in providing the right to counsel was caused by the desire of the police to get a potentially volatile situation under control assisted in justifying the ultimate admission of the evidence. In *R. v. Golub*, where the police entered a residence without warrant after receiving a report that the accused had an Uzi submachine gun, the Ontario Court of Appeal held that, if this constituted a *Charter* breach at all, the seriousness of the breach was significantly mitigated by the urgent need to ensure public safety.<sup>128</sup>

#### 6.4) Step 2 in Assessing Disrepute—Gauging the Impact of the *Charter* Violation on the *Charter*-protected Interests of the Accused

The significance of the impact—*The measure of the significance of the impact of the violation on the accused is gained by examining*

---

124 *R. v. Silveira*, above note 94 at 374, Cory J.

125 Above note 99 at 169.

126 *R. v. Silveira*, above note 94 at 374, Cory J.

127 Above note 50.

128 *R. v. Golub* (1997), 9 C.R. (5th) 98 (Ont. C.A.).

*the nature and degree of intrusion of the Charter breach into the Charter-protected interests of the accused. The way the impact is assessed varies with the kind of evidence sought to be admitted:*

- a. *Statements—Generally speaking, the degree of intrusion that occurs when statements are unconstitutionally obtained is high. Unless there is a sound basis for concluding that the accused would have spoken in any event, or the breach is so technical as to have no real effect on the important Charter-protected interest of the accused to make an informed choice about whether to speak to the authorities, unconstitutionally obtained statements are presumptively inadmissible.*
- b. *Bodily Samples—The degree of intrusion caused when bodily samples are secured depends upon the extent to which privacy, bodily integrity, and human dignity are compromised given the nature of the samples and the manner in which they are secured.*
- c. *Non-bodily physical evidence—The significance of the impact of the violation where non-bodily physical evidence is obtained turns primarily on the manner of discovery and the degree to which the manner of discovery undermines the Charter-protected privacy interests of the accused, although privacy interests related to the nature of the non-physical evidence also fall to be considered.*
- d. *Derivative evidence—For “derivative evidence,” typically real evidence that is discovered as a result of unconstitutionally obtained statements, the significance of the impact of the violation will turn on the Charter breach used to obtain the statement that led, in turn, to the derivative evidence. Since “derivative evidence” comes from unconstitutionally obtained statements, that degree of intrusion will generally be significant, unless*
  - i. *the breach had no real impact on the Charter-protected interest of the accused to make an informed choice about whether to speak to the authorities;*
  - ii. *it can confidently be said that the statement in question would have been made notwithstanding the Charter breach; or*
  - iii. *it can confidently be concluded that there is a likelihood that the derivative evidence would have been discovered even had there been no Charter violation. Where this conclusion can be made, the significance of the intrusion varies with the degree of likelihood that discovery would have occurred in any event.*

“This [second] inquiry focuses on the seriousness of the impact of the *Charter* breach on the *Charter*-protected interests of the accused.”<sup>129</sup> The more those interests are harmed by the *Charter* violation, the greater the case for exclusion. It is meant to address “the danger that admitting the evidence may suggest that *Charter* rights do not count thereby negatively impacting on the repute of the administration of justice.”<sup>130</sup> The more intrusive the breach is, the greater the danger to the repute of the administration of justice in appearing to discount *Charter* rights.

While the *Grant* decision rejected the fair trial theory that drove the *Collins/Stillman* framework, this did not make the kinds of evidence being tendered immaterial. Indeed, the kind of evidence secured is a key consideration in assessing the degree of intrusion. This is because the degree and nature of intrusion tends to vary between different kinds of proof. The common law has long reacted more strongly to compelling statements than it does to compelling bodily samples such as fingerprints, breath samples, or even blood samples. Meanwhile the law has long been more reticent to compel bodily samples than it has been in restricting the seizure of property. These values are reflected in the *Grant* decision, which, in discussing how the degree of intrusion is to be measured, breaks things down according to the kind of evidence secured. Of course, the nature of the investigative technique employed will also colour the degree of intrusion into the *Charter*-protected interests of the accused. According to the *Grant* decision, the measure of the degree of intrusion will also be affected by the role the *Charter* breach played in making the evidence available. Certainly, in the case of statements and “derivative evidence,” and probably in the case of all kinds of evidence, if the Crown would have had the impugned evidence even without the breach, the breach is considered to be less intrusive and exclusion is less likely to occur. In keeping with the structure of the *Grant* decision, the method for evaluating the intrusiveness of the breach will be described for each kind of evidence identified by the Court. It will then be fitting to take a closer look at causation and discoverability issues.

#### 6.4) (a) Statements

“Statements by the accused engage the principle against self-incrimination, ‘one of the cornerstones of our criminal law.’”<sup>131</sup> The *Grant* judges accepted that the unconstitutional obtainment of statements from the accused tends to undercut the ability of the accused to “make a meaningful . . . choice [about] whether to speak, the related right

129 *R. v. Grant*, above note 4 at para. 76.

130 *Ibid.* at para. 109.

131 *Ibid.* at para. 89.

to silence, and most importantly, the protection against testimonial self-incrimination.”<sup>132</sup> This is a significant intrusion into an individual’s interest in liberty and autonomy.<sup>133</sup> For this reason (and because statements may prove unreliable), the Court held that there is a presumption that statements obtained in breach of the *Charter* will be excluded.<sup>134</sup> While that presumption can be overcome when the balance of the factors favour admission, the “centrality of the protected interest . . . against testimonial self-incrimination” will in most cases favour exclusion of statements taken in breach of the *Charter*.<sup>135</sup>

There will be exceptional cases where this presumption in favour of excluding statements will not operate. First, the *Grant* Court noted that technical *Charter* breaches that do not prevent the accused from being informed of his choice to speak or from exercising that choice will have a lesser impact on an accused’s protected interest.<sup>136</sup>

Second, the Court made it clear that the impact of the breach will be lessened when there is no causal link between the breach and the statement. Some statements are made spontaneously and independently of the breach. Others would have been made regardless of the breach. The *Grant* Court cited, as an example, *R. v. Harper*.<sup>137</sup> In that case, statements made subsequent to a defective right to a counsel warning were admitted into evidence because before being detained, the accused had already blurted out that he was the one the police were looking for, and he invited the police to take him away. *R. v. Hachez*<sup>138</sup> provides another example. Hachez declined to contact counsel when advised of his right to do so, and he then confessed to the crime for which he was arrested. The police then changed the focus of their interrogation by asking him about other crimes. Before doing this they should have re-advised him of his right to counsel, but they did not do so. Hachez’s confession to other crimes was nonetheless ultimately admitted into evidence because the trial judge was satisfied that Hachez would have continued to speak even if he had been re-advised of the right to counsel.<sup>139</sup> Of course, attempting to determine whether an accused would have spoken “even

---

132 *Ibid.* at para. 95.

133 *Ibid.*

134 *Ibid.* at para. 92.

135 *Ibid.* at para. 98.

136 *Ibid.* at para. 96.

137 (1994), 33 C.R. (4th) 61 (S.C.C.).

138 (1995), 42 C.R. (4th) 69 (Ont. C.A.); and see *United States of America v. Yousef* (2003), 178 C.C.C. (3d) 286 (Ont. C.A.).

139 What is important in each of these cases is that the accused understood his basic right to counsel and to remain silent. These cases involved informational breaches only. In *R. v. Auclair* (2004), 183 C.C.C. (3d) 273 at paras. 58–68 (Que.

if” his *Charter* rights had been respected is dangerous and conjectural. Indeed, the Quebec Court of Appeal was not comfortable applying this kind of reasoning in *R. v. Auclair*.<sup>140</sup> Fittingly, the *Grant* Court has now affirmed that discoverability should be applied only in those exceptional circumstances where it can be said *confidently* that the statement in question would have been made notwithstanding the *Charter* breach.

#### 6.4) (b) Bodily Evidence

Perhaps the greatest change wrought by *R. v. Grant* is its approach to bodily evidence. The Court held that the *Collins/Stillman* fair trial theory “wrongly equates bodily evidence with statements.” The *Grant* Court found that equation to be erroneous because bodily samples, unlike statements, are not “communicative.”<sup>141</sup> They are not, therefore, “self-incriminatory” in the way that statements are. The accused whose bodily samples are taken is not being used as a “witness” against himself. Statements create new information, but bodily samples exist. When we take offence at unconstitutionally obtained bodily samples, we are not so much reacting to the compelled participation by the accused in the investigation as we are to the violation of the privacy and dignity of the person that obtaining the evidence involves.<sup>142</sup> Significantly, the nature and degree of the violation of privacy and dignity will fluctuate with the “wide variation between different kinds of bodily evidence.”<sup>143</sup> As the Court noted, “[a]t one end of the spectrum, one finds the forcible taking of bodily samples or dental impressions (as in *Stillman*). At the other end of the spectrum lie relatively innocuous procedures such as fingerprinting or iris-recognition technology.”<sup>144</sup> The importance of the nature and degree of intrusion is therefore “better addressed [on a case-by-case basis] by reference to the interests in privacy, bodily integrity and human dignity”<sup>145</sup> and by the nature of the technique used to secure those samples.

As a result, under the *Grant* regime there is no presumption favouring the exclusion of bodily evidence, as there is with statements. This is not to say that bodily evidence should routinely be admitted. Depending on the nature and degree of the intrusion and the seriousness of the violation, courts may have to exclude to avoid condoning the breach.

---

C.A.), it was held that the “even if” doctrine should not be used unless the accused is shown to have understood his rights.

140 *Ibid.*

141 *R. v. Grant*, above note 4 at para. 105.

142 *R. v. Grant*, *ibid.*

143 *Ibid.* at para. 103.

144 *Ibid.* at para. 109.

145 *Ibid.* at para. 104.

The largest impact of *Grant* will be felt in alcohol driving cases. On a day to day basis it is samples secured in alcohol driving offences that have historically been the most common subject of *Charter*-exclusion applications. This is because *Charter* breaches are common in alcohol driving cases, and alcohol driving charges are common and frequently litigated. These cases invariably involve detentions that trigger *Charter* obligations, and the law surrounding alcohol driving investigations is complex. Courts applying the *Collins/Stillman* framework routinely excluded such samples, thereby destroying the Crown case, often because of “minor” violations. The *Grant* decision has now changed things dramatically.<sup>146</sup> It characterizes the collection of breach samples as “relatively non-intrusive,” and uses them as an illustration of intrusions that are “less severe in terms of privacy, bodily integrity and dignity,” and more apt to result in admission.<sup>147</sup>

#### 6.4) (c) Non-Bodily Physical Evidence

When it comes to non-bodily physical evidence, the degree of intrusion is primarily influenced by the nature of the search or seizure that produces the evidence, and how compromising that search or seizure is of the privacy interests of the accused. Some personal searches or seizures, including body-cavity searches<sup>148</sup> and strip searches,<sup>149</sup> represent more serious intrusions into privacy rights than other personal searches, such as “pat-down” or “frisk” searches.<sup>150</sup> Meanwhile, unreasonable pat-down or frisk searches of one’s person tend to be more offensive than property searches, while searches of one’s home<sup>151</sup> are more serious than searches of one’s office or car<sup>152</sup> or one’s locker in a school.<sup>153</sup>

146 This change was underway for several years before *Grant* was decided, as appellate courts began to deviate from the *Collins/Stillman* framework. The legitimacy of those initiatives was not confirmed until *R. v. Grant, ibid.*, was released.

147 *Ibid.* at paras. 106 and 111.

148 See *R. v. Greffe* (1990), 75 C.R. (3d) 257 (S.C.C.) where a sigmoidoscope was used. Body cavity searches include “a physical inspection of the detainee’s genital or anal regions” but not the mouth: *R. v. Golden* (2001), 159 C.C.C. (3d) 449 at 473 (S.C.C.).

149 “A strip search is properly defined as . . . the removal or rearrangement of some or all of the clothing of a person so as to permit a visual inspection of a person’s private areas, namely genitals, buttocks, breasts (in the case of a female), or undergarments.” *R. v. Golden, ibid.* It is apparent that even the degree to which a strip search violates privacy interests can vary.

150 “Frisk” or “pat down” searches do not involve the removal of clothing: *R. v. Golden, ibid.*

151 *R. v. Silveira*, above note 94.

152 *R. v. Wise*, above note 94; *R. v. Caslake*, above note 117; *R. v. Belnavis*, above note 35.

153 *R. v. M.(M.R.)*, above note 42. See *R. v. Tessling*, [2004] 3 S.C.R. 432 at paras.

20–24 where an illustrative hierarchy of expectations of privacy is furnished.

Of course, the degree of intrusion can even vary within a particular kind of search. In *R. v. Golden*, for example, the Supreme Court of Canada described a number of features that can change the intrusiveness of a strip search, including where it took place, the nature of the physical contact, and the relative sex of the subject and those who participate in or are present for the search.<sup>154</sup>

The intensity of the privacy interest can also be affected by the nature of the objects searched or seized. Searches that reveal highly personal documents containing core information, for example, are more intrusive of privacy interests than searches that may, for example, uncover ordinary articles of clothing.

#### 6.4) (d) Derivative Evidence

“Derivative evidence” was defined in *R. v. Grant* as “physical . . . evidence discovered as a result of an unlawfully obtained statement.”<sup>155</sup> Generally speaking, where derivative evidence is being evaluated for admission, the negative impact of the breach on the *Charter*-protected interests of the accused will be high. This will be because the relevant breach is the one that produced the statement, which in most cases will have “impinged upon a free and informed choice” by the accused as to whether to speak.<sup>156</sup> This is true not only of involuntary statements, but also of breaches of “the section 10(b) right to counsel, which protects the accused’s interest in making an informed choice whether to speak to the authorities.”<sup>157</sup> “Where that interest was significantly compromised by the breach, this factor will strongly favour exclusion.”<sup>158</sup>

The *Grant* decision recognized that “discoverability” may reduce the intrusiveness of the violation. Where reasonable conclusions can be drawn about “discoverability,” it plays “a useful role . . . in assessing the actual impact of the breach on the protected interests of the accused,” by enabling “courts to assess the strength of the causal connection between the *Charter*-infringing self-incrimination and the resultant evidence.”<sup>159</sup> “The more likely it is that the evidence would have been obtained even without the statement, the lesser the impact of the breach.”<sup>160</sup> Where “it cannot be determined with any confidence wheth-

---

154 Above note 148.

155 Above note 4 at para. 116. As indicated, it is possible for statements to be derivative evidence: see note 48 above.

156 *R. v. Grant*, above note 4 at para. 66.

157 *Ibid.*

158 *Ibid.*

159 *Ibid.* at para. 122.

160 *Ibid.*

er evidence would have been discovered in absence of the statement, discoverability will have no impact on the s. 24(2) inquiry<sup>161</sup> and the intrusiveness of the breach is apt to be treated as high.

#### 6.4) (e) Remaining Issues about Discoverability and Causation

As can be seen, according to the *Grant* decision, the role that the *Charter* breach played in making statements and derivative evidence available to the Crown will influence admissibility decisions. If the breach does not lead to the discovery of the evidence, or the evidence would have been discovered even without the breach, the evidence is more likely to be admitted. This raises three issues.

The first is whether causation and discoverability are relevant to the admissibility of bodily samples and non-bodily physical evidence, or are confined as considerations to statements and derivative evidence. Although the *Grant* decision does not mention causation and discoverability when discussing these latter forms of evidence, too much should not be made of this. There is no reason in principle why the relationship between the breach and the availability of the evidence should be relevant only to statements and derivative evidence. These considerations were certainly relevant to bodily samples and non-bodily physical evidence prior to *Grant*. Indeed, as has been explained, in the pre-*Grant* authority, discoverability played a critical role for bodily samples. Under the pre-*Grant* law, if bodily samples were discoverable without the breach, this would save them from all but automatic exclusion.<sup>162</sup> In *R. v. Connors*,<sup>163</sup> for example, the police illegally took Connors' fingerprints when they arrested him. He was then charged with impaired driving. Since the police had the authority to compel Connors to give his prints after he had been charged, the prints would have been obtained even without the breach and they were ultimately admitted into evidence. The same is true of real evidence. Prior to *Grant*, both causation and discoverability played a role. In *R. v. Strachan*, for example, the fact that the right to counsel breach did not lead to the discovery of the narcotics assisted the Court in concluding that the admission of the evidence would not bring the administration of justice into disrepute.<sup>164</sup> Similarly, in pre-*Grant* case law, unreasonable searches were considered to be less serious where there would have been reasonable grounds for the

---

161 *Ibid.*

162 See the discussion of the pre-*Grant* rule above in section 6.2, "Rejected Practices."

163 (1998), 14 C.R. (5th) 200 (B.C.C.A.).

164 Above note 50.

warrantless search or for the defective search warrant.<sup>165</sup> Although the *Grant* decision does not say so specifically, causation and discoverability are relevant considerations for all kinds of evidence.

The second issue worth discussing is the intersection between the blameworthiness of the officer and discoverability. In the pre-*Grant* case law, discoverability would not enhance admissibility if the police knew they could have obtained the evidence without violating the *Charter* or if they failed to make a “sincere effort to comply with the *Charter*.”<sup>166</sup> In such cases, the blameworthiness of the *Charter* violation would be aggravated because the *Charter* violation would be gratuitous. Similar principles should operate post-*Grant*. Discoverability is not a pro-inclusionary factor for bad faith breaches.

The third issue raised is more academic. Is it theoretically sound for the *Grant* decision to have treated causation and discoverability as bearing on the degree of the intrusiveness of the breach? Certainly a breach that gives the Crown evidence it would not otherwise have had costs the accused more in the sense that the case against the accused will be stronger than if there had been no breach. From the perspective of the accused, breaches that produce evidence that the Crown could not otherwise have found are therefore no doubt particularly distressing. The matter in issue, however, is supposed to be the intrusiveness of the breach *on the Charter-protected interests of the accused*.<sup>167</sup> The *Charter* does not protect accused persons against the discovery of probative evidence, or the prospect of facing a stronger case. The *Charter* is intended instead to protect, for example, privacy interests, the liberty of movement, or the right to make an informed choice to speak. If this makes evidence inaccessible it is not because of a problem with access to the information *per se*, but because of the attempt to prevent the use of undesirable investigative techniques. The degree of intrusiveness of the breach should therefore arguably turn on the nature of the investigative violation and not on what the breach happened to make available.

This is not to say that discoverability should not matter. Discoverability should increase the prospect of admission, but not because discovering the otherwise undiscoverable is more intrusive. A better explanation for the relevance of causation and discoverability is the third analytical factor about to be discussed, namely, “society’s inter-

165 *R. v. Buhay*, above note 13 at para. 65; *R. v. Brooks* (2003), 15 C.R. (6th) 319 (Ont. C.A.); *R. v. Caslake*, above note 117 at para. 34.

166 See *R. v. Buhay*, *ibid.* at para. 63; *R. v. Feeney*, above note 99 at para. 76; *R. v. Dyment*, above note 10 at 440.

167 *R. v. Grant*, above note 4 at para. 76.

est in adjudication on its merits”. It is more costly to society to exclude evidence the Crown would have had even without the breach. To do so not only removes the fruits of the breach but also causes the loss to the Crown of evidence it would have without the *Charter* violation. As Professor Roach has put it, the idea behind admitting discoverable evidence is that in some cases the state should not be “placed in a worse position than if had not unconstitutionally obtained” the evidence.<sup>168</sup> Be that as it may, the *Grant* decision considers causation and discoverability as pertinent in measuring the degree of intrusion of the breach, and *Grant* is the authority that governs. In gauging the intrusiveness of the breach, discoverability is, as a matter of law, a pro-inclusionary consideration.

### 6.5) Step 3 in Assessing Disrepute—Judging Society’s Interest in an Adjudication on the Merits

*Society’s Interest in Adjudication on the Merits—The weight to be accorded to society’s interest in the adjudication of the case on its merits varies according to (a) the reliability of the evidence and (b) the importance of that evidence to the case for the Crown. While the seriousness of the offence is also a “valid consideration,” it in fact contributes little to the outcome since both society’s interest in deciding a case on its merits, and its vital interest in having a justice system that is above reproach, are heightened, effectively neutralizing the importance of the seriousness of the offence as a factor material to the exclusionary decision.*

“The third line of inquiry relevant to the s. 24(2) analysis asks whether the truth-seeking function of the criminal trial process would be better served by admission of the evidence or by its exclusion.”<sup>169</sup> Measuring the damage to the truth-seeking function permits Courts to determine “whether the vindication of the specific *Charter* violation through the exclusion of evidence extracts too great a toll on the truth-seeking goal of the criminal trial.”<sup>170</sup>

There are two central factors in examining the impact of exclusion on the truth seeking function: (1) the reliability of the evidence, and (2) the importance of the evidence to the prosecution case.

---

168 K. Roach, “The Evolving Fair Trial Test under Section 24(2) of the *Charter*” (1996) 1 Can. Crim. L. Rev. 117 at 134.

169 *R. v. Grant*, above note 4 at para. 79.

170 *Ibid.* at para. 82.

### 6.5) (a) The “Reliability of the Evidence”

The *Grant* Court noted that “reliability of the evidence is an important factor” in determining the impact that exclusion will have on the public interest in truth-finding. “If a breach (such as one that effectively compels the suspect to talk) undermines the reliability of the evidence this points in the direction of exclusion of the evidence.”<sup>171</sup> This is because there is no public interest in the admissibility of unreliable evidence. In contrast, “exclusion of relevant and reliable evidence may undermine the truth-seeking function of the justice system and render the trial unfair from the public perspective, thus bringing the administration of justice into disrepute.”<sup>172</sup>

In its early section 24(2) decisions the Supreme Court of Canada had not featured reliability. Indeed, in 1995 in *R. v. Burlingham* a majority of the Court rejected reliability as a central consideration in section 24(2) jurisprudence, rebuffing an attempt by Justice L’Heureux-Dubé to develop a guiding “reliability principle.”<sup>173</sup> This resistance did not last long. Justice Cory agreed with Justice Doherty of the Ontario Court of Appeal in the 1997 decision in *R. v. Belnavis* that the more reliable and probative the evidence, the greater costs of its exclusion.<sup>174</sup> Indeed, in *R. v. White* the evidence at issue was reliable and proved the guilt of the accused to a virtual certainty, prompting the Ontario Court of Appeal to hold that even if the trial judge had been right about the *Charter* breach, it would have been an error to have excluded the evidence.<sup>175</sup>

It is important to appreciate that the reliability factor is not a return to the common law approach exemplified in *R. v. Wray*.<sup>176</sup> As the *Grant* Court put it, “[t]he view that reliable evidence is admissible regardless of how it was obtained . . . is inconsistent with the *Charter’s* affirmation of rights. More specifically, it is inconsistent with the wording of s.24(2), which mandates a broad inquiry into all the circumstances, not just the reliability of the evidence.”<sup>177</sup> As *R. v. Harrison* shows,<sup>178</sup> where the breach is serious enough and its impact significant, the reliability of the evidence will not save it from exclusion.

---

171 *Ibid.* at para. 81.

172 *Ibid.*

173 Above note 6 at para. 85 (L’Heureux-Dubé J.), paras. 37–39 (Iacobucci J.), and para. 146 (Sopinka J.).

174 *R. v. Belnavis*, above note 35 at 84.

175 *R. v. White*, above note 49.

176 Above note 2.

177 *R. v. Grant*, above note 4 at para. 80.

178 Above note 17. See the outline of the decision in section 2.2, “The Law Illustrated,” above in this chapter.

### 6.5) (b) The Importance of the Evidence

“The importance of the evidence to the prosecution’s case is another factor to be considered in this line of inquiry.”<sup>179</sup> This is because the exclusion of evidence “may impact more negatively on the repute of the administration of justice where the remedy effectively guts the prosecution.”<sup>180</sup>

Even under the *Collins/Stillman* framework this was an important pro-inclusionary consideration. In *R. v. Silveira*, for example, the Court supported its decision to admit the evidence because “[t]he evidence at issue . . . was vitally important if not crucial to the prosecution of the case.”<sup>181</sup> Exclusion would have substantially diminished the strength of the Crown’s case. In some respects this is curious. It appears to endorse exclusion as a remedy, provided it will have no real effect. In *R. v. Buhay*, however, the Supreme Court of Canada cautioned against treating the fact that evidence is crucial to the Crown case as automatically requiring that the evidence be included.<sup>182</sup> Even if evidence is crucial, exclusion will occur if a *Charter* breach is serious enough or its impact on *Charter*-protected interests is significant enough. This is in keeping with the goal of protecting the long-range interests of justice, and not making the exclusionary decision solely by considering the case at hand. The point is simply this. The more crucial the evidence is, the more serious or significant the breach must be for exclusion to occur.

### 6.5) (c) The Seriousness of the Offence

Under the *Collins/Stillman* framework, the seriousness of the offence was an important consideration in determining how much damage exclusion would do to the repute of the administration of justice. The thinking was that the more serious the offence is, the greater the costs of exclusion will be. In *R. v. Silveira*, for example, the significant quantity of hard drugs involved, coupled with the catastrophic effect of drug use on society, helped to encourage the court to receive the fruits of the illegal search.<sup>183</sup> In *R. v. Colarusso* the appalling circumstances in which the impaired driving occurred justified the admission of the evi-

---

179 *R. v. Grant*, above note 4 at para. 83.

180 *Ibid.*

181 Above note 94 at 375. See also *R. v. Plant* (1993), 24 C.R. (4th) 47 (S.C.C.).

Paradoxically, in *R. v. Smith* (1991), 4 C.R. (4th) 125 (S.C.C.), the Court justified admitting an unconstitutionally obtained statement made by the accused, in part because he was not prejudiced by its admission. There was ample other evidence to show that it was he who had discharged the gun.

182 Above note 13 at para. 71; *R. v. Mann*, above note 97 at para. 57.

183 Above note 94 at 384; *R. v. Jacoy* (1988), 66 C.R. (3d) 336 (S.C.C.).

dence.<sup>184</sup> This is not to say that the exclusion of evidence did not occur in serious cases. In the homicide cases of *R. v. Feeney*<sup>185</sup> and *R. v. Stillman*<sup>186</sup> the Supreme Court of Canada excluded important evidence to remedy *Charter* violations. The breaches were simply too serious to condone. Still, seriousness of the offence was treated as a standard pro-inclusionary consideration in the pre-*Grant* case law.

The *Grant* majority has now made the seriousness of the offence largely immaterial to section 24(2). It affirmed that section 24(2)'s goals "operate independently of the type of crime for which the individual stands accused,"<sup>187</sup> and noted that the section addresses the long-term interests of the administration of justice and not the immediate impact on how people view the justice system.<sup>188</sup> The majority disagreed with Justice Deschamps, who, in her concurring decision, considered the seriousness of the offence to be a very important consideration. Curiously, the majority allowed that the seriousness of the offence may be a "valid consideration," but then effectively neutralized its impact by noting that seriousness "has the potential to cut both ways."<sup>189</sup> "The public has a heightened interest in seeing a determination on the merits where the offence is serious, [but] it also has a vital interest in having a justice system that is above reproach, particularly where the penal stakes for the accused are high."<sup>190</sup> This "cuts-both-ways" observation effectively undercut the seriousness of the offence as a factor of influence. In *R. v. Grant*, the Court found that the seriousness of the gun charges was not of much assistance because the public safety concerns were met by Mr. Grant's argument that "the seriousness of the offence makes it all the more important that his rights be respected."<sup>191</sup> Meanwhile, in *R. v. Harrison* the Court discounted the seriousness of drug charges involving 35 kilograms of cocaine, an appalling amount of the drug, because this factor "must not take on disproportionate significance."<sup>192</sup> It has to be wondered why the seriousness of the offence was recognized as a valid consideration if it will in fact have no material bearing on the outcome.

---

184 [1994] 1 S.C.R. 20.

185 Above note 99.

186 Above note 11.

187 Above note 4 at para. 84.

188 *Ibid.*

189 *Ibid.*

190 *Ibid.*

191 *Ibid.* at para. 139.

192 Above note 17 at para. 34.

## 7. EXCLUDING UNFAIRLY OBTAINED EVIDENCE IN THE ABSENCE OF A *CHARTER* VIOLATION

Until relatively recently, courts disclaimed the authority to exclude evidence because it was obtained illegally or unfairly where the *Charter* had not been violated.<sup>193</sup> It is now settled that courts can, in fact, exclude evidence because of how it was obtained, even in the absence of a *Charter* breach. The power to do so had been recognized in passages in a number of cases<sup>194</sup> but remained controversial until the Supreme Court of Canada decision in *R. v. Harrer*,<sup>195</sup> where the authority to exclude unfairly obtained evidence received a clear endorsement. For the sake of clarity, this discretion will be referred to as “non-24(2) unfair trial exclusion” in the following discussion.

*Harrer* involved an application by the accused to exclude statements made to American authorities while she was being detained in the US. Although the American authorities complied with the requirements of the law in the US, had a Canadian peace officer conducted an interview in the same fashion, the accused’s right to counsel would have been violated. It was nonetheless impossible for Harrer to rely on the *Charter*’s exclusionary remedy in subsection 24(2) because there had been no misconduct by Canadian state agents and therefore no *Charter* breach. The Court noted, however, that had the actions of the American authorities been such as to render the admission of the evidence unfair, the evidence should nonetheless be excluded. In the circumstances of *Harrer*, the evidence was ultimately received, but the discretion to exclude was given unambiguous endorsement. Justice McLachlin, in her concurring opinion, grounded the discretion in the common law,<sup>196</sup> although Justice La Forest, writing for the majority, went further. In his view, the discretion to exclude evidence to preserve the fairness of a trial in a criminal case is actually a matter of obligation. Where, in all of the circumstances, admission of the evidence would render a trial unfair, subsection 11(d) of the *Charter* imposes a duty on the trial judge

---

193 *R. v. Wray*, above note 2. See the discussion in chapter 2, section 4, “The Exclusionary Discretion.”

194 See, for example, *R. v. Potvin* (1989), 68 C.R. (3d) 193 (S.C.C.); *R. v. Hebert* (1990), 77 C.R. (3d) 145 (S.C.C.); *R. v. S.(R.J.)* (1995), 36 C.R. (4th) 1 at 83–84 (S.C.C.).

195 Above note 38.

196 In *R. v. Buhay*, above note 13 at para. 40, the Court referred to this power as a common law discretion. Its antecedents are controversial. See Michael C. Plaxton, “Who Needs Section 24(2)? Or: Common Law Sleight-of-Hand” (2003) 10 C.R. (6th) 236.

to exclude it to preserve the integrity of the trial. Members of the Court have since held that section 7 produces much the same effect; it would violate principles of fundamental justice for a court to admit evidence where that admission would render the trial unfair.<sup>197</sup>

The Supreme Court of Canada recognized that this “non-24(2) unfair trial exclusion” could be used where the person who acts illegally or unfairly is a private actor, like a security guard.<sup>198</sup> It would be available as well, where the accused does not have standing to rely on subsection 24(2) because it is the rights of another that have been violated. Courts have, however, taken a stringent view of when maltreatment of a witness or co-accused could render the trial of an accused unfair, thereby triggering “non-*Charter* unfair trial exclusion.”<sup>199</sup> It has been used successfully, however, to support the principle against self-conscripting where the state has tried to use information it is authorized to gather for a limited purpose or for a different or improper purpose. In *R. v. Milne*,<sup>200</sup> for example, the Ontario Court of Appeal used “non-24(2) unfair trial exclusion” to prevent sobriety tests from being relied upon as proof of impairment where they were obtained without advising the accused of her right to counsel. Although it is not a *Charter* breach for officers to ask drivers who have consumed alcohol to perform such tests without advising them of the right to counsel, the demonstrably justifiable provincial law that permits this to occur contemplates that the test results will be used solely to enable the officer to determine if there are reasonable grounds to make a breath demand. The Court held that a trial would be rendered unfair if this self-conscripting evidence, which the law allows to be obtained for a limited purpose, was subsequently used by the Crown as actual proof of impairment.

Unfortunately, the “non-24(2) unfair trial exclusion” authority leaves the framework for determining when exclusion should occur vague and undefined. What is clear is that its standards differ from the now rejected *Collins/Stillman* fair trial theory. At the time that these “non-24(2) unfair trial exclusion” decisions were rendered, section 24(2) demanded that virtually any compelled conscriptive evidence that would not have been discovered without the *Charter* breach should be excluded, but the “non-24(2) unfair trial exclusion” authorities invited courts to conduct an unstructured case-by-case evaluation in-

---

197 *R. v. Cook*, [1998] 2 S.C.R. 597.

198 *R. v. Buhay*, above note 13 at para. 40.

199 See, for example, *R. v. Caster* (2001), 159 C.C.C. (3d) 404 (B.C.C.A.), and *R. v. Hyatt* (2003), 9 C.R. (6th) 378 (B.C.C.A.).

200 (1996), 48 C.R. (4th) 182 (Ont. C.A.), approved in *R. v. Orbanski*, above note 15 at para. 58.

volving a careful balancing of all competing interests to see whether a fair trial, “one which satisfies the public interest in getting at the truth, while preserving basic procedural fairness to the accused,”<sup>201</sup> could be conducted if the evidence was to be admitted. Courts considering “non-24(2) unfair trial exclusion” have identified the following factors for consideration:<sup>202</sup>

- a) whether the manner of obtaining the evidence renders it unreliable;
- b) whether the evidence, by its nature, could be misleading;
- c) the seriousness of the misconduct; and
- d) whether, as a result of the unfair conduct, the accused is compelled to incriminate himself.

Where the case involves the actions of state agents in another jurisdiction, a relevant consideration is whether the authorities respected the legal standards within that jurisdiction, and even where this is so, whether those legal standards would be anathema to a Canadian conscience.<sup>203</sup>

It is to be hoped that the analytical structure adopted in *Grant*, but not the *Grant* test itself, comes to be used in this line of authority. This would improve the guidance given to judges and lawyers on how to proceed. Now that *Grant* has rejected the two-box approach and adopted an “all the circumstances” analysis like the one contemplated for the “non-*Charter* unfair trial exclusion,” this is now possible. It must be remembered, however, that important differences remain between section 24(2) exclusion and “non-*Charter* unfair trial exclusion.” The goals differ. Whereas the “non-24(2) unfair trial exclusion” is dedicated to ensuring a fair trial that “satisfies the public interest in getting at the truth, while preserving basic procedural fairness to the accused,”<sup>204</sup> section 24(2) is used to protect “the integrity of the judicial system and the truth-seeking function of the courts.”<sup>205</sup> Section 24(2) is driven by fear that admission will be seen to condone *Charter* breaches, while the “non-*Charter* unfair trial” exclusion operates where there is no *Charter* breach. Different inquiries are therefore required. Courts applying the “non-24(2) unfair trial exclusion” can profit from the analytical structure adopted in *Grant* without undermining the differences between the two exclusionary rules if courts applying “non-24(2) unfair trial

201 *R. v. Harrer*, above note 38 at 288.

202 *R. v. Harrer*, *ibid.*; *R. v. Cook*, above note 197 at 46; *R. v. Brunczlik* (1995), 103 C.C.C. (3d) 131 (Ont. Ct. Gen. Div.).

203 *R. v. Harrer*, *ibid.* at 290.

204 *Ibid.* at 288.

205 *R. v. Harrison*, note 17 above at para. 26.

exclusion” were to conduct a three-part inquiry into the seriousness of the misconduct, the degree of intrusiveness of the misconduct, and society’s interest in an adjudication on the merits, before asking whether a reasonable person, fully informed of the all of the circumstances and the values at stake, would conclude that the admission of the evidence would produce a trial that does not properly balance the public interest in getting at the truth, while preserving basic procedural fairness to the accused.

## 8. IMPROPERLY OBTAINED EVIDENCE AND CIVIL CASES

The general common law rule that relevant evidence is admissible regardless of how it has been obtained applies in both civil and criminal cases. While this rule has been displaced by the *Charter*, the *Charter*’s exclusionary remedy is tenable only against the state. The conventional view is that subsection 24(2) is therefore available only in criminal cases and in civil cases conducted before courts of competent jurisdiction where the state seeks to rely on unconstitutionally obtained evidence, but not in private civil proceedings.<sup>206</sup>

Judges conducting civil trials do, however, have an exclusionary discretion. This discretion should be exercised consistently with *Charter* values and can therefore result in the exclusion in private civil litigation of unconstitutionally obtained evidence.<sup>207</sup> In *Mooring v. Canada (National Parole Board)*<sup>208</sup> the Supreme Court of Canada recognized that the duty of fairness that applies to public authorities to make administrative decisions can, depending on the case, require the exclusion of unconstitutionally obtained evidence based on concerns related both to fairness and reliability. Had the police misconduct been egregious, the parole board review panel may have been obliged to exclude the evidence. In *Thomsen v. Alberta (Transport and Safety Board)*<sup>209</sup> it was

206 *Monsanto Canada Inc. v. Schmeiser* (2002), 218 D.L.R. (4th) 31 (Fed. C.A.); but see the *obiter dictum* of Rosenberg J.A. in *P.(D.) v. Wagg* (2004), 184 C.C.C.

(3d) 321 at paras. 59–60 (Ont. C.A.), leaving open the possibility that *Charter* remedies like exclusion of evidence may be available in a civil action between private citizens on the basis that state action is satisfied where it was a state agent who infringed the *Charter*.

207 *P.(D.) v. Wagg*, *ibid.* See also *Seddon v. Seddon*, [1994] B.C.J. No. 1729 (S.C.).

208 Above note 33.

209 *Thomson v. Alberta (Transportation and Safety Board)* (2003), 178 C.C.C. (3d) 508 at para. 68 (Alta. C.A.).

also held that an administrative tribunal under its duty of fairness *must* consider the source of evidence or information, including whether it was gathered in breach of the *Charter*, and decide whether to exercise its discretion to receive the evidence.

In exercising this discretion, context is critical. In *R. v. Daley*, dealing with proceeds of crime legislation even in a criminal milieu, the Alberta Court of Appeal indicated that a section 24(2) analysis would not include the criminal law's trial fairness doctrine that excludes automatically conscriptive evidence because the notion "makes little sense in [a] proceeding where there are no charges, no accused and no risk of conviction."<sup>210</sup> The Ontario Court of Appeal made the same point in *P.(D.) v. Wagg*.<sup>211</sup> Even though the automatic exclusion of conscriptive evidence has now been rejected for section 24(2) cases, the underlying point made by these courts remains true. Practices developed in criminal cases should not be mimicked in civil cases without regard for the differences in interests, concerns, and principles between criminal and civil litigation.

## FURTHER READINGS

- BRYANT, A.W., *et al.*, "Public Attitudes toward the Exclusion of Evidence: Section 24(2) of the *Canadian Charter of Rights and Freedoms*" (1990) 69 *Can. Bar Rev.* 1
- CLEARY, E.W., ed., *McCormick on Evidence*, 3d ed. (St. Paul, MN: West, 1984) ss. 164–83
- DELISLE, R.J., "*Collins*: An Unjustified Distinction" (1987) 56 *C.R.* (3d) 216
- MAHONEY, R., "Using Improperly Obtained Evidence to Impeach the Accused's Testimony: Should We Let the Phoenix Fly?" (1994) 16 *N.Z.U.L. Rev.* 46
- MCLELLAN, A.A., & B.P. ELMAN, "The Enforcement of the *Canadian Charter of Rights and Freedoms*: An Analysis of Section 24" (1983) 21 *Alta. L. Rev.* 205
- MORISSETTE, Y.-M., "The Exclusion of Evidence under the *Canadian Charter of Rights and Freedoms*: What to Do and What Not to Do" (1984) 29 *McGill L.J.* 521

---

<sup>210</sup> [2001] A.J. No. 815 at para. 37.

<sup>211</sup> Above note 206 at paras. 62–70.

- PACIOCCO, D.M., “*Stillman*, Disproportion and the Fair Trial Dichotomy under Section 24(2)” (1997) 2 Can. Crim. L. Rev. 163
- PACIOCCO, D.M., “The Judicial Repeal of s. 24(2) and the Development of the Canadian Exclusionary Rule” (1989–90) 32 Crim. L.Q. 326
- PENNEY, S.M., “Unreal Distinctions: The Exclusion of Unfairly Obtained Evidence under s. 24(2) of the *Charter*” (1994) 32 Alta. L. Rev. 782
- ROACH, K., “The Evolving Fair Trial Test for Section 24(2) of the *Charter*” (1996) 1 Can. Crim. L. Rev. 117
- SOPINKA, J., S.N. LEDERMAN, & A.W. BRYANT, *The Law of Evidence in Canada*, 2d ed. (Toronto: Butterworths, 1999) at 399–462.



# TABLE OF CASES

Hunter v. Southam Inc., [1984] 2 S.C.R. 145, 11 D.L.R. (4th) 641, [1984] S.C.J. No. 36 .....	3
Monsanto Canada Inc. v. Schmeiser, [2003] 2 F.C. 165, 218 D.L.R. (4th) 31, 2002 FCA 309 .....	49
Mooring v. Canada (National Parole Board), [1996] 1 S.C.R. 75, 45 C.R. (4th) 265, [1996] S.C.J. No. 10.....	49, 50
Ouellette v. New Brunswick (1996), 182 N.B.R. (2d) 306, 2 C.R. (5th) 223, [1996] N.B.J. No. 439 (C.A.) .....	21
P.(D.) v. Wagg (2004), 71 O.R. (3d) 229, 184 C.C.C. (3d) 321, [2004] O.J. No. 2053 (C.A.) .....	49, 50
People v. Defore, 150 N.E. 585 (N.Y.C.A. 1926) .....	1
R. v. Arbour (1990), 4 C.R.R. (2d) 369, [1990] O.J. No. 1353 (C.A.) .....	13
R. v. Asante-Mensah, [2003] 2 S.C.R. 3, 11 C.R. (6th) 1, [2003] S.C.J. No. 38.....	16
R. v. Auclair, [2004] R.J.Q. 767, 183 C.C.C. (3d) 273, [2004] J.Q. no 32 (C.A.) .....	36–37
R. v. B.(B.W.) (2002), 172 B.C.A.C. 309, 4 C.R. (6th) 24, 2002 BCCA 388 .....	92
R. v. Belnavis, [1997] 3 S.C.R. 341, 10 C.R. (5th) 65, [1997] S.C.J. No. 81 .....	14, 30, 32, 38, 43
R. v. Blom (2002), 61 O.R. (3d) 51, 167 C.C.C. (3d) 332, [2002] O.J. No. 3199 (C.A.) .....	13
R. v. Brooks (2003), 176 O.A.C. 337, 15 C.R. (6th) 319, [2003] O.J. No. 3757 (C.A.) .....	41

R. v. Brunczlik (1995), 103 C.C.C. (3d) 131, [1995] O.J. No. 3939 (Gen. Div.) .....	48
R. v. Brydges, [1990] 1 S.C.R. 190, 74 C.R. (3d) 129, [1990] S.C.J. No. 8.....	31
R. v. Buhay, [2003] 1 S.C.R. 631, 10 C.R. (6th) 205, 2003 SCC 30 .....	4, 5, 6, 16, 27, 29, 41, 46, 47
R. v. Burlingham, [1995] 2 S.C.R. 206, 38 C.R. (4th) 265, [1995] S.C.J. No. 39 .....	3, 6, 18, 29, 43
R. v. Calderon (2004), 188 C.C.C. (3d) 481, 23 C.R. (6th) 1, [2004] O.J. No. 3474 (C.A.) .....	29, 31
R. v. Caslake, [1998] 1 S.C.R. 51, 13 C.R. (5th) 1, [1998] S.C.J. No. 3 ....	32, 38, 41
R. v. Caster (2001), 159 C.C.C. (3d) 404, 47 C.R. (5th) 257, 2001 BCCA 633 .....	7, 47
R. v. Chang (2003), 339 A.R. 278, 180 C.C.C. (3d) 330, 2003 ABCA 293 .....	16
R. v. Chiasson, [2006] 1 S.C.R. 415, 37 C.R. (6th) 43, 2006 SCC 11 .....	31
R. v. Clarkson, [1986] 1 S.C.R. 383, 50 C.R. (3d) 289, [1986] S.C.J. No. 20 .....	29, 32
R. v. Colarusso, [1994] 1 S.C.R. 20, 26 C.R. (4th) 289, [1994] S.C.J. No. 2.....	44
R. v. Collins, [1987] 1 S.C.R. 265, 56 C.R. (3d) 193, [1987] S.C.J. No. 15 .....	2, 4, 5, 23, 50
R. v. Connors (1998), 49 B.C.L.R. (3d) 376, 14 C.R. (5th) 200, [1998] B.C.J. No. 41 (C.A.).....	40
R. v. Cook, [1998] 2 S.C.R. 597, 19 C.R. (5th) 1, [1998] S.C.J. No. 68.....	47, 48
R. v. Daley (2001), 281 A.R. 262, [2001] A.J. No. 815, 2001 ABCA 155.....	50
R. v. Debot, [1989] 2 S.C.R. 1140, 73 C.R. (3d) 129, [1989] S.C.J. No. 118 .....	31
R. v. Dolnychuk (2004), 184 Man. R. (2d) 71, 184 C.C.C. (3d) 214, 2004 MBCA 45 .....	5
R. v. Dwernychuk (1992), 77 C.C.C. (3d) 385, 135 A.R. 31, [1992] A.J. No. 1058 (C.A.), leave to appeal to S.C.C. refused, [1993] 2 S.C.R. vii, 141 A.R. 317n, [1993] S.C.C.A. No. 30 .....	13
R. v. Dyment, [1988] 2 S.C.R. 417, 66 C.R. (3d) 348, [1988] S.C.J. No. 82.....	4, 41
R. v. Edwards, [1996] 1 S.C.R. 128, 45 C.R. (4th) 307, [1996] S.C.J. No. 11 .....	14
R. v. Evans, [1991] 1 S.C.R. 869, 4 C.R. (4th) 144, [1991] S.C.J. No. 31.....	32
R. v. Feeney, [1997] 2 S.C.R. 13, 115 C.C.C. (3d) 129, [1997] S.C.J. No. 49 .....	29, 31, 32, 33, 41, 45
R. v. Flintoff (1998), 111 O.A.C. 305, 16 C.R. (5th) 248, [1998] O.J. No. 2337 (C.A.).....	19, 20, 21, 22
R. v. Généreux, [1992] 1 S.C.R. 259, 70 C.C.C. (3d) 1, [1992] S.C.J. No. 10 .....	30
R. v. Genest, [1989] 1 S.C.R. 59, 67 C.R. (3d) 224, [1989] S.C.J. No. 5 .....	32
R. v. Golden, [2001] 3 S.C.R. 679, 159 C.C.C. (3d) 449, 2001 SCC 8.....	38, 39
R. v. Goldhart, [1996] 2 S.C.R. 463, 48 C.R. (4th) 297, [1996] S.C.J. No. 76 .....	17, 18, 19, 20, 22
R. v. Golub (1997), 34 O.R. (3d) 743, 9 C.R. (5th) 98, [1997] O.J. No. 3097 (C.A.).....	33
R. v. Grant, [1993] 3 S.C.R. 223, 24 C.R. (4th) 1, [1993] S.C.J. No. 98.....	28
R. v. Grant, 2009 SCC 32, [2009] S.C.J. No. 32.....	2, 5, 6, 10–12, 22, 23, 24, 25, 26, 27, 28, 29, 31, 32, 35–48

R. v. Greffe, [1990] 1 S.C.R. 755, 75 C.R. (3d) 257, [1990] S.C.J. No. 32.....	38
R. v. Hachez (1995), 42 C.R. (4th) 69, (sub nom. R. v. Hieronymi) 25 O.R. (3d) 363, [1995] O.J. No. 2428 (C.A.) .....	36
R. v. Hamill, [1987] 1 S.C.R. 301, 56 C.R. (3d) 220, [1987] S.C.J. No. 12 .....	27
R. v. Hape, [2007] 2 S.C.R. 292, 220 C.C.C. (3d) 161, 2007 SCC 26.....	15
R. v. Harper, [1994] 3 S.C.R. 343, 33 C.R. (4th) 61, [1994] S.C.J. No. 71 .....	36
R. v. Harrer, [1995] 3 S.C.R. 562, 42 C.R. (4th) 269, [1995] S.C.J. No. 81 .....	15, 46, 48
R. v. Harris (2007), 87 O.R. (3d) 214, 49 C.R. (6th) 220, 2007 ONCA 574.....	23
R. v. Harrison, 2009 SCC 34, [2009] S.C.J. No. 34.....	5, 11, 23, 29, 30, 32, 43, 45, 48
R. v. Hebert, [1990] 2 S.C.R. 151, 77 C.R. (3d) 145, [1990] S.C.J. No. 64 .....	46
R. v. Hyatt (2003), 176 B.C.A.C. 216, 9 C.R. (6th) 378, 2003 BCCA 27 .....	47
R. v. Hynes, [2001] 3 S.C.R. 623, 159 C.C.C. (3d) 359, 2001 SCC 82.....	14
R. v. Jacoy, [1988] 2 S.C.R. 548, 66 C.R. (3d) 336, [1988] S.C.J. No. 83.....	44
R. v. Kitaitchik (2002), 161 O.A.C. 169, 166 C.C.C. (3d) 14, [2002] O.J. No. 2476 (C.A.) .....	27
R. v. Koesch, [1990] 3 S.C.R. 3, 1 C.R. (4th) 62, [1990] S.C.J. No. 117 .....	27, 28
R. v. Kutynec (1992), 7 O.R. (3d) 277, 70 C.C.C. (3d) 289, [1992] O.J. No. 347 (C.A.).....	13
R. v. LaChappelle (2007), 229 O.A.C. 206, 226 C.C.C. (3d) 518, 2007 ONCA 655 .....	19
R. v. Lau (2003), 186 B.C.A.C. 3, 12 C.R. (6th) 296, 2003 BCCA 337 .....	30
R. v. Leclair, [1989] 1 S.C.R. 3, 67 C.R. (3d) 209, [1989] S.C.J. No. 2 .....	4
R. v. Lerke (1986), 67 A.R. 390, 49 C.R. (3d) 324, [1986] A.J. No. 27 (C.A.) .....	16
R. v. Loveman (1992), 71 C.C.C. (3d) 123, 12 C.R. (4th) 167, [1992] O.J. No. 346 (C.A.).....	13
R. v. M.(M.R.), [1998] 3 S.C.R. 393, 129 C.C.C. (3d) 361, [1998] S.C.J. No. 83 .....	15, 16, 38
R. v. Mann, [2004] 3 S.C.R. 59, 185 C.C.C. (3d) 308, 2004 SCC 52 .....	29, 44
R. v. Mills (sub nom. Mills v. R.), [1986] 1 S.C.R. 863, 52 C.R. (3d) 1, [1986] S.C.J. No. 39 .....	13
R. v. Milne (1996), 28 O.R. (3d) 577, 48 C.R. (4th) 182, [1996] O.J. No. 1728 (C.A.).....	47
R. v. Orbanski, [2005] 2 S.C.R. 3, 29 C.R. (6th) 205, 2005 SCC 37 .....	5, 47
R. v. Paolitto (1994), 73 O.A.C. 73, 1 C.C.C. (3d) 75, [1994] O.J. No. 1220 (C.A.).....	14
R. v. Petri (2003), 171 C.C.C. (3d) 553 (Man. C.A.).....	5
R. v. Pettit (2003), 187 B.C.A.C. 246, 179 C.C.C. (3d) 295, 2003 BCCA 522 .....	19
R. v. Plant, [1993] 3 S.C.R. 281, 24 C.R. (4th) 47, [1993] S.C.J. No. 97.....	44
R. v. Potvin, [1989] 1 S.C.R. 525, 68 C.R. (3d) 193, [1989] S.C.J. No. 24.....	46
R. v. Richfield (2003), 175 O.A.C. 54, 14 C.R. (6th) 77, [2003] O.J. No. 3230 (C.A.).....	5
R. v. S.(R.J.), [1995] 1 S.C.R. 451, 36 C.R. (4th) 1, [1995] S.C.J. No. 10 .....	46
R. v. Sanelli, [1990] 1 S.C.R. 30, 74 C.R. (3d) 281, [1990] S.C.J. No. 2.....	27

R. v. Schedel (2003), 184 B.C.A.C. 166, 12 C.R. (6th) 207, [2003]  
 B.C.J. No. 1430 (C.A.) ..... 30

R. v. Shafie (1989), 31 O.A.C. 362, 68 C.R. (3d) 259, [1989]  
 O.J. No. 102 (C.A.) ..... 15

R. v. Sieben, [1987] 1 S.C.R. 295, 56 C.R. (3d) 225, [1987] S.C.J. No. 11 ..... 27

R. v. Silveira, [1995] 2 S.C.R. 297, 38 C.R. (4th) 330, [1995]  
 S.C.J. No. 38 ..... 28, 32, 33, 44

R. v. Simon (2008), 176 C.R.R. (2d) 68, [2008] O.J. No. 3072,  
 2008 ONCA 578 ..... 17, 21

R. v. Smith (2005), 199 C.C.C. (3d) 404 (B.C.C.A.) ..... 27

R. v. Smith, [1991] 1 S.C.R. 714, 4 C.R. (4th) 125, [1991] S.C.J. No. 24 ..... 44

R. v. Stillman, [1997] 1 S.C.R. 607, 5 C.R. (5th) 1, [1997]  
 S.C.J. No. 34 ..... 4, 27, 30, 31, 37, 45, 51

R. v. Strachan, [1988] 2 S.C.R. 980, 67 C.R. (3d) 87, [1988]  
 S.C.J. No. 94 ..... 18–20, 22, 33, 40

R. v. Tessling, [2004] 3 S.C.R. 432, 23 C.R. (6th) 207, 2004 SCC 67 ..... 38

R. v. Therens, [1985] 1 S.C.R. 613, 45 C.R. (3d) 97, [1985] S.C.J. No. 30 ..... 3, 7, 19

R. v. Travers (2001), 193 N.S.R. (2d) 263, 154 C.C.C. (3d) 426,  
 2001 NSCA 71 ..... 13

R. v. Washington (2007), 248 B.C.A.C. 65, 52 C.R. (6th) 132,  
 2007 BCCA 540 ..... 27, 28

R. v. White (2007), 85 O.R. (3d) 407, 47 C.R. (6th) 271,  
 2007 ONCA 318 ..... 18, 43

R. v. White, [1999] 2 S.C.R. 417, 24 C.R. (5th) 201, [1999] S.C.J. No. 28 ..... 7

R. v. Wise, [1992] 1 S.C.R. 527, 11 C.R. (4th) 253, [1992] S.C.J. No. 16 .. 28, 32, 38

R. v. Wittwer, [2008] 2 S.C.R. 235, 57 C.R. (6th) 205, 2008 SCC 33 ..... 17, 20, 21

R. v. Wong, [1990] 3 S.C.R. 36, 1 C.R. (4th) 1, [1990] S.C.J. No. 118 ..... 27, 30

R. v. Wray (1970), [1971] S.C.R. 272, [1970] 4 C.C.C. 1, [1970]  
 S.C.J. No. 80 ..... 2, 43, 46

Seddon v. Seddon, [1994] B.C.J. No. 1729 (S.C.) ..... 49

Thomson v. Alberta (Transportation and Safety Board) (2003),  
 330 A.R. 262, 178 C.C.C. (3d) 508, 2003 ABCA 256 ..... 49

United States of America v. Yousef (2003), 174 O.A.C. 286, 178 C.C.C.  
 (3d) 286, [2003] O.J. No. 3118 (C.A.) ..... 36