

**THE SUPREME COURT OF CANADA**

**on**

**EXCLUDING EVIDENCE UNDER S. 24(2) OF THE CHARTER**

Hon. Gerard Mitchell

September 2009

This paper is to fulfill a commitment to participants in the Atlantic Provincial Court Judges Educational Conference held at Stanhope, P.E.I. in May, of 2009. I thank Sheila Gallant and Erin Mitchell for their assistance. GM

## Table of Contents

Section 24 of the <i>Canadian Charter of Rights and Freedoms</i>	1
Purpose of s.24(2)	2
Comparing French and English Texts	2
Court of Competent Jurisdiction	3
Procedure	5
Standing	7
Requirements for Exclusion	8
State Agent	9
Onus and Standard of Proof	10
Connection between the Breach and the Evidence	14
The Administration of Justice	21
Disrepute by Admission	21
All The Circumstances	23
Non-Factors	27
Balancing	28
Statements	28
Bodily Substances	29
Non-bodily Physical Evidence	30
Derivative Evidence	32
The Factual Record	33
24(2) and Evidence Gathered Outside Canada	38
Limited Use of Evidence Previously Excluded Under s.24(2)	39
Appeals	40
Standard of Review	41
Curative Provision	44
Section One	46
Exclusion of Evidence under 24(1) or Common Law	46

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

English Text

French Text

Enforcement

Recours

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

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

(2) 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.

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

Section 24(2) of the *Canadian Charter of Rights and Freedoms* directs courts to exclude unconstitutionally obtained evidence where, having regard to all the circumstances, its admission would bring the administration of justice into disrepute. Thus, it effectively changes the common law which would admit all reliable relevant evidence regardless of how it was obtained.<sup>1</sup> The 'end justifies the means' philosophy

---

<sup>1</sup> Contrast the pre-*Charter* decisions in *R. v. Wray*, [1971] S.C.R. 272 and *R. v. Rothman*, [1981] 1 S.C.R. 640 with the post-*Charter* decisions in *R. v. Burlingham*, [1995] 2 S.C.R. 206 and *R. v. Hebert*, [1990] 2 S.C.R. 151.

of the common law has been replaced by one that values truth, but not at the expense of the repute of the administration of justice.

### **Purpose of s.24(2)**

The purpose of s. 24(2) is to maintain the rule of law and the values underlying the *Charter*. It is not meant to punish police misconduct or to compensate an accused for violation of his or her rights. The concern of s. 24(2) is systemic. Its focus is long-term, prospective, and societal.<sup>2</sup>

### **Comparing French and English Texts**

By virtue of s.57 of the *Constitution Act, 1982*, the English and French texts of the *Charter* are equally authoritative. The significance of this in the context of s. 24(2) is highlighted by the decision in *R. v. Collins*<sup>3</sup> where the Supreme Court gave effect to the less onerous but equally official French test rather than the more demanding English one. The English version of s. 24(2) provides for exclusion where the tainted evidence "would" bring the administration of justice into disrepute. The French text is significantly different. It speaks of the admission of tainted evidence which "*est susceptible de deconsiderer l'administration de la justice*" which translates as "could bring the administration of justice into disrepute." Lamer J. writing for the majority chose to apply the French version because it was the more beneficial to the purposes of s. 24. The result is that the word "would" in the English text of 24(2) should now be read as synonymous with the English word "could."<sup>4</sup> Another example

---

<sup>2</sup> *R. v. Grant*, 2009 SCC 32 at paras. 67-70.

<sup>3</sup> [1987] 1 S.C.R. 265.

<sup>4</sup> *Collins*, note 3, at pp. 287-288.

of how the dual official texts influence the interpretation of s. 24(2) is found in the judgment of Le Dain J. in *R. v. Therens* where he says:

In my opinion the words ‘obtained in a manner that infringed or denied any rights or freedoms guaranteed by this *Charter*,’ particularly when they are read with the French version, *obtenus dans des conditions qui portent atteinte aux droits et libertés garantis par la présente charte*, do not connote a relationship of causation.<sup>5</sup> ...

### **Court of Competent Jurisdiction**

Only courts of "competent jurisdiction" have authority to exclude evidence under s. 24(2) of the *Charter*<sup>6</sup>. A court of competent jurisdiction within the meaning of s. 24 is a court or tribunal that has:

- (1) jurisdiction over the person;
- (2) jurisdiction over the subject matter; and
- (3) jurisdiction to grant the remedy.<sup>7</sup>

The third head usually causes the greatest difficulty. It requires determination of whether Parliament or the Legislature intended to empower the court or tribunal to make rulings on *Charter* violations that arise incidentally to their proceedings, and to grant the remedy sought for such violation.<sup>8</sup> Absent express empowerment, the test

---

<sup>5</sup> [1985] 1 S.C.R. 613 at p. 649.

<sup>6</sup> *R. v. Hynes*, [2001] 3 S.C.R. 623, at para. 15.

<sup>7</sup> *Hynes*, note 6, at paras. 17 and 26.

<sup>8</sup> *Hynes*, at para. 26.

is whether the court or tribunal is suited by its function and structure to grant the requested remedy.<sup>9</sup>

In *Hynes*, a 5-4 majority of the Supreme Court held that, although a preliminary inquiry judge had jurisdiction over the person and subject matter, he or she did not have express power to exclude evidence under s. 24(2) remedy, and a preliminary inquiry forum was not suited by its function and structure to do so. Accordingly, the Court ruled a preliminary inquiry is not a court of competent jurisdiction to exclude evidence under s. 24(2) of the *Charter*. In *Mooring v. Canada (National Parole Board)*<sup>10</sup>, the Supreme Court held that the National Parole Board is not a court of competent jurisdiction for the purpose of excluding evidence under s. 24(2). The majority found that the Parole Board's structure, function, and the language of its constituting statute indicated it was not empowered to grant the remedy sought.

Trial courts are courts of competent jurisdiction and the preferred fora for resolving *Charter* issues and s. 24(2) applications in particular.<sup>11</sup> In the criminal law context, superior courts are always courts of competent jurisdiction to dispense s. 24 remedies. Non-superior trial courts are also courts of competent jurisdiction for s. 24 purposes where they have jurisdiction over the person and the offence. Superior trial courts have concurrent original jurisdiction with non-superior trial courts to deal with applications for remedies under s. 24. However, the superior court has jurisdiction to

---

<sup>9</sup> *Hynes*, note 6, at para. 27.

<sup>10</sup> [1996] 1 S.C.R. 75.

<sup>11</sup> *Hynes*, note 6, at para. 40.

decline to exercise its jurisdiction when the non-superior court provides a more appropriate forum. Thus, a superior court will normally only exercise its authority under s. 24 in cases where the trial is or will be actually proceeding before it.<sup>12</sup>

### Procedure

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

The absence of jurisdictional provisions and directions in the Charter confirms the view that the *Charter* was not intended to turn the Canadian legal system upside down. What is required is that it be fitted into the existing scheme of Canadian legal procedures. There is no need for special procedures and rules to give it full and adequate effect.<sup>13</sup>

Thus, in criminal cases the procedures provided in the *Criminal Code* must be adapted and utilized for s. 24(2) applications.<sup>14</sup>

The s. 24(2) remedy can only issue in proceedings under s. 24(1).<sup>15</sup> A person whose *Charter* rights have been infringed or denied may apply to a court of competent jurisdiction for such remedy as the court considers appropriate and just in the circumstances under s. 24(1). Subsection 24(2) specifically directs the court hearing an application under s. 24(1) to exclude evidence it concludes was obtained

---

<sup>12</sup> *R. v. Mills*, [1986] 1 S.C.R. 863.

<sup>13</sup> *Mills*, note 12, at p. 953.

<sup>14</sup> *Mills*, note 12, at pp. 956-7.

<sup>15</sup> *Hynes*, note 6, at para. 15.

in a manner that infringed or denied *Charter* rights if it has been established that, having regard to all the circumstances, its admission would bring the administration of justice into disrepute.

The judges of the Supreme Court who heard *Mills* appear to consider a pre-trial motion analogous to those provided for in the *Criminal Code*, as the most appropriate procedure for invoking s. 24. But, it should be noted that *Mills* did not involve an issue concerning the admission of evidence. It appears from the cases coming before the Supreme Court that most applications for exclusion are made during the trial. That is not surprising because questions about the admissibility of evidence do not affect the validity of the proceedings, and in the Canadian system of criminal justice, evidence is not usually challenged until it is actually tendered.

It is very important to make the application for a s. 24(2) exclusion before the evidence is actually admitted. There would have to be some unusual circumstances to justify an *ex post facto* application. It is, at least, desirable that the trial judge and the Crown be given reasonable notice of an intended s. 24(2) application. The decisions of the Ontario Court of Appeal in *R. v. Kutynec*<sup>16</sup> and the Alberta Court of Appeal in *R. v. Dwernychuk*<sup>17</sup> provide useful guidance in respect of appropriate s. 24(2) procedure.

### Standing

---

<sup>16</sup> (1992), 70 C.C.C. (3d) 289.

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

"Anyone," including corporations<sup>18</sup>, whose rights or freedoms guaranteed by the *Charter* have been or would be infringed or denied by a state agent may apply for a remedy under s. 24. A claim for exclusion of evidence under s. 24(2) must be based on a violation of the applicant's own *Charter* rights.<sup>19</sup> An accused does not automatically have s. 24(2) standing just because he or she was the target of the investigation or is charged with possession of seized contraband. The right to challenge the legality of a search depends upon the accused establishing that his or her personal rights to privacy have been violated. To do so, the accused must establish on an assessment of the totality of the circumstances that he or she had a reasonable expectation of privacy in the place searched or the item seized. If the accused cannot establish such a personal reasonable expectation of privacy, he or she cannot obtain a s. 24(2) remedy<sup>20</sup>.

A question that remains open is whether a third party, whose rights have been violated in order to acquire evidence against an accused, could obtain an order under s. 24(2) excluding the illegally obtained evidence from any court proceedings including the accused's trial<sup>21</sup>.

### Requirements for Exclusion

---

<sup>18</sup> *Big M Drug Mart Ltd*, [1985] 1 S.C.R. 342; *R. v. Dairy Supplies Ltd.*, [1988] 1 S.C.R. 665 affirming the Manitoba Court of Appeal at 33 C.C.C. (3d) 253.

<sup>19</sup> *R. v. Edwards*, [1996] 1 S.C.R. 128 at para.55; *R. v. Belnavis*, [1997] 3 S.C.R. 441 at paras.19-20. Note, however, the opinion of La Forest J. in each of these decisions would give a broader ambit to s. 8 rights than does the majority.

<sup>20</sup> *Belnavis*, note 19, at para.20.

<sup>21</sup> This question was first raised by Lamer C.J.C. in *Collins*, note 3, at pp.267-7.

Evidence obtained in breach of the *Charter* is not automatically excluded. In fact, such evidence remains presumptively admissible. Lamer J. in *Collins*<sup>22</sup> and again in *R. v. Manninen*<sup>23</sup> pointed out that there are three prerequisites for the exclusion of evidence under s. 24(2). First, the applicant's rights or freedoms guaranteed by the *Charter* must have been infringed or denied. Second, the evidence in question must have been obtained in a manner that infringed or denied that right or freedom. Third, the circumstances must be such that admission of the evidence could bring the administration of justice into disrepute. Unless all three of those conditions are present, the evidence cannot be excluded under s. 24(2). However, evidence that does not meet the requirements under s. 24(2) may nevertheless be excluded by operation of the common law or through s. 24(1) if its admission at trial would impair a legal right set out in the *Charter*.<sup>24</sup> On the other hand, if all three conditions are present, the wording of s. 24(2) would seem to preclude any other option but exclusion. Subsection 24(2) directs that the court "shall" exclude the evidence when the conditions precedent are met. This does not mean there are no discretionary elements in a s. 24(2) analysis.<sup>25</sup> Courts must exercise considerable judgment in deciding whether admission of the evidence in question could bring the administration of justice into disrepute.

---

<sup>22</sup> *Collins*, note 3, at p. 276.

<sup>23</sup> [1987] 1 S.C.R. 1233 at p. 1241.

<sup>24</sup> See: *R. v. Harrer*, [1995] 3 S.C.R. 562; *R. v. White*, [1999] 2 S.C.R. 417; and *R. v. Buhay*, [2003] 1 S.C.R. 206 at para. 40.

<sup>25</sup> *Buhay*, note 24, at paras. 42-48.

### **State Agent**

Section 32 of the *Charter* provides that its provisions apply to the Parliament and government of Canada and to the legislatures and governments of the provinces. Accordingly, *Charter* remedies only apply in the case of actions by persons or entities who are part of government or who perform a specific government function or who are government agents. The police are the usual state actors in s. 24(2) cases. However, other persons such as informers, security guards, and school officials may become state agents and have their actions subject to *Charter* scrutiny. For a private person or entity to be classified as a state actor, fairly stringent conditions must exist. In order to determine whether a non-police person has become a state actor it is important to focus on the relationship between the police and the non-police person. In the case of an informer, the test is whether the exchange between the accused and the informer would have taken place in the form and manner it did but for the intervention of the police. The mere fact there is cooperation between the police and the non-police person and that the police were present at the time of the action in question is not sufficient to make the non-police person a state agent. The fact that the non-police person is trying to prevent or investigate crime does not make him or her a state agent. In order for the *Charter* to apply to a private person or entity he, she or it must be found to be implementing a specific government policy or program. Volunteer participation in the detection of crime by private actors or general encouragement by police authorities for

citizens to participate in the detection of crime will not usually be sufficient direction by police to trigger the application of the *Charter*.<sup>26</sup>

### **Onus and Standard of Proof**

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

First, an applicant seeking the exclusion of evidence under s. 24(2) bears the burden of persuading the court, on a balance of probabilities, that his or her rights have been infringed.<sup>27</sup> However, as Lamer C.J.C. points out in *R. v. Cobham*, this does not mean that an applicant must formally prove every single fact upon which his or her claim of a violation is based, including those not in dispute between the parties and those matters of common knowledge amongst members of the bench and bar of which judicial notice should therefore be taken.<sup>28</sup>

Secondly, an applicant has to establish that an adequate relationship exists between the *Charter* violation and the evidence he or she wants excluded to bring it within the domain of s. 24(2). Since *R. v. Strachan*,<sup>29</sup> it seems safe to infer that the applicant only bears the burden of persuading the court that the violation occurred in the course of obtaining the evidence. Ordinarily, that should not be difficult. In *R. v. Bartle* Chief Justice Lamer urged courts to take a "generous approach" toward what will suffice as a connector between the evidence and the

---

<sup>26</sup>*Buhay*, note 24, at paras. 25-29.

<sup>27</sup> *Collins*, note 3, at p. 277.

<sup>28</sup> [1994] 3 S.C.R. 360, 33 C.R. (4th) 73 at p. 81.

<sup>29</sup> [1988] 2 S.C.R. 980.

*Charter* breach so that generally, as long as it is not too remote, all the evidence obtained as part of the chain of events involving the *Charter* breach will fall within the scope of s. 24(2).<sup>30</sup>

Thirdly, the use of the phrase "if it is established that" in s. 24(2) places on the applicant the burden of persuading the court that admission of the evidence could bring the administration of justice into disrepute. Again, the standard of persuasion is the civil one: a balance of probabilities.<sup>31</sup>

Although the applicant bears the ultimate burden of persuasion under s. 24(2), that does not mean that he or she has that onus at every turn of the inquiry. Once an applicant proves certain facts in relation to a particular issue, a presumption will sometimes arise which the Crown has to rebut. When the burden of persuasion shifts to the Crown, the standard to discharge it is also a balance of probabilities. For example, it has been recognized by the Supreme Court in *R. v. Burlingham* that while, theoretically, the onus is on the accused to show that the impugned evidence would not have been found but for the unconstitutional conduct, in practice that burden will often fall on the Crown because it possesses superior knowledge and therefore, it must satisfy the court on a balance of probabilities that the police would have discovered the evidence regardless of the information arising from the unconstitutional conduct.<sup>32</sup>

---

<sup>30</sup> [1994] 3 S.C.R. 173.

<sup>31</sup> *Collins*, note 3, at p. 280.

<sup>32</sup> [1995] 2 S.C.R. 206.

In *Bartle* Lamer C.J.C. identifies two other such instances where the onus shifts to the Crown in s. 24(2) applications. They are: (1) In cases involving a breach of s. 8 of the *Charter* where evidence has been obtained as a result of an unreasonable search and seizure, there is a presumption that the violation is a serious one. The Crown can overcome the presumption if it can show that the police had reasonable and probable grounds to act as they did, or that there were compelling and urgent circumstances. (2) In cases of s. 10(b) violations, the Crown has the burden of establishing, on the evidence, that the s. 24(2) applicant would not have acted any differently had his or her s. 10(b) rights been fully respected, and that as a consequence, the evidence would have been obtained irrespective of the breach. There is no legal onus on the applicant to prove that the unconstitutional act caused the discovery of the evidence in question. On the contrary, if the Crown claims there was no causal link between a *Charter* breach and the obtaining of evidence, it must prove this assertion. Furthermore, Lamer C.J.C. makes it clear that the Crown cannot satisfy the onus that shifts to it in s. 10(b) cases by engaging the Court in speculation about whether the applicant would have sought legal advice or the nature of the advice he would have received had his right not been violated.<sup>33</sup> Nevertheless, applicants for exclusion cannot afford too much complacency about the onus on the Crown because as Lamer C.J.C. notes in *Bartle*:

... once there is positive evidence supporting the inference that an accused would not have acted any

---

<sup>33</sup> *Bartle*, note 30, at p. 218.

differently had his or her s.10(b) rights been fully respected, a s. 24(2) applicant who fails to provide evidence that he or she would have acted differently (a matter clearly within his or her particular knowledge) runs the risk that the evidence on the record will be sufficient for the Crown to satisfy its legal burden (the burden of persuasion).<sup>34</sup>

Chief Justice Lamer in both *R. v. Schmautz*<sup>35</sup> and *R. v. Harper*<sup>36</sup> drew inferences adverse to the accused from their failure to testify at the s. 24(2) *voir dire* that they would have sought advice or acted differently if their right to counsel had not been violated.

### **Connection between the Breach and the Evidence**

Evidence obtained before or in the absence of a *Charter* violation does not qualify for s. 24(2) relief.<sup>37</sup> If evidence is to be excluded under s.24(2), it must have been "obtained in a manner that infringed or denied" a *Charter* right or

---

<sup>34</sup> *Bartle*, note 30, at p. 213.

<sup>35</sup> [1990] 1 S.C.R. 398.

<sup>36</sup> [1994] 3 S.C.R. 343.

<sup>37</sup> *Harper*, note 36, at p. 352.

freedom. Meeting this prerequisite requires establishing some connection or relationship between the violation and the evidence in question.<sup>38</sup>

In *Therens* Le Dain J. expressed the view that the relationship did not have to be one of causation. He considered that it would be sufficient if the violation preceded or occurred in the course of obtaining the evidence.<sup>39</sup> However, Lamer J. disagreed. He did not think that a temporal connection would suffice.<sup>40</sup> When the Supreme Court handed down its decision in *R. v. Upton*<sup>41</sup>, it appeared as though the position taken by Lamer J. had prevailed. This support for a causal requirement did not last long. Less than seven months after *Upton*, the Supreme Court in *Strachan*<sup>42</sup> expressly rejected the need for a causal relationship. Dickson C.J.C. writing for the majority dismissed the causation requirement as too narrow and difficult to apply. He established a broader test which he described as follows:

In my view, all the pitfalls of causation may be avoided by adopting an approach that focuses on the entire chain

---

<sup>38</sup> *Therens*, note 5, at p. 648.

<sup>39</sup> *Therens*, note 5, at p. 649.

<sup>40</sup> *Therens*, note 5, at pp. 623-4.

<sup>41</sup> [1988] 1 S.C.R. 1083.

<sup>42</sup> [1988] 2 S.C.R. 980.

of events during which the *Charter* violation occurred and the evidence was obtained. Accordingly, the first inquiry under s. 24(2) would be to determine whether a *Charter* violation occurred in the course of obtaining the evidence. A temporal link between the infringement of the Charter and the discovery of the evidence figures prominently in this assessment, particularly where the *Charter* violation and the discovery of the evidence occur in the course of a single transaction. The presence of a temporal connection is not, however, determinative. Situations will arise where evidence though obtained following the breach of a *Charter* right will be too remote from the violation to be 'obtained in a manner' that infringed the Charter. In my view, these situations should be dealt with on a case by case basis. There can be no hard and fast rule for determining when evidence obtained following the infringement of a *Charter* Right becomes too remote.<sup>43</sup>

Lamer J. wrote a brief judgment concurring with Dickson C.J.C. and repudiating the position he had taken earlier in *Therens*.<sup>44</sup> Later writing for the majority in *R. v. Brydges*, he said:

... s. 24(2) is implicated as long a *Charter* violation occurred in the course of obtaining the evidence.<sup>45</sup>

---

<sup>43</sup> *Strachan*, note 42, at pp. 1005-6.

<sup>44</sup> *Strachan* note 42, at p. 1009.

<sup>45</sup> [1990] 1 S.C.R. 190 at p. 210, also see: *Bartle*, note 30, at p. 209 where Chief Justice Lamer writing for the majority directed courts to take a "generous approach" to the proof of this aspect of the 24(2) inquiry.

Sopinka J., writing for the unanimous nine-member panel in *R. v. Grant*, put a somewhat finer point on it. He held a sufficient relationship exists to trigger s. 24(2) if the violation occurred in the course of carrying out some "integral component in a series of investigative tactics which led to the unearthing of the evidence in question."<sup>46</sup> Thus, so long as there is a sufficient temporal and tactical linkage, evidence can be considered for exclusion under s. 24(2) despite the fact that the police misconduct was not directly involved in its acquisition. For example, evidence acquired with the aid of a valid search warrant could nevertheless be considered for exclusion if there was a sufficient temporal and tactical connection between a *Charter* violation (a previous warrantless perimeter search) and the obtaining of the evidence. A *Charter*-right violation (unlawful entry) is not corrected nor would its seriousness be diminished simply because the police subsequently obtained a warrant so that the unlawful act is followed by a lawful one. Where the two are "intertwined in time and in their nature," the

---

<sup>46</sup> *R. v. Grant*, [1993] 3 S.C.R. at p. 255, also see: *R. v. Wiley*, [1993] 3 S.C.R. 263, *R. v. Plant*, [1993] 3 S.C.R. 281, and *R. v. I. (L.R.) and T.(E.)*, [1993] 4 S.C.R. 504.

unlawful conduct taints the lawful<sup>47</sup>. Lamer C.J.C. summed up the situation by saying in *Bartle*:

Generally speaking, so long as it is not too remotely connected with the violation, all the evidence obtained as part of the "chain of events" involving the *Charter* breach will fall within the scope of s. 24(2).<sup>48</sup>

Moreover, the subsequent decision of the Supreme Court in *Burlingham* demonstrates that even evidence only remotely connected to unconstitutional conduct may be excluded if its admission would have the same effect as admitting more proximate excluded evidence.<sup>49</sup>

Although the presence of a causal connection is not necessary for the invocation of the exclusionary remedy, that does not mean the existence and strength of a causative relationship has no relevance. As Wilson J. points out in *R. v. Black*<sup>50</sup>, former Chief Justice Dickson in *Strachan* was not precluding the use of a causal connection to determine if evidence was obtained in a manner that infringed *Charter* rights. While he was establishing a broader one, the "causal

---

<sup>47</sup> *R. v. Silveria*, [1995] 2 S.C.R. 297, at p. 363.

<sup>48</sup> *Burlingham*, note 32, at pp. 208-9.

<sup>49</sup> *Burlingham*, note 32, at pp. 235-39.

<sup>50</sup> [1989] 2 S.C.R. 138 at p. 163.

connection" test can still be used in cases where such a link is obviously present and the evidence is clearly derivative. Furthermore, as Sopinka J. in *R. v. I.(L.R.) and T.(E.)*<sup>51</sup> and Lamer C.J. in *Bartle*<sup>52</sup> indicate, the presence and strength of a causal connection may have relevance to the issues of remoteness and to whether admission of the evidence would bring the administration of justice into disrepute.

The Supreme Court gave some indication of when the nexus would be considered too remote in *R. v. Goldhart*, a case where Sopinka J. said:

If both the temporal connection and the causal connection are tenuous the Court may very well conclude that the evidence was not obtained in a manner that infringes a right or freedom under the *Charter*.<sup>53</sup>

Some see the Supreme Court's decision in *Goldhart* (involving an application for the exclusion of testimony from a witness who was discovered in the course of an illegal search of a premises) as a turning back to a causal connection test. More likely, it is merely an instance of the Court concluding that the evidence in that

---

<sup>51</sup> [1993] 4 S.C.R. 504.

<sup>52</sup> *Bartle*, note 30, at p. 209.

<sup>53</sup> [1996] 2 S.C.R. 463 at para. 40.

particular case, though obtained following the *Charter* breach, was too remote from the violation to be ‘obtained in a manner’ that infringed the *Charter*.

The Supreme Court’s decision in *Goldhart* is consistent with the earlier statement of Dickson C.J.C. in *Strachan*. Indeed, the witness’s testimony in *Goldhart* was much more the product of his own decision to testify than of his being discovered on the premises in the course of the illegal search. Thus *Goldhart* is just an instance of what Dickson C.J.C. was referring to in *Strachan* when he said:

Situations will arise where evidence though obtained following the breach of a *Charter* right will be too remote from the violation to be obtained in a manner that infringed the *Charter*. In my view, these situations should be dealt with on a case by case basis. There can be no hard and fast rule for determining when evidence obtained following the infringement of a *Charter* right becomes too remote.<sup>54</sup>

*R. v. Wittwer*<sup>55</sup> concerned the admission of an incriminating statement made by an accused upon being confronted with another statement obtained in violation of his constitutional rights five months earlier. Fish J., writing for the court, said:

---

<sup>54</sup> *Strachan*, note 42, at para. 47.

<sup>55</sup> 2008 SCC 33 at para. 21.

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 subsequent statement. The statement will be tainted if the breach and the impugned statement can be said to be part of the same transaction or course of conduct: *Strachan*, at p. 1005. The required connection between the breach and the subsequent statement may be "temporal, contextual, causal or a combination of the three": *R. v. Plaha* (2004), 189 O.A.C. 376, at para. 45. A connection that is merely "remote" or "tenuous" will not suffice: *R. v. Goldhart*, [1996] 2 S.C.R. 463, at para. 40; *Plaha*, at para. 45.

Fish J. went on to hold that in Mr. Wittwer's case, there was a temporal, a causal and, to some extent, a contextual connection. He found a temporal connection because the mention of the first unconstitutionally obtained statement five months earlier was immediately followed by the incriminating statement in question. He found a causal connection because the incriminating statement was obtained as a result of the interrogator's reference to the earlier statement. He found there was some contextual connection because the police associated one statement with the other by their actions in the course of interrogating the accused.

### **The Administration of Justice**

In *Therens* Le Dain J. said:

The central concern of s. 24(2) would appear to be the maintenance of respect for and confidence in the

administration of justice, as that may be affected by the violation of constitutional rights and freedoms."<sup>56</sup>

According to *Grant*, the term “administration of justice” in s. 24(2) concerns maintaining the rule of law and its processes and includes upholding *Charter* rights in the justice system as a whole<sup>57</sup>.

### **Disrepute by Admission**

Police conduct violating *Charter* rights already brings disrepute to the justice system. The concern of s. 24(2) is to avoid adding to that disrepute by admitting the fruit of illegal state conduct into evidence. The focal point in s.24(2) cases is on the effect of the "admission" of the illegally obtained evidence on the repute of the administration of justice. The question is: will the overall integrity of, and public confidence in, the repute of the justice system, viewed in the long haul, be adversely affected by the admission of the evidence? The question is to be answered by the court from the perspective of the reasonable person informed of all the relevant circumstances and the values underlying the *Charter*.

The “disrepute” being referred to in s.24(2) is “disrepute” in the local community. The administration of justice does not have to be brought into disrepute on a national scale before courts may interfere to protect the integrity of the process within which they operate.<sup>58</sup> Trial judges have to be concerned for the reputation of the administration of justice in the community with which they deal

---

<sup>56</sup> *Thereins*, note 5, at p. 652.

<sup>57</sup> *Grant*, note 2, at para. 67.

<sup>58</sup> *Buhay*, note 24, at para. 68.

on a daily basis.<sup>59</sup> Thus, a court in a particular case must determine what the long term impact on the repute of the administration of justice in the community where it operates would be if evidence obtained under similar circumstances was to be regularly admitted.

The threshold for exclusion under s. 24(2) is lower than the "community shock" test advanced by Lamer J. in his dissenting opinion in *R. v. Rothman*<sup>60</sup>. That is because s. 24 involves consideration of a breach of the supreme law of the land and because the French version, which is equally official, only requires that the evidence "could" bring the administration of justice into disrepute.<sup>61</sup>

### **All The Circumstances**

In determining whether the admission of unlawfully obtained evidence could bring the administration of justice into disrepute, s. 24(2) directs courts to have "regard to all the circumstances." In *Grant*<sup>62</sup>, the Supreme Court of Canada revised the analytical framework that had previously been established in *Collins* and *R. v. Stillman*<sup>63</sup> for determining when in all the circumstances admission of the evidence would bring the administration of justice into disrepute.

---

<sup>59</sup> *R. v. A.M.*, 2008 SCC 19 at para. 98.

<sup>60</sup> [1981] 1 S.C.R. 640.

<sup>61</sup> *Collins*, note 3, at pp. 286-7, and *R. v. Hebert*, [1990] 2 S.C.R. 151 at p. 187.

<sup>62</sup> *Grant*, note 2, at paras. 59 -140

<sup>63</sup> [1997] 1 S.C.R. 607.

*Collins* identified three groups of factors to be considered in determining whether the admission of unconstitutionally obtained evidence would bring the administration of justice into disrepute. According to *Collins*, a court faced with an application under s. 24(2) was to consider factors relating to: (1) the effect of the violation on trial fairness; (2) the seriousness of the breach; and (3) the disrepute to the administration of justice that would be caused by exclusion. However, if trial fairness was negatively impacted the evidence was generally excluded without reference to the second and third factors. The trial fairness rationale led to the almost-automatic exclusion of conscriptive evidence on the basis that nothing could bring greater disrepute to the administration of justice than a unfair trial.<sup>64</sup> This view was reinforced and compounded by *Stillman* where the *Collins* test was affirmed and the category of conscriptive evidence was greatly expanded.<sup>65</sup> According to the majority in *Stillman*, conscriptive evidence would generally only escape exclusion if the Crown could show that it was discoverable absent the violation.<sup>66</sup> Often, highly reliable evidence was excluded on the *Collins/Stillman* trial fairness rationale even though the violation seemed otherwise relatively minor. Conversely, non-conscriptive real evidence often got

---

<sup>64</sup> *Collins*, note 3, at p. 286.

<sup>65</sup> *Stillman*, note 63, at para. 81 held that evidence is conscriptive when an accused, in violation of his or her Charter rights, is compelled to incriminate him or herself at the behest of the state by means of a statement, the use of the body, or the production of bodily samples.

<sup>66</sup> *Stillman* note 63, at paras. 102-118.

admitted despite what appeared to be much more serious violations of *Charter* rights.

In *Grant*<sup>67</sup>, the Supreme Court made significant corrections to the analytical course set by *Collins/Stillman*. The majority judgment was jointly authored by Chief Justice McLachlin and Madam Justice Charron. Only Madam Justice Deschamps of the seven-judge panel disagreed with the revised test developed by the majority authors. As a result of the *Grant* revision, trial fairness is no longer a discrete stage of the s. 24(2) analysis, and the exclusion of undiscoverable conscriptive evidence is no longer near-automatic.<sup>68</sup> Under the revised approach, a court faced with an application under s. 24(2) must assess and balance the effect of admitting the illegally obtained evidence on public confidence in the integrity of the justice system having regard to: (1) the seriousness of the state action; (2) the impact on the accused's *Charter*-protected interests; and (3) society's interest in having an adjudication on the merits.

The revised approach gives trial judges more discretion and is more in keeping with the language of s. 24(2) but it does not mean that all that happened between *Collins* and *Grant* is no longer relevant. The *Grant* headings or lines of inquiry, as it calls them, do not coincide exactly with the three categories set forth earlier in *Collins*. However, they do capture the factors relevant to the s. 24(2)

---

<sup>67</sup> *Grant*, note 2.

<sup>68</sup> *Grant*, note 2, at paras. 65 and 111.

determination as identified in *Collins* and other cases subsequent to it.<sup>69</sup> Those factors continue to be relevant in s. 24(2) cases.

The first inquiry under the revised s. 24(2) framework of analysis requires an evaluation of the seriousness of the state conduct. The main concern is the preservation of public confidence in the rule of law and its processes. State conduct resulting in *Charter* violations vary from minor or inadvertent to wilful or reckless. The former have a minimal impact on the repute of the justice system but the latter inevitably have a negative effect on public confidence in the rule of law. The *Charter* is the supreme law of the land and police are expected to abide by its standards regardless of the offence they are investigating. Deliberate police misconduct in violation of *Charter* standards tends to support exclusion as does evidence that the conduct was part of a pattern of abuse.<sup>70</sup> On the other hand, extenuating circumstances such as the need to preserve evidence or good faith may lessen the need for the court to disassociate itself from the state conduct. However, carelessness or ignorance of *Charter* standards are not to be encouraged, and negligence or wilful blindness do not constitute good faith.<sup>71</sup> Misleading in-court evidence from police about the circumstances surrounding a breach, although not part of the breach itself, adds to its seriousness and increases the need for the court to disassociate it from their conduct.<sup>72</sup>

---

<sup>69</sup> *Grant*, note 2, at para. 71.

<sup>70</sup> *Grant*, note 2, at paras. 72-74.

<sup>71</sup> *Grant*, note 2, at para. 75.

<sup>72</sup> *R. v. Harrison*, 2009 SCC 34 at para. 26.

The second line of inquiry requires an evaluation of the extent to which the breach actually undermined the *Charter*-protected interests of the accused. This involves examining the interests engaged by the right and the extent to which the breach impacted them. When the impact on the accused interests is serious, admission of the evidence would bring the administration of justice into disrepute by breeding public cynicism about the value and availability of *Charter* protection.<sup>73</sup>

Under the third line of inquiry the court must consider whether exclusion takes too great a toll on the truth-finding function of a criminal trial. Important factors in this part of the analysis are the reliability of the evidence and its importance to the Crown's case. In *Grant* the majority held that the seriousness of the offence may be a valid factor to consider, but noted that it has the potential to cut both ways. Society has a greater interest in having a determination on the merits when the crime is serious. At the same time, society also has an important interest in having a justice system that is above reproach, especially when the penal consequences for the accused are high.<sup>74</sup>

### **Non-Factors**

The Supreme Court has identified some factors that should not be given any weight in determining whether admission of the evidence would bring the administration of justice into disrepute. In *Burlingham*, the Supreme Court held that the fact the impugned evidence may be unimportant to the outcome cannot be

---

<sup>73</sup> *Grant*, note 2, at paras. 76-78

<sup>74</sup> *Grant*, note 2, at para. 79-85.

used as a consideration to support its admission.<sup>75</sup> Another factor that has been declared irrelevant is the existence of other remedies. The availability of another remedy would not lessen the disrepute that could fall on the administration of justice from the court's acceptance of illegally obtained evidence.<sup>76</sup> In *Harrison* the Supreme Court said: “The fact that a *Charter* breach is less heinous than the offence charged does not advance the inquiry mandated by s. 24(2)”.<sup>77</sup>

### **Balancing**

The role of the trial judge on a s. 24(2) application is to balance the various assessments made under the analytical approach set out in *Grant* and so determine whether, considering all the circumstances, admission of the evidence would bring the administration of justice into disrepute. The balancing is not a mathematical exercise. It is qualitative.<sup>78</sup> A trial judge must be careful not to give undue emphasis to one line of inquiry or to neglect the importance of any of the three lines of inquiry. The s. 24(2) analysis should not boil down to a simple contest between the degree of police misconduct and the seriousness of the offence.<sup>79</sup>

### **Statements**

---

<sup>75</sup> *Burlingham*, note 32, at p. 241.

<sup>76</sup> *Collins*, note 3, at p. 286.

<sup>77</sup> *Harrison*, note 72 at para.. 41.

<sup>78</sup> *Grant* , note 2, at para. 86.

<sup>79</sup> *Harrison*, note 72 at para. 33.

The law has always required the utmost probity from police in obtaining statements from an accused. The taking of a statement from an accused engages his or her *Charter*-protected rights to silence, rights to counsel and rights against self-incrimination. Except in cases of minor slips or mere inadvertence, a statement obtained through police misconduct violating the accused's *Charter* rights will generally be excluded even when it is voluntary under the confessions rule. According to the majority in *Grant*, all three branches of the revised framework for analyzing s. 24(2) applications support the presumptive general exclusion of statements obtained in breach of the *Charter*. However, *Grant* also emphasizes there is no absolute rule of exclusion of *Charter*-infringing statements. The presumption in favor of exclusion may be overcome if the accused is clearly informed of his or her choice to speak to the police, but compliance with either the information or implementation component of s.10(b) is technically deficient. The presumption may also be overcome in circumstances where a statement is made spontaneously following a *Charter* breach or in the exceptional circumstances where the court can confidently conclude that the statement would have been made notwithstanding the *Charter* breach.<sup>80</sup>

### **Bodily Substances**

A flexible, multi-factored approach to the admissibility of bodily evidence is required under s. 24(2) because of the wide variations in its kinds. There is no automatic exclusion just because it meets the *Stillman* definition of

---

<sup>80</sup> *Grant*, note 2, at paras. 89-98.

undiscoverable conscriptive evidence. The admissibility of bodily evidence obtained through a *Charter* breach must be analysed in the manner described in *Grant*.

The first step involves consideration of the police conduct and the reasons for it. Admitting bodily evidence obtained as a result of deliberate and egregious conduct police conduct violating the accused's rights tends to bring the administration of justice into disrepute. However, if the police acted in good faith, the negative impact on the system may not be so great.

The second line of inquiry set out in *Grant* requires the court to consider the degree to which the violation intruded upon the privacy, bodily integrity, and human dignity of the accused.

The third line of inquiry generally supports admission because bodily evidence is usually reliable.

In general, where an intrusion is deliberately inflicted and the impact on the accused's privacy, bodily integrity, and dignity is high, bodily evidence will be excluded, notwithstanding its relevance and reliability. On the other hand, where the violation is less egregious and the intrusion on privacy, bodily integrity and dignity is less severe, bodily evidence may be admitted. This would usually be the case with breath sample evidence where the method of collection is relatively unintrusive.<sup>81</sup>

### **Non-bodily Physical Evidence**

The same three lines of inquiry identified in *Grant* apply to non-bodily evidence obtained through a *Charter* breach. The right most often infringed in procuring this type of evidence is the one guaranteeing protection against

---

<sup>81</sup>*Grant*, note 2, at paras. 99-111.

unreasonable searches and seizures. The interest protected is the expectation of privacy. The greater the expectation of privacy involved the more serious the police misconduct and the more serious the impact of the breach. An illegal search of a home is more serious than one of a business or vehicle. A strip or body cavity search will be very serious because of its intrusiveness and its indignity even if the evidence secured is not itself a bodily substance. Non-bodily physical evidence is usually reliable so that aspect of the analysis supports admission under the third line of inquiry.<sup>82</sup> However, non-bodily physical evidence will not routinely be admitted even where it is practically conclusive of guilt and vital to the Crown's case relating to a serious offence.

In *Harrison*<sup>83</sup> the Supreme Court excluded a large quantity of cocaine obtained from the accused's vehicle through violation of his s. 8 and s. 9 *Charter* rights. The evidence was highly reliable and important to the Crown's case on a very serious charge. These factors, which come under the third line of inquiry as set forth in *Grant*, supported admission of the evidence. However, the Supreme Court found these factors were overcome by others relating to the first and second lines of inquiry of the *Grant* approach. The police officer acted recklessly and without sufficient regard for *Charter* rights. He detained the accused and searched his vehicle simply on a hunch and without any semblance of reasonable grounds. He later aggravated his initial misconduct by giving misleading in-court testimony. The impact of the detention and search on the accused's privacy and liberty interests was

---

<sup>82</sup> *Grant*, note 2, at paras. 112-115.

<sup>83</sup> *Harrison*, note 72, at paras. 20-42.

significant although not egregious. On balance, the Supreme Court found the factors favouring exclusion outweighed those favouring admission. Despite the seriousness of the offence and the reliability of the evidence the Supreme Court concluded that admitting the evidence would undermine the repute of the administration of justice as to do so would imply that the Court condoned the serious misconduct of the police and the significant incursion on the rights of the accused.

### **Derivative Evidence**

Derivative evidence is physical evidence discovered as a result of an illegally obtained statement. As a result of s. 24(2), reliable derivative evidence is no longer always admitted. It will be excluded if its admission would bring the administration of justice into disrepute. Again courts should follow the three lines of inquiry established in *Grant*. The first looks at the state conduct. The more serious the police misconduct in obtaining the statement, the more the admission of the evidence derived from it tends to undermine public confidence in the rule of law. The second inquiry considers the impact on the *Charter*-protected interests of the accused. A common consideration under this heading is the extent to which the breach impinged upon the accused's right to make a free and informed choice as to whether to speak to the police. The impact of a violation may be lessened if the evidence was independently discoverable. However, if the evidence was non-discoverable, that aggravates the impact of the breach on the accused's interest in being able to make an informed choice to talk to the police. The third line of inquiry,

the public interest in adjudication on the merits, usually favours the admissibility of derivative evidence because it is physical and therefore quite reliable.

The trial judge must balance all of the factors coming to light from the three lines of inquiry. However, as a general rule, reliable derivative evidence obtained in good faith and without serious impact on the accused's *Charter*-protected interests will be admitted. On the other hand, egregious police conduct having a severe impact on the accused's protected interests may well result in the exclusion of derivative evidence, notwithstanding its reliability.<sup>84</sup>

The Supreme Court in *Grant* warned trial judges to be wary of police illegally obtaining statements knowing they would be inadmissible but hoping that the derivative evidence would be admitted. The *Grant* majority said the judge should refuse to admit the derivative evidence in such a case.<sup>85</sup>

In *Grant*, the balancing of all the factors considered under the three lines of inquiry tipped in favour of admitting the evidence. The tipping point was that the police did not believe they were doing wrong and their mistake was understandable given the murky state of the law regarding when such an encounter as they had with Mr. Grant became a detention within the meaning of the *Charter*. However, the Supreme Court hastened to point out that as the law has now been clarified, such conduct by the police would be less justifiable in the future. Police are expected to know the law.<sup>86</sup>

---

<sup>84</sup>*Grant*, note 2, at paras. 116-127.

<sup>85</sup> *Grant*, note 2, at para. 128.

<sup>86</sup> *Grant*, note 2, paras. 133-140.

### The Factual Record

In *R. v. Orbanski; R. v. Elias*, Charron J. observed that in most *Charter* cases, the factual context is of critical importance to the proper resolution of the questions before the court.<sup>87</sup> This is certainly no less true in s. 24(2) cases. In the opening paragraph of his judgment in *Silveria*, Cory J. says:

At issue on this appeal is whether the evidence . . . should be excluded pursuant to the provisions of s. 24(2) of the **Canadian Charter of Rights and Freedoms**. As is so often the case, the factual background and the findings of the courts below will have a profound effect on the result.<sup>88</sup>

Four decisions of the Supreme Court, *Collins*, *Genest*, *Grefe*, and *Grant* serve to illustrate the truth of what Cory J. said and to stress the importance of laying a proper evidential foundation for s. 24(2) issues at the trial court level. All of these cases were finally resolved on appeal to the Supreme Court of Canada, but they were decided by that court on the basis of the trial record. It is obvious from what the Supreme Court said and did in those cases that the facts are crucial in s. 24(2) cases and that it is crucial to establish them at trial. In *Grant*, the result might have been different if there had been evidence of racial profiling or other discriminatory police practices. The absence of such evidence was noted by the majority of the Supreme

---

<sup>87</sup> *R. v. Orbanski; R. v. Elias*, [2005] 2.S.C.R. 3 at para. 23.

<sup>88</sup> *Silveria*, note 47, at p. 358.

Court<sup>89</sup>. Lamer J. implied in *Collins* that the result might have been different in that case if the trial record had disclosed that the police had information which led them to believe that the accused was dangerous or handling drugs.<sup>90</sup> Dickson C.J.C. left a similar impression in *Genest*. In that case Dickson C.J.C. acknowledged that fear for the safety of the searchers and the possibility of violence could constitute reason to use force in the execution of a search warrant. However, he pointed out, that at the trial the police had failed to lay a factual foundation for such a conclusion and went on to say that the Crown could not rehabilitate its case at the appeal stage.<sup>91</sup> Writing for the majority in *R. v. Greffe*, Lamer J. makes it quite clear that the *Charter* violations in that case would not have been considered nearly so serious if the Crown had established at the trial that the police had reasonable and probable grounds to believe that the accused was in possession of heroin. Lamer J. considered the presence or absence of such reasonable and probable grounds as the key to determining the seriousness of the *Charter* violations. He said it was

---

<sup>89</sup> *Grant*, note 2, at para.133.

<sup>90</sup> *Collins*, note 3, at p. 288.

<sup>91</sup> *R. v. Genest*, [1989] 1 S.C.R. 59 at pp. 89-91.

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

... at no point in the trial established that those grounds existed or even led evidence in support of their existence.<sup>92</sup>

All that was on the record was a mere conclusory statement by the police. The Crown, even though it had the opportunity, did not elicit any evidence from the police by whom the trial judge could have assessed whether the confidential information the police had received gave rise to reasonable and probable grounds. The Court would not engage in speculation to fill the void left by the absence of evidence. Lamer J. held that the Crown had to bear the consequences of its failure. As a result, he found the police did not have reasonable and probable grounds to believe that the appellant had drugs in his possession when they violated his s. 8 and s. 10 rights. Lamer J. said this was the most determinative factor in the case and emphasized that he had reached his conclusion by "taking the record as it is given to us by the police and the prosecution."<sup>93</sup> The absence of established reasonable and

---

<sup>92</sup> [1990] 1 S.C.R. 755 at p. 789.

<sup>93</sup> *Greffe*, note 92, at p. 798.

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

If it is important for the Crown to introduce evidence at the trial level to justify the police action in question, it is even more important for the applicant to introduce all of the evidence that supports exclusion. After all, it is the person seeking exclusion that bears the ultimate burden of persuasion in s. 24(2) cases.<sup>94</sup> In that regard, the decisions of the Supreme Court in *R. v. Schmautz*<sup>95</sup> and *R. v. Harper*<sup>96</sup> pose some cause for concern among defence strategists because in both those cases Lamer J. drew an adverse inference from the failure of the accused to testify at the *voir dire* on the s. 24(2) application arising from the alleged breach of his right to counsel. Six of the seven judges who heard the *Schmautz* case dismissed the appeal because they found no violation of s. 10(b) rights. Only Lamer J. found that there had been a violation of s. 10(b), but he too voted to dismiss the appeal. He found that the applicant had not established sufficient grounds for exclusion. After discussing some other factors he said:

---

<sup>94</sup> *Collins*, note 3, at p. 280.

<sup>95</sup> *Schmautz*, note 35.

<sup>96</sup> *Harper*, note 36.

Finally, and perhaps most important, the appellant never testified on a *voir dire*, to the effect that he would have chosen to contact counsel had he been informed once again of his right upon detention.<sup>97</sup>

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

The appellant never testified on the *voir dire*, nor did he tender any evidence showing that he would have contacted duty counsel had he been informed of their existence and how to access the service.<sup>98</sup>

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

### **24(2) and Evidence Gathered Outside Canada**

The Supreme Court of Canada held in *R. v. Hape*<sup>99</sup> that the *Charter* generally does not apply to criminal investigations conducted outside Canada. Therefore, evidence obtained outside Canada, whether by foreign or Canadian authorities or a combination of both, cannot be excluded under s. 24(2). Exceptions to

---

<sup>97</sup> *Schmautz*, note 35, at p. 423.

<sup>98</sup> *Harper*, note 36, at p. 354.

<sup>99</sup>[2007] 2 S.C.R. 292. This decision by the Supreme Court effectively overruled its previous decision in *R. v. Cook*, [1998] 2 S.C.R. 597.

this general rule will be rare. One exception will be in cases where evidence establishes that the foreign state consented to the exercise of Canadian enforcement jurisdiction within its territory. In that case, the *Charter* can apply to the activities of Canadian officers in foreign investigations. LaBel J., who wrote for the majority in *Hape*, also left open the possibility of another exception in a case of the participation by Canadian officers in activities in another country that would violate Canada's international human rights obligations. He opined that those activities might justify a remedy under s. 24(1) because of their impact on *Charter* rights in Canada. In *Canada (Justice) v. Khadr*, the Supreme Court held that if Canadian agents participate in a process that violates Canada's binding obligations under international law, the *Charter* applies to the extent of that participation.<sup>100</sup>

### **Limited Use of Evidence Previously Excluded Under s. 24(2)**

In rare cases a court may reconsider and admit, for a limited purpose, evidence that was excluded under s. 24(2) of the *Charter* when initially tendered. The Crown would first have to establish, on a *voir dire*, that there has been a material change in circumstances such that admission of the evidence for the limited purpose

---

<sup>100</sup> 2008 SCC 28.

would not bring the administration of justice into disrepute. This task is not easy.<sup>101</sup>

Only in special and very rare circumstances would such an application be allowed.<sup>102</sup>

### Appeals

A trial judge's decision on an application for exclusion under s. 24(2) is often crucial to the outcome of a criminal case. Therefore, the party on the losing side of such an application sometimes wants to appeal the s. 24(2) decision even before the trial is completed. Lamer J. held in *Collins* that a trial judge's decision to exclude or not to exclude evidence under s. 24(2) is generally appealable as a question of law except, for instance, when it is based on the assessment of the credibility of a witness.<sup>103</sup>

---

<sup>101</sup> *R. v. Calder*, [1996] 1 S.C.R. 660. In this case the police had obtained a statement of the accused in violation of his s. 10(b) *Charter* rights. The statement was excluded under s. 24(2) when the Crown tendered it as part of its case-in-chief as substantive evidence of consciousness of guilt. The accused subsequently took the stand and in his testimony in chief he contradicted what he had said in the statement that had been excluded. The Crown thereupon sought to use the previously excluded statement to impeach his credibility during cross-examination. The Supreme Court of Canada by majority held that the lower courts were correct to rule against the application because the proposed use of the statement for impeachment of credibility was not a material change in circumstances which warranted a reconsideration of the finding that admission of the statement would bring the administration of justice into disrepute. Sopinka J., writing for the majority, nevertheless allowed, that under some "very limited circumstances", a change in proposed use would warrant reopening the issue even though the evidence had already been excluded under s. 24(2).

<sup>102</sup> *R. v. Cook*, [1998] 2 S.C.R. 597 at para.76.

<sup>103</sup> *Collins*, note 3, at. pp. 275-6.

However, as McIntyre J. pointed out in *Mills*<sup>104</sup> and in *R. v. Meltzer*,<sup>105</sup> s. 24 decisions in criminal cases cannot be appealed before the proceedings in the trial court have been completed. When an accused invokes a provision of the *Charter* in a criminal case, the question of its application and effect is clearly criminal law. Neither the *Charter* itself nor the *Criminal Code* provides a special right to appeal the granting or refusal of a remedy under s.24(2). Therefore, the appeal has to follow the normal procedure for criminal appeals established by the *Criminal Code* and the Rules of Court made pursuant to it. The *Criminal Code* is exhaustive of all appellate jurisdiction in criminal matters and does not authorize interlocutory appeals. Accordingly, a party aggrieved by a ruling on a s.24(2) application cannot appeal until the completion of the trial or at least until the proceedings are somehow effectively terminated by the trial judge.

### **Standard of Review**

In *Buhay*, Arbour J., writing for a unanimous Court, said:

An appellate court must determine if, all factors considered, the trial judge's conclusion to exclude the evidence, based on

---

<sup>104</sup> *Mills*, note 12, at pp. 958-64.

<sup>105</sup> [1989] 1 S.C.R. 1764 at pp. 1773-4.

his or her finding that its admission would bring the administration of justice into disrepute, was reasonable.<sup>106</sup>

The Supreme Court of Canada has often indicated that courts of appeal should not readily second guess a trial judge's findings under s. 24(2) or substitute their view for the trial judge's just because they would have decided the matter differently in the first instance. In *R. v. Duguay* the majority stated:

It is not the function of this court, though it has the jurisdiction to do so, absent some apparent error as to the applicable principles or rules of law or absent a finding that is unreasonable to review findings of the courts below under s. 24(2) of the Charter and substitute its opinion of the matter . . .<sup>107</sup>

Lamer J. reiterated this position in *Grefe*<sup>108</sup>, and in *R. v. Mellenthin*<sup>109</sup> the Supreme Court held that the Alberta Court of Appeal erred in overturning a decision to exclude when it did not appear that "the trial judge made either an unreasonable finding of fact or an error in law." In *R. v. Chaisson* Fish J., writing for the Supreme Court, said:

We are all of the view that the Court of Appeal erred in concluding as it did. With respect, we are satisfied that the trial judge was entitled, on the facts as he found them, to conclude that the appellant's rights under ss. 8, 9 and 10(b) of the *Charter* had been violated. We are satisfied as well that the trial judge committed no reviewable error in concluding that the cumulative effect of these violations warranted

---

<sup>106</sup>*Buhay*, note 24, at para. 72.

<sup>107</sup> [1989] 1 S.C.R. 93 at p. 98.

<sup>108</sup> *Grefe*, note 92, at p. 783.

<sup>109</sup> [1992] 3 S.C.R. 615 at p. 626.

exclusion of the impugned evidence under s. 24(2) of the *Charter*. In reaching a contrary conclusion, the Court of Appeal impermissibly recast the issues by substituting its own findings of fact for those of the trial judge.<sup>110</sup>

In *Grant* the majority said: “Where the trial judge has considered the proper factors, appellate courts should accord considerable deference to his or her ultimate determination.”<sup>111</sup> Deference is especially due when the findings of the trial judge are based on an appreciation of the testimony of witnesses.<sup>112</sup> This is particularly true in respect to the assessment of the seriousness of the *Charter* breach which depends on factors generally established through testimony such a good faith and the existence of a situation of necessity or urgency.<sup>113</sup>

On the other hand, Iacobucci J., writing for the majority in *Borden*<sup>114</sup>, points out a Court of Appeal does not err by conducting the s. 24(2) analysis anew when it is clear that the trial judge, due to some error, has approached the matter from a fundamentally different standpoint than he or she should have. It is important, after all, that the accused have the impugned evidence scrutinized in light of the proper principles. In *Harrison*, the Supreme Court allowed an appeal where the trial judge had

---

<sup>110</sup> [2006] 1 S.C.R. 415 at para. 7.

<sup>111</sup> *Grant*, note 2, at para. 86.

<sup>112</sup> *R. v. Mann*, [2004] 3 S.C.R. 59 at para.59.

<sup>113</sup> *Buhay*, note 24, at para. 46; *Mann*, note 112, at para.59.

<sup>114</sup> [1994] 3 S.C.R. 145 at pp. 167-168.

placed undue emphasis on factors related to the third line of inquiry set forth in *Grant* while neglecting the importance of the other factors.<sup>115</sup>

A trial judge's decision should not be set aside just because it is brief, poorly expressed or does not contain a review of all the evidence.<sup>116</sup> That said, deficiencies in the scope of reasons must not be such as to foreclose meaningful appellate review.<sup>117</sup> In *R. v. Feeney* the Supreme Court indicated that little deference would be paid to brief conclusory findings by courts below.<sup>118</sup>

### **Curative Provision**

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

... if the evidence in question should have been excluded under s. 24(2) of the Charter because its admission would put the administration of justice into disrepute, then generally its admission was such as to amount to a substantial wrong or miscarriage of justice thereby putting matters beyond the reach of s. 686(1)(b)(iii) which is available to cure errors of law where no substantial wrong or miscarriage of justice results.<sup>119</sup>

---

<sup>115</sup> *Harrison*, note 72, at para. 37.

<sup>116</sup> *Buhay*, note 24, at paras. 54-55.

<sup>117</sup> *Buhay*, note 24, at paras. 54-55.

<sup>118</sup> [1997] 2 S.C.R. 13 at para. 84.

<sup>119</sup> [1991] 3 S.C.R. 24 at p. 46.

Iacobucci J. went on to hold that s-s. 686(1)(b)(iii) could not cure the defect in that particular case, but he did allow that there might be other circumstances where the curative provision could apply notwithstanding that evidence should have been excluded under s. s. 24(2).<sup>120</sup> Later, in *Burlingham*, Iacobucci J., writing for the majority, indicated that the "small" exception allowed for in *Elshaw* should be limited to cases in which it can be shown beyond any reasonable doubt that the excluded evidence did not contribute at all to the original verdict.<sup>121</sup> He further stated in *Burlingham* that appellate courts should not retry cases to assess the worth of residual evidence after improperly adduced evidence has been extracted. The proper approach in such cases is to order a new trial rather than invoking s. 686(1)(b)(iii).<sup>122</sup> Another comment from the Supreme Court on whether the wrongful admission of evidence can be cured by s.686(1)(b)(iii) proviso comes from *R. v. Fliss* where Bennie J., writing for the majority, said:

The message of 24(2) of the *Charter* is that even if admission of the evidence obtained in breach of the *Charter* would not create a substantial wrong or miscarriage of justice to a particular accused, the Court must nevertheless consider whether 'having regard to all the circumstances, the admission of it in the proceeding would bring the administration of justice into disrepute.'<sup>123</sup>

---

<sup>120</sup> *Elshaw*, note 119, at p.

<sup>121</sup> *Burlingham*, note 32, at p. 243.

<sup>122</sup> *Burlingham*, note 32, at pp. 243-4.

<sup>123</sup> [2002] 1 S.C.R. 535 at para. 73.

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

### Section One

*Charter* rights are not absolute. According to s.1 of the *Charter* they are subject to “such reasonable limitations prescribed by law as can be demonstrably justified in a free and democratic society.” Police actions and investigatory procedures prescribed by law that are otherwise incompatible with *Charter* rights but meet the standard of s.1 do not engage s. 24(2) because there really is no *Charter* violation. For example, although a person required to supply a breath sample for roadside screening is “detained” within the meaning of s. 10(b) of the *Charter*, there is no right to counsel because s. 254(2) of the *Criminal Code* constitutes a justifiable limit within the meaning of s. 1.<sup>124</sup>

### Exclusion of Evidence under 24(1) or Common Law

Subsection 24(2) does not operate unless there has been a *Charter* breach.<sup>125</sup> However, the Supreme Court has held that a trial judge has power to exclude evidence obtained without violating the *Charter* but which, if admitted, would undermine the accused's constitutional right to a fair trial or not to be deprived of his

---

<sup>124</sup> *R. v. Thomsen*, [1988] 1 S.C.R. 640, also see: *R. v. Hufsky*, [1988] 1 S.C.R. 621; *R. v. Ladouceur*, [1990] 1 S.C.R. 1257; and *R. v. Obanski*; *R. v. Elias*, note 87.

<sup>125</sup> *R. v. Terry*, [1996] 2 S.C.R. 207 at para. 23.

liberty in a manner contrary to the principles of fundamental justice.<sup>126</sup> The source of this power is found in either the common law or s. 24(1) of the *Charter*.

In *R. v. Harrer*, La Forest J., writing for seven members of the Court, held evidence, even though not obtained in a manner which violated the *Charter*, could nonetheless be rejected if it was necessary to do so in order to provide the accused a fair trial as guaranteed by s. 11(d) or to protect his or her right under s. 7 not to have their liberty interests violated in a manner contrary to the principles of fundamental justice. In such a case, La Forest J. would not reject the evidence under s. 24(1) or s. 24(2), but "on the basis of the trial judge's duty, now constitutionalized by the enshrinement of a fair trial in the *Charter*, to exercise properly his or her judicial discretion to exclude evidence that would result in an unfair trial."<sup>127</sup> McLachlin J., as she then was, (Major J. concurring), on the other hand, acknowledged that evidence obtained in breach of the *Charter* could only be excluded under s. 24(2), but she would use either the common law or s. 24(1) to reject evidence that could undermine the accused's right to a fair trial, even though it was not obtained in breach of the *Charter*.<sup>128</sup> Subsequently, in *R. v. White*<sup>129</sup>, the majority of the Supreme Court sided with Madame Justice McLachlin's position in *Harrer*. They affirmed that evidence, although not obtained in a manner that violated *Charter* rights, but which, if admitted, would violate an accused's *Charter*

---

<sup>126</sup> *R. v. Corbett*, [1988] 1 S.C.R. 670; *R. v. Potvin*, [1989] 1 S.C.R. 525; *R. v. Harrer*, [1995] 3 S.C.R. 562; *R. v. Terry*, note 125, at para. 25; *R. v. White*, [1999] 2 S.C.R. 417 at para.89; *R. v. Hape*, note 99, at paras.108-112.

<sup>127</sup> *Harrer*, note 126, at pp. 205-6.

<sup>128</sup> *Harrier*, note 126, at p. 211.

<sup>129</sup> *White*, note 125.

rights, may be excluded pursuant to either the common law or s. 24(1).<sup>130</sup> In *Buhay* Arbour J. writing for a full nine-member panel, indicates trial judges have a common law discretion to exclude even non-conscriptive evidence obtained without violating *Charter* rights when its admission would result in an unfair trial.<sup>131</sup>

In *Hape*, LaBel J. commented on the use of ss.7 and 11(d) of the *Charter* to exclude evidence gathered outside Canada. He made the following points:

- (1) if evidence is gathered in a way that fails to meet certain minimum standards, its admission at trial in Canada may, regardless of where it was obtained, constitute a violation of either or both sections 11(d) and 7 of the *Charter*;
- (2) judges have the discretion to exclude evidence that would result in an unfair trial;
- (3) it does not necessarily follow that a trial will be unfair or that the principles of fundamental justice will be violated if evidence obtained in circumstances that do not meet *Charter* standards is admitted;
- (4) the circumstances must be considered in their entirety to determine whether admission of the evidence would render a Canadian trial unfair;
- (5) some of the circumstances to be considered are: reliability, whether abusive conduct or torture was involved, lawfulness of the investigative activity in the territory where the evidence was obtained, the expectations of the accused in the place where the evidence was obtained, whether the evidence was

---

<sup>130</sup> *White*, note 126, at para. 89.

<sup>131</sup> *Buhay*, note 24, at para. 40.

gathered in a way that complied with the basic standards of all free and democratic societies<sup>132</sup>.

---

<sup>132</sup> *Hape*, note 99, at paras. 108-111.