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**IMPROPERLY OR ILLEGALLY  
OBTAINED EVIDENCE:  
THE EXCLUSIONARY EVIDENCE RULE  
IN CANADA**

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# Improperly or Illegally Obtained Evidence: The Exclusionary Evidence Rule in Canada

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## **I. Introduction**

The exclusion of illegally or improperly obtained evidence is a powerful remedy for the violation of constitutional rights. Such an enforcement mechanism enhances the constitution as a whole by demonstrating that the rights it guarantees are important and must be effectively protected. In Canada, the *Charter of Rights and Freedoms* contains a remedial section, section 24(2)<sup>1</sup>. This section allows evidence obtained in violation of an accused person's *Charter* rights to be excluded from the proceedings if it is found that the admission of that evidence would bring the administration of justice into disrepute. The exclusionary rule is not without controversy in Canada. Whether and in what circumstances courts should exclude illegally or improperly obtained evidence is one of the most hotly contested questions in criminal procedure and evidence law.

The Supreme Court of Canada has developed a significant amount of jurisprudence in which principles have been expanded to guide trial judges in deciding when to exclude evidence pursuant to the *Charter*. The case law has provoked much discussion, criticism and suggestions for reform. The exclusionary rule attracts controversy because some see the remedy of exclusion of evidence as vindicating the rule of law, while others see it as undermining it.

The exclusionary rule has been described as a balance between the right to a fair trial and the interests of the community in convicting offenders. But where exactly is that balance is subject to debate. Should the exclusionary rule provide a clear message to law enforcement officers that illegally methods of obtaining evidence will not be condoned? Or should any evidence be allowed to try to get at the truth notwithstanding how it was obtained? The public is concerned about letting guilty people free into their community. But at the same time the public is also interested in promoting the rule of law.

This paper will include an exploration of the underlying basis for such a remedy provision in Canada, including a brief description of our international obligations to ensure everyone has the right to an effective remedy. The application of the exclusionary rule by the courts in Canada will be discussed through a description of the more important case law of the Supreme Court of Canada. Finally, some of the main critiques of the case law as well as some suggestions for reform will be examined.

## **II. Underlying Basis for a Remedy Provision**

### **1. Right to a remedy under international law**

International human rights instruments recognize the importance of ensuring the existence of effective remedies when the State violates individuals' fundamental rights and freedoms. States must not only "respect" human rights but must also ensure the

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<sup>1</sup> *Canadian Charter of Rights and Freedoms*, enacted as Schedule B to the Canada Act 1982 (U.K.) 1982, c. 11, which came into force on 17 April 1982.

“enjoyment” of these rights to all individuals under their jurisdiction.<sup>2</sup> The right to an effective remedy, along with the right of access to an impartial tribunal and the right to a fair hearing, are to guarantee access to justice in accordance with the rule of law. These long-established rights are inherent in all legal systems which respect the rule of law and are seen as being part of effective legal protection.

Article 8 of the *Universal Declaration of Human Rights* underlines the sweeping customary requirement to ensure enjoyment of rights:

“Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution of by law”.<sup>3</sup>

The *International Covenant on Civil and Political Rights (ICCPR)* restricts in article 2(3) the right to an effective remedy at law to a redress only of the rights and freedoms recognised by the Covenant itself.<sup>4</sup> It is generally left up to the State Parties concerned to choose the method of implementation in their countries within the framework of the Covenant.<sup>5</sup> But article 2(3) requires direct observance of its provisions without regard to national laws or constitutions. Article 14 of the *ICCPR* also recognizes the right of access to courts.<sup>6</sup>

It seems from many State reports that this right is often not observed or has been insufficiently guaranteed by domestic legislation.<sup>7</sup> The *ICCPR* does not specifically deal with what kind of remedies should be available. A review of other international instruments does not provide much more detail. However the *Guidelines on the Role of Prosecutors* provide for the exclusion of evidence elicited as a result of torture or other coercion, including confessions by the accused.<sup>8</sup>

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<sup>2</sup> *International Covenant on Civil and Political Rights*, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976.

Article 2 (1) Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, political or other opinion, national or social origin, property, birth or other status.

Art 2 (2) Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognised in the present Covenant.

<sup>3</sup> *Universal Declaration of Human Rights*, G.A. res. 217A (III), 10 December 1948.

<sup>4</sup> *ICCPR* Art 2 (3) Each State Party to the present Covenant undertakes: (a) to ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) to ensure that the competent authorities shall enforce such remedies when granted.

<sup>5</sup> Human Rights Committee, General Comment No. 3 “Implementation at the national level (Art 2)” 29/07/81.

<sup>6</sup> Article 14(1). All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

<sup>7</sup> Human Rights Committee, General Comment No. 2 “Reporting Guidelines:” 28/07/81.

<sup>8</sup> *Guidelines on the Role of Prosecutors*, Eighth U.N. Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990, U.N. Doc. A/CONF.144/28/Rev.1 at 189 (1990).

Art. 16: When prosecutors come into possession of evidence against suspects that they know or believe on reasonable grounds was obtained through recourse to unlawful methods, which constitute a grave violation of the suspect’s human rights, especially involving torture or cruel, inhuman or degrading treatment or punishment, or other abuses of human rights, they shall refuse to use such evidence against anyone other than those who used such methods.

The *Rome Statute of the International Criminal Court* reflects the most recent development under international law. The accompanying document, the *Rules of Procedure and Evidence*, was adopted by consensus and entered into force in 2002. This document represents the views of States from every region and principle legal systems of the world. Article 69 of the *Rome Statute* provides that the Court may rule on the relevance or admissibility of any evidence, taking into account the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness.<sup>9</sup> It further provides that evidence obtained by means of a violation of the *Rome Statute* or internationally recognizes human rights shall not be admissible if the violation casts “substantial doubt on the reliability of the evidence or the admission of the evidence would be antiethical to and would seriously damage the integrity of the proceedings”.<sup>10</sup> It is the International Criminal Court that will determine admissibility and relevance and when doing so will not be bound by the national laws of the State where the evidence is collected.<sup>11</sup>

## 2. Drafting of the Canadian Charter

Prior to the adoption of the *Canadian Charter on Rights in Freedoms* in 1982, the common law dealt with illegally or improperly obtained evidence in a very relaxed manner.<sup>12</sup> Basically, there was no rule of law or judicial discretion to exclude evidence because of the improper or illegal method by which it was obtained.<sup>13</sup> The general rule of admissibility was that all evidence that was relevant, probative and reliable would be admitted in court. This resulted in a bias favoring admissibility.

At common law, judges had discretion to exclude evidence where its probative value was outweighed by its prejudicial effect.<sup>14</sup> In examining this balancing of probative value and prejudicial effect, the focus was on reliability. The actual “manner” in which the evidence was obtained was not seen to be a relevant factor affecting the issue of “reliability” of the evidence. The only exceptions were those related to involuntary statements made to persons in authority, illegal wire taps and a narrow judicial discretion to exclude evidence of negligible probative value compared to its prejudicial effect on the accused.<sup>15</sup>

As one commentator puts it, the common law meant “effectively the judges turned a blind eye to police misconduct”.<sup>16</sup> His was not the only criticism of the common law position. Some of the judges of the Supreme Court of Canada felt that there should be a balancing of the “competing interests by weighing the social interest in the particular case against the gravity or character of the invasion”<sup>17</sup> and some suggested that exclusion

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<sup>9</sup> *Rome Statute of the International Criminal Court*, U.N. Doc. A/183/9<sup>th</sup>, Article 69(4).

<sup>10</sup> *Rome Statute*, article 69(7).

<sup>11</sup> *Rome Statute*, article 69(8).

<sup>12</sup> *Canadian Charter of Rights and Freedoms*, enacted as Schedule B to the Canada Act 1982 (U.K.) 1982, c. 11, which came into force on 17 April 1982.

<sup>13</sup> Anthony F. Sheppard, *Evidence, Revised Edition* (1996: Carswell).

<sup>14</sup> Adam Parachin describes that it was in the early part of the twentieth century when this general discretion was developed in common law as discussed in Adam Parachin “*Compromising on the Compromise: The Supreme Court and Section 24(2) of the Charter*” (2000) 10 Windsor Review of Legal and Social Issues 7.

<sup>15</sup> Gerard Mitchell, “*The Supreme Court of Canada on Excluding Evidence Under Section 24(2) of the Charter*” (2005) found at [www.gov.pe.ca/photos/original/section\\_24.pdf](http://www.gov.pe.ca/photos/original/section_24.pdf).

<sup>16</sup> Parachin, *supra* note 14.

<sup>17</sup> Justice Lamer in a dissenting view in *R v Hogan* [1975] 2 S.C.R. 574 at 595.

should be made if admission of evidence “brings the administration of justice into disrepute”<sup>18</sup>. The Law Reform Commission of Canada weighed in on this debate in 1975 and recommended amending the *Canadian Evidence Act* to include a discretionary exclusionary rule.<sup>19</sup>

A stinging criticism came from the Macdonald Commission in 1981 which found:

“The files of the [Royal Canadian Mounted Police (RCMP)] disclose that there is a significantly general attitude that, since the courts of Canada have held that illegally obtained evidence is admissible, this means that the judges do not condemn unlawful investigative conduct, and this in turn is taken as implied authorization of unlawful investigative conduct if the result is the obtaining of evidence relevant to an issue before the Court.... It can now be said, at least in this country and in regard to the RCMP, that the attitude of members of that Force, as expounded by its most senior officers, is to regard the absence of critical comment by the judiciary as tacit approval of forms of conduct that might be unlawful.”<sup>20</sup>

This finding came on the eve of the adoption of the *Charter*.

The *Charter* takes a middle ground between the past common law approach which had an inclusionary bias for reliable evidence no matter how it was obtained and the perceived American position of the next-to-automatic rule of exclusion. Section 24(2) of the *Charter* reads:

“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 circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.”<sup>21</sup>

Therefore if, in the course of a criminal investigation, the police violate the accused’s *Charter* rights to obtain evidence, the accused may have a remedy against the police and the evidence may be inadmissible in a proceeding against him or her. This could also mean that despite having obtained the evidence in a manner violating the accused’s *Charter* rights, the evidence may be admissible if the court is of the opinion that the admission would not bring the administration of justice into disrepute.

Everyone, including a criminal suspect or an accused is entitled to the protection of the rights contained in the *Charter*. These include: the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice<sup>22</sup>; to be secure against unreasonable search and seizure<sup>23</sup>; not to be arbitrarily detained or imprisoned<sup>24</sup>; to be informed promptly on arrest or detention of the reasons thereof<sup>25</sup>; to retain and instruct counsel on arrest or detention, without delay and

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<sup>18</sup> Justice Lamer in *R v Rothman* [1981] 1 S.C.R. 640 at 698.

<sup>19</sup> Parachin, *supra* note 14.

<sup>20</sup> Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, (Macdonald Commission Report) as cited in Parachin, *supra* note 14 at page 21.

<sup>21</sup> Subsection 24(1) provides: “Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.”

<sup>22</sup> *Charter*, section 7.

<sup>23</sup> *Charter*, section 8.

<sup>24</sup> *Charter*, section 9.

<sup>25</sup> *Charter*, section 10(a).

to be informed of that right<sup>26</sup>; to be informed of the specific offence charged without unreasonable delay<sup>27</sup>; and not to be subject to any cruel and unusual treatment or punishment<sup>28</sup>.

As summarized by the Supreme Court of Canada:

“The Charter introduced a marked change in philosophy with respect to the reception of improperly or illegally obtained evidence. Section 24(2) stipulates that evidence obtained in violation of rights may be excluded if it would tend to bring the administration of justice into disrepute, regardless of how probative it may be. No longer is reliability determinative. The Charter has made the rights of the individual and the fairness and integrity of the judicial system paramount.”<sup>29</sup>

Therefore such evidence could be excluded regardless of its probative value, importance to the prosecution or reliability.

### 3. Differing theories behind the exclusionary rule

The liberalism theory has been used by some to frame and understand the discussion around section 24(2).<sup>30</sup> This theory views the individual and the State as two opposing forces with the constitution being seen as preserving the autonomy of the individual and restricting the powerful State. Under the rubric of the liberalism theory, there is tension between the due process model, which emphasis individual rights protections, and the crime control model, which emphasizes efficiency and the truth-seeking process in the administration of justice.<sup>31</sup> Under the crime control model, there is a bias towards inclusion as long as the evidence is considered reliable as this furthers the truth-seeking function of the justice system. Under the due process model, the exclusion of evidence is seen as a primary tool for protection of individual rights.

In Canada there is a balance but it appears to be weighed in favor of the due process model. One commentator has said that the Supreme Court of Canada’s approach to the exclusionary rule with its basis in legal liberalism has created a justice system which truth-seeking has taken second place to the examination of police behaviour.<sup>32</sup> As such, the emphasis is on the rights of the accused and not on the interests of the community or the victims of crime. This commentator further adds that “the impact of this theory is to elevate the protection of individual privacy to a position of supremacy”.<sup>33</sup> However, other commentators raise their concerns that recent jurisprudence place more emphasis on the view of a trial as a search for truth as opposed to an independent testing of facts to the standard as set out in the *Charter*.<sup>34</sup> This, they argue has had an effect of limiting the scope of the exclusionary rule.

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<sup>26</sup> *Charter*, section 10(b).

<sup>27</sup> *Charter*, section 11(a).

<sup>28</sup> *Charter*, section 12.

<sup>29</sup> As stated by Justice McLachlin in *R v Hebert* [1990] 2 S.C.R. 151 at 178.

<sup>30</sup> Julianne Parfett “*A Triumph of Liberalism: The Supreme Court of Canada and the Exclusion of Evidence*” (2002) 40 *Alberta Law Review* 299.

<sup>31</sup> Herbert Packer’s legal theory which incorporates both the due process model and the crime control model is described in Parfett, *supra* note 30.

<sup>32</sup> Parfett, *supra* note 30.

<sup>33</sup> Parfett, *supra* note 30.

<sup>34</sup> Keith Kilback and Michael Tochor “*Searching for Truth but Missing the Point*” (2002) 40 *Alberta Law Review* 333.

The Supreme Court of Canada has discussed and endorsed, to varying degrees, a number of purposes behind section 24(2). These include: providing compensation to victims of violation; deterring constitutional violations; and avoiding judicial condonation of police misconduct. So, one purpose is that exclusion of evidence can place the accused in a position of where he or she would have been in “but for” the violation. This then provides compensation to the victim, who in this case is the accused person, whose rights have been violated. However the exclusion of evidence may not adequately address the harm caused by the invasion of privacy or dignity.<sup>35</sup> Others argue that the exclusionary remedy would provide too much compensation to the accused, the remedy is seen as grossly disproportionate to the wrong.<sup>36</sup> This view argues that there may be other ways to ensure a remedy such as monetary compensation.

A second purpose deals with deterrence of future constitutional violations. As stated in the Macdonald Commission report, without exclusion of the improper or illegally obtained evidence this may be seen as tacit approval of police misconduct by the courts.<sup>37</sup> One commentator concludes that the only worthwhile theoretical reason to exclude evidence under section 24(2) is to deter constitutional violations.<sup>38</sup> Such a theory balances what he sees as the two conflicting purposes of section 24(2): encouraging constitutional compliance and convicting the factually guilty. He argues that such a rule should try to maximize deterrence, meaning that evidence should only be excluded when the benefit of increased deterrence outweighs the cost of lost convictions. He explains that this would be a better way to balance the objectives of the criminal justice system of rights protection and truth seeking. Others argue that deterrence does not justify exclusion since the social costs of lost convictions is too high and that there are other methods to deter which does not involve excluding “reliable” evidence and the acquittal of “factually guilty people”.<sup>39</sup>

Empirical evidence from the United States shows fairly definitely that exclusion has a substantial deterrent effect and causes few “lost convictions”.<sup>40</sup> The deterrent effect is limited by a number of factors. Legal sanctions can only influence the police when they understand the law, bring that understanding to bear on their conduct and perceive the costs of non-compliance outweighs the benefits. Deterrence may not be so effective if some constitutional rules governing investigative behaviour are too complex for police to understand.<sup>41</sup>

The third purpose is to maintain the integrity of the legal system and avoid judicial condonation of police misconduct. Some cases have clearly stated that the purpose for

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<sup>35</sup> Parfett, *supra* note 30.

<sup>36</sup> Steven Penney “*Taking Deterrence Seriously: Excluding Unconstitutionally Obtained Evidence under Section 24(2) of the Charter*” (2004) 49 McGill Law Journal 105.

<sup>37</sup> See note 20.

<sup>38</sup> Penney, *supra* note 36.

<sup>39</sup> Richard Fraser and Jennifer Addison “*What’s Truth Got to Do with It? The Supreme Court of Canada and Section 24(2)*” (2004) 29 Queen’s Law Journal 823.

<sup>40</sup> As discussed in Penney, *supra* note 36. He cites the dramatic increase in the use of search warrants after *Mapp v Ohio* as well as police surveys which show that officials believe that the rules exert significant deterrent force and that they behave accordingly. He also refers to a number of American studies which have found that the proportion of convictions lost due to evidentiary exclusion is very low – between 1-2%.

<sup>41</sup> Penney, *supra* note 36.

such an exclusionary power would be to protect the reputations of the criminal justice system, rather than to repudiate police misconduct.<sup>42</sup> Some commentators agree with this position stating that it is not the police who suffer when the evidence is excluded due to their actions but rather the victim and the community.<sup>43</sup> Others dismiss this reason since they feel that the public is more concerned in cases where the evidence is excluded rather than when it is admitted.<sup>44</sup> This view argues that the public does not see admitting such evidence as condoning police misconduct or that excluding such evidence would prevent future misconduct, but rather that there is no reason to exclude evidence that is reliable to show someone's guilt. However, despite the various debates regarding the underlying purpose or rationale, the Supreme Court of Canada has endorsed all as being legitimate purposes underlying the exclusionary rule in Canada.

### III. Situation in Canada – the jurisprudence of the Supreme Court of Canada

#### 1. Some preliminary comments

Only courts of competent jurisdiction have the authority to grant remedies under section 24 of the *Charter*.<sup>45</sup> Courts must have jurisdiction over the person, over the subject matter; and to grant the remedy. Regarding the last criteria, the test is whether the court is suited by its function and structure to grant the remedy.<sup>46</sup> Trial courts are courts of competent jurisdiction whereas preliminary inquiry hearings and National Parole Boards have been found not to be.<sup>47</sup>

For the defence to seek the right to an effective remedy such as exclusion of illegally or improperly obtained evidence, the defence must prove that the accused's rights or freedoms have been infringed or denied and that the evidence was obtained in a manner that infringed or denied that right or freedom. The defence bears the initial burden of presenting evidence and the burden of persuading the judge, on the civil standard of balance of probabilities that a violation of the accused's *Charter* rights occurred. Generally the application for exclusion is made during trial since in the Canadian criminal justice system, evidence is not usually challenged until it is actually tendered. A claim for exclusion of evidence under section 24(2) must be based on a violation of the accused's own *Charter* rights and not on a violation of the rights of a third party.<sup>48</sup>

There must be some connection or relationship between the violation and the evidence which is sought to be excluded. It was felt that the causal requirement was too strict, so the Supreme Court of Canada opted for temporal and tactical linkage between the evidence gathered and the *Charter* violation as being a broader test.<sup>49</sup> As the Court has

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<sup>42</sup> *R v Rothman*, *supra* note 18.

<sup>43</sup> Parfett, *supra* note 30.

<sup>44</sup> Penney, *supra* note 36.

<sup>45</sup> *R v Hynes* [2001] 3 S.C.R. 623.

<sup>46</sup> *Ibid.*

<sup>47</sup> The preliminary inquiry hearing issue was discussed in *R v Hynes*, *supra* note 45 and the National Parole Board decision was found in *Mooring v Canada (National Parole Board)* [1996] 1 S.C.R. 75.

<sup>48</sup> *R v Wijesinha* 42 C.R. (4<sup>th</sup>) 1.

<sup>49</sup> *R v Grant* [1993] 3 S.C.R. 223.

stated: “generally speaking, so long as it is not too remotely connected with the violation, all evidence obtained as part of the “chain of events” involving the *Charter* breach will fall within the scope of s. 24(2)”.<sup>50</sup> This could mean that evidence gathered from a lawful search warrant might be excluded if there was a sufficient temporal and tactical connection to a *Charter* violation such as a previous warrantless search. The courts have also discussed situations where the evidence was just too remote to the *Charter* breach and such analysis needs to be done on a case by case basis.<sup>51</sup>

The Supreme Court of Canada has provided guidelines to assist judges in deciding whether to exclude or admit evidence obtained in breach of the *Charter* through its jurisprudence. The Court has also developed various presumptions to guide judges in deciding whether evidence was obtained by a *Charter* violation and whether admission of the evidence would bring the administration of justice into disrepute.

## 2. The *Collins* framework

The first opportunity the Supreme Court of Canada had to analyze section 24(2) and provide guidance to trial judges on its application was in 1987 in the case of *R v Collins*.<sup>52</sup> The RCMP Drug Squad had Ruby Collins under surveillance. One of the police officers approached her in a bar, identifying himself as a police officer, grabbed her throat and pulled her to the floor. The officer saw her clutching something which turned out to be a balloon containing heroin. Ms. Collins was arrested for possession of narcotics. At trial, the defence argued that the search took place without a warrant and reasonable grounds and therefore violated her rights to be free of unreasonable search and seizure according to section 8 of the *Charter*. While the trial judge agreed that there was a violation of the accused’s *Charter* rights, he admitted the evidence after having regard to all the circumstances and she was convicted. The Court of Appeal upheld the conviction but this was overturned at the Supreme Court of Canada.

The Supreme Court of Canada listed a number of factors that should be considered and balanced when considering “all the circumstances”. These factors included: what kind of evidence was obtained; what *Charter* right was infringed; was the *Charter* violation serious or was it of a merely technical nature; was it deliberate, willful or flagrant, or was it inadvertent or committed in good faith; did it occur in circumstances of urgency or necessity; were there other investigatory techniques available; would the evidence have been obtained in any event; is the offence serious; is the evidence essential to substantiate the charge; and are other remedies available.<sup>53</sup>

The Court grouped these factors in a three part approach to the consideration of evidence under section 24(2):

- first, factors that go to determining the effect on the fairness of the trial in admitting the evidence;

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<sup>50</sup> *R v Bartle* [1994] 3 S.C.R. 173.

<sup>51</sup> *R v Goldhart* [1996] 2 S.C.R. 463.

<sup>52</sup> *R v Collins* [1987] 1 S.C.R. 265.

<sup>53</sup> *Ibid*, at page 283 and 284.

- second, factors that go to establishing the seriousness of the *Charter* violation; and
- third, factors that go to determining the effects to the repute of the administration of justice in admitting the evidence.

Regarding trial fairness, the Court stated that: “if the admission of the evidence in some way affects the fairness of the trial, then the admission of the evidence would tend to bring the administration of justice into disrepute and, subject to a consideration of the other factors, the evidence generally should be excluded.”<sup>54</sup> In analyzing trial fairness, there is to be an examination of the nature of the evidence obtained as a result of the violation and the nature of the right violated. The Court made a distinction between the nature of the evidence - real evidence and self-incriminating evidence:

“Real evidence that was obtained in a manner that violated the Charter will rarely operate unfairly for that reason alone. The real evidence existed irrespective of the violation of the Charter and its use does not render the trial unfair. However the situation is very different with respect to cases, where, after a violation of the Charter, the accused is conscripted against himself through a confession or other evidence emanating from him. The use of such evidence would render the trial unfair, for it did not exist prior to the violation and it strikes at one of the fundamental tenets of a fair trial, the right against self-incrimination. Such evidence will generally arise in the context of an infringement of the right to counsel.... The use of self-incriminating evidence obtained following a denial of the right to counsel will generally go to the very fairness of the trial and should generally be excluded.”<sup>55</sup>

Fair trial has been defined as one which satisfies the public interest in getting at the truth while preserving basic procedural fairness to the accused.<sup>56</sup>

The issue of the seriousness of the *Charter* violation is to be assessed in the light of whether “it was committed in good faith, or was inadvertent or of a merely technical nature, or whether it was deliberate, willful or flagrant”.<sup>57</sup> The Court should also look to see whether there was urgency or necessity to prevent the loss or destruction of the evidence. If the evidence could have been obtained without the violation to the *Charter* this tends to make the violation more serious.

Regarding whether the exclusion of evidence “would bring the administrative justice into disrepute”, the first thing the Court did in the *Collins* case was to substitute “could” for “would” based on the French translation of the *Charter*.<sup>58</sup> Some say this effectively lowers the threshold for exclusion.<sup>59</sup> In exploring whether the exclusion of evidence could bring the administration of justice into disrepute, the Court held that if the evidence was essential to substantiate the charge and thus result in the acquittal of the accused because of a trivial breach of the *Charter*, then there would be disrepute. Evidence is likely to be excluded if the offence is less serious. However, if the admission of evidence

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<sup>54</sup> *Ibid* at page 285.

<sup>55</sup> *Ibid*, at page 285

<sup>56</sup> *R v Harrer* [1995] 3 S.C.R. 562.

<sup>57</sup> *Collins*, *supra* note 52 at page 285.

<sup>58</sup> The English version of the Charter s. 24(2) provides for exclusion where the tainted evidence “would” bring the administration of justice into disrepute. The French text provides for 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”.

<sup>59</sup> Parfett, *supra* note 30.

would result in an unfair trial, then the seriousness of the offence could not render the evidence admissible.

The Court determined that the public's perception of the administration of justice was not to be the standard by which the court would judge its actions. Rather the standard would be that of a reasonable man, dispassionate and fully apprised of the circumstances of the case, such as the judges themselves. The Court noted the dangers of taking opinion polls or surveys to reflect the community's view and felt that the determination of the community's interest should be left with the courts. The Court held that: "the *Charter* is designed to protect the accused from the majority, so the enforcement of the *Charter* must not be left to that majority".<sup>60</sup> However the Court must consider the long term values of the local community and how the regular admission of such evidence would have on the repute of the administration of justice.

### 3. Post-*Collins* application

In the immediate post-*Collins* period, the Supreme Court of Canada applied the *Collins* framework following the multi-factor approach. However certain trends became apparent. One such trend was the way that trial fairness was analyzed, with focus only on the nature of the evidence involved, whether it was "real" or "self-incriminating" evidence.<sup>61</sup> The general rule was that the admission of real evidence would rarely render the trial unfair whereas the admission of self-incriminating evidence would undermine the fairness of the trial.<sup>62</sup>

However this was not always the case and the courts did look at the other factors in balancing whether to exclude or admit the illegally or improperly obtained evidence. For example, in cases where the accused had given breath samples in drinking and driving cases where their right to counsel had been infringed, the courts admitted the evidence even though it was in the category of self-incriminating evidence.<sup>63</sup> In examining all the circumstances, the court was of the opinion that the administration of justice would not be brought into disrepute if the evidence was admitted.

Other cases also applied the factors as set out in *Collins*. In one case the Court found that where the police seized a blood sample from the accused in violation of his section 8 *Charter* rights, this evidence fell into the category of self-incriminating evidence since it was to conscript the accused himself.<sup>64</sup> The Court excluded the evidence because it went to trial fairness as well as considered the seriousness of the breach. In another case, the Court held that line-up evidence obtained in violation of the accused's right to counsel was not real evidence but rather evidence emanating from the accused's participation and therefore self-incriminating evidence that goes to the fairness of the trial.<sup>65</sup> The Court also found that the breach was serious and reviewed the circumstances, including the bad

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<sup>60</sup> *Collins*, *supra* note 52 at page 282. This statement was subsequently reaffirmed by the majority in *R v Burlingham* [1995] 2 S.C.R. 206.

<sup>61</sup> As defined in *Collins*, self-incriminating evidence had been defined as confessions or other evidence emanating from the accused.

<sup>62</sup> *Parachin*, *supra* note 14.

<sup>63</sup> *R v Tremblay* [1987] 2 S.C.R. 435 and *R v Mohl* [1989] 1 S.C.R. 1389.

<sup>64</sup> *Pohoretsky v The Queen* [1987] 1 S.C.R. 945.

<sup>65</sup> *R v Ross* [1989] 1 S.C.R. 3.

faith of the police, lack of urgency to conduct the line-up and the fact that the accused was a youth. In another case where evidence was obtained in violation of the accused's right to counsel, the Court viewed factors such as inadvertence of the breach and the fact that there was no mistreatment of the accused, to determine that the exclusion of evidence rather than its admission would tend to bring the administration of justice into disrepute.<sup>66</sup>

#### **4. *Hebert* – movement towards automatic exclusion**

In the *Hebert* case, the Court held that once it is determined that the admission of the evidence in question would undermine trial fairness, there is no need to consider the other factors of *Collins*.<sup>67</sup> In that case, Mr. Hebert had been arrested for robbery and informed of his right to counsel. He refused to make a statement to the police after consulting with a lawyer. He later made an inculpatory statement to an undercover police officer placed in his cell. The trial judge found that the accused's right to counsel and right to remain silent had been violated and excluded his statements, resulting in his acquittal. The Supreme Court of Canada agreed with the exclusion of the statements.

This case discusses the fact that the evidence was self-incriminatory, the reception of which would render the trial unfair. The accused would be deprived of his presumption of innocence and would be placed in the position of having to take the stand if he wished to counter the damaging effects of the confession, which would be contrary to the privilege against self-incrimination. The Court expands on why admitting conscriptive evidence gathered by violations of the right to counsel would affect trial fairness in *R v Bartle*.<sup>68</sup> When there is a violation of the right to counsel this tends to impact on the accused's privilege against self-incrimination, one of the fundamental aspects of a fair trial and a right that might have been protected had the accused been properly informed of his right to counsel.

Despite the position that they need not consider the other factors of *Collins*, the majority of judges in *Hebert* did find that the *Charter* violation was a serious one as the breach was willful and deliberate and that the admission of the evidence would bring the administration of justice into disrepute.

Following *Hebert*, the Court in *Mellenthin* restated that the factors affecting the fairness of the trial are the most important and should be given the most weight.<sup>69</sup> In *R v Mellenthin*, the accused was stopped in his vehicle at a road side check stop. The police asked him what was inside his gym bag that was open on the front passenger seat. When the police officer noticed empty vials, of a type commonly used to store cannabis resin, he searched the car, found drugs and then later the accused gave an incriminating statement to the police. The Court found that the fairness of the trial would be affected if check stops were accepted as a basis for warrantless searches and the evidence derived

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<sup>66</sup> *R v Strachan* [1988] 2 S.C.R. 980.

<sup>67</sup> *R v Hebert* [1990] 2 S.C.R. 151. "Where impugned evidence falls afoul of the first set of factors set out in *Collins* (trial fairness), the admissibility of such evidence cannot be saved by resort to the second set of factors (the seriousness of the violation). These two sets of factors are alternative grounds for the exclusion of evidence, and not alternative grounds for the admission of evidence." As per Wilson and Sopinka JJ. The facts of this case are taken from the SCC's decision.

<sup>68</sup> *R v Bartle* [1994] 3 S.C.R. 173.

<sup>69</sup> *R v Mellenthin* [1992] 3 S.C.R. 615. The facts of this case are taken from the SCC's decision.

from them were automatically admitted<sup>70</sup>. To admit evidence obtained in an unreasonable and unjustified search carried out while a motorist was detained in a check stop would adversely and unfairly affect the trial process and would definitely bring the administration of justice into disrepute.

The Supreme Court of Canada has also held that where derivative evidence including real evidence, was collected through the self-incriminating statements from the accused through a violation of his right to counsel, such evidence would be excluded. In *R v Burlingham* this extended to all the derivative evidence, both real and testimonial, including a voluntary statement made to a person not in authority which resulted, indirectly from information obtained through a violation of the accused's right to counsel.<sup>71</sup> Mr. Burlingham had been subjected to an intensive and manipulative interrogation that lasted several days during a murder investigation. Despite Mr. Burlingham's expression of his right to remain silent until he spoke to counsel, the police continually question him and also offered him a deal that he would only be charged with second degree murder if he told them where the gun was and other information. The police did not give him a chance to speak to counsel. The accused then gave a full confession, brought police to the murder scene and told them where he had thrown the weapon. After this, the accused recounted these events to his girlfriend. Due to misunderstanding the deal fell through and the accused was charged with first degree murder. The Court noted in that case that even when the charge is serious and the evidence is essential to the prosecutor's case, admitting the evidence could still bring the administration of justice into disrepute.

### **5. The *Stillman* restatement**

By 1997, the jurisprudence of the Supreme Court of Canada on section 24(2) was criticized as being confusing and complicated. The Court signaled that their decision in *R v Stillman* would clarify the law in this area when they ordered a re-hearing of the case before all nine members of the Court and allowed intervenors to provide submissions.<sup>72</sup> Mr. Stillman was accused of raping and murdering a teenage girl under a bridge near a river.<sup>73</sup> He was arrested based on information that he was the last person seen with the victim on the night of the crime and that he arrived home late, wet, muddy, grass stains on his pants and cut above his eye. He retained a lawyer who informed the police by letter that the accused would not consent to provide bodily samples or to give any statement. Notwithstanding this, the police, under threat of force, took a number of bodily samples, such as hair, buccal swab and teeth impressions. Also the police recovered a tissue that he had used to blow his nose and discarded in a wastebasket.

The trial judge found that the hair samples, buccal swab and teeth impressions had been obtained in violation of section 8 but nonetheless admitted them at trial. Regarding the discarded tissue he held that there was no violation of section 8 when it was seized from the public wastebasket and therefore was admissible. The accused was convicted. The

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<sup>70</sup> *ibid.*

<sup>71</sup> *R v Burlingham* [1995] 2 S.C.R. 206. The facts of this case are taken from the SCC's decision.

<sup>72</sup> Parachin, *supra* note 14 at page 40.

<sup>73</sup> The facts of this case are taken from the judgment *R v Stillman* [1997] 1 S.C.R. 607.

Court of Appeal upheld the conviction. At the Supreme Court of Canada, the majority of the Court held that all the evidence was improperly obtained by infringements of the accused's *Charter* rights. The bodily samples were excluded, however the tissue was not.

The Court held that when assessing trial fairness, the relevant distinction is between conscriptive and non-conscriptive evidence.<sup>74</sup> Evidence is conscriptive if the accused was compelled to incriminate him or her self in violation of his or her rights and includes: statements; the use as evidence of the body; and bodily samples. So for example, the use of the body as evidence would include forcing the accused, in violation of his rights, to participate in a line-up. If the accused was not compelled to participate in the creation or discovery of the evidence, the evidence will be classified as non-conscriptive. Its admissibility will not render the trial unfair and the court will then go on to look at the other factors, such as the seriousness of the breach and the effect of exclusion on the repute of the administration of justice.

Conscriptive evidence will undermine trial fairness and should therefore be excluded.<sup>75</sup> Only if the evidence is non-conscriptive or if conscriptive could have been discovered by alternative non-conscriptive means, then the other factors should be reviewed. As the Court explicitly held, the primary aim of considering trial fairness factor in a section 24(2) analysis is to prevent an accused person whose *Charter* rights have been infringed from being forced or conscripted to provide evidence in the form of confession, statement or bodily sample for the benefit of the State.

In *Stillman's* case, while the bodily samples were "real" evidence, the accused had been compelled by the police to provide evidence from his body. Therefore this evidence was classified as conscriptive evidence and would have rendered the trial unfair and must be excluded. The Court also listed that the other factors would support this: the breach was very serious, the police used the threat of force and intrusive measures to obtain the samples as well as blatantly disregarded the lawyer's letter and ignored the fundamental rights of the accused, who was a youth. They concluded that the admission of such evidence would shock the conscience of all fair minded members of the community and thus bring the administration of justice into disrepute. The tissue was not conscripted evidence as the police did not compel the accused to produce it. It was not a serious breach, there was no force by the police, and in any event the tissue was discoverable and the administration of justice would not be brought into disrepute if the evidence obtained from it were to be admitted.

The Court's analogy between testimonial self-incriminatory evidence and bodily samples has been criticized as reflecting a misunderstanding of the principles underlying the original concept of self-incrimination.<sup>76</sup> Originally involuntary statements from an accused were not admissible in common law due to the concern of the reliability of a compelled statement. There would be very little concern regarding the reliability of bodily samples as DNA science is considered very accurate. However the Court focused

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<sup>74</sup> *ibid.*

<sup>75</sup> *ibid.*

<sup>76</sup> Parfett, *supra* note 30.

more on the violation to the accused's right to privacy and his expectation to privacy when discussing the bodily samples.

One of the dissenting judges in this case raised her concern over the expansion of the concept of self-incrimination by including "real" evidence in the definition of conscriptive evidence: "using the principle against self-incrimination to real evidence requires either distortion or supplementation if it is to operate fairly and practically".<sup>77</sup> She suggests using a section 8 analysis when making the necessary distinctions between permissible use of the suspect's body and impermissible use of the suspect's body.<sup>78</sup>

## 6. Post-*Stillman* cases

There are a number of significant cases that have discussed exclusion of evidence since the restatement in the *Stillman* case. Some cases have discussed situations when the court concludes that admitting the evidence would not adversely impact on trial fairness. In those cases, the trial judges are directed to view the second and third group of factors of equal importance in relation to each other. That means that they should weight the factors regarding the seriousness of the violation with the factors regarding the disrepute of the administration of justice caused by exclusion of such evidence.<sup>79</sup>

The case of *R v Feeney* illustrates how the Court weighed the second and third group of factors in a case where the defence sought to exclude evidence that was non-conscriptive. In that case, the police, during an investigation into a murder, entered Mr. Feeney's home without permission.<sup>80</sup> The police first knocked, but when no answer, they entered and found Mr. Feeney asleep. They asked him to come outside and when he did, they saw that his shirt was spattered with blood. He was then arrested and read his rights, including the right to counsel. However they did not tell him he had an immediate right to counsel and started to ask him questions and seized his shirt. At the police station he said he should obtain a lawyer but he gave a statement to the police and admitted to hitting the victim and stealing from him. The police then obtained a warrant to search Feeney's home where they seized his shoes, cigarettes and cash. His fingerprints were matched to those found in the victim's home. His shoe print matched that found on the victim's wallet. The blood of the shirt matched the victim's. At trial, Feeney was convicted of murder. The Supreme Court of Canada, in a narrow majority ordered a new trial which should exclude the physical evidence collected by the police on the first visit to Feeney's home.

The Court found that the police had committed a number of breaches when collecting the evidence including unreasonable search and seizure since they did not have reasonable grounds to enter his home without a search warrant and the failure to ensure his effective right to counsel. As a result of these breaches the police came to know about the cash,

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<sup>77</sup> Judge McLachlin's dissenting opinion in *Stillman*.

<sup>78</sup> As cited in Parfett, *supra* note 30.

<sup>79</sup> *R v Belnavis* [1997] 3 S.C.R. 341 and *R v Feeney* [1997] 2 S.C.R. 13. These cases and the balancing of the 2<sup>nd</sup> and 3<sup>rd</sup> groups of factors is discussed in J. Andres Hannah-Suarez "Bringing the Administration of the Charter into Disrepute: A Critique of the Third Branch of the Collins Test for Excluding Evidence Under Section 24(2) of the Charter" (2004) 18 Windsor Review of Legal and Social Issues 63

<sup>80</sup> The facts of this case are from the judgment of *R v Feeney* [1997] 2 S.C.R. 13.

cigarettes and the shoes and would not have had the grounds for a warrant, therefore they found the warrant also violated section 8. Furthermore, the Court found that fingerprinting when not lawfully under arrest involves an unreasonable search and seizure of the persons' body. Following the *Stillman's* classification of conscriptive and non-conscriptive evidence, the Court held that the statements, the fingerprints were conscriptive and therefore inadmissible as affecting the fairness of the trial. The bloody shirt, the shoes, cigarettes and cash were non-conscriptive evidence and after an analysis of the seriousness of the breach and the effect on the administration of justice, were found to be excluded.

The dissenting opinion concluded that the accused's rights were not violated. However even if they were, the conduct of the police in this case was not flagrant and did not deliberately violate the accused's rights. It was during a time when there were no provisions in the *Criminal Code* to obtain a search warrant to enter a private dwelling in order to arrest a suspect. They argued that these actions of the police were far from the kind of improper conduct that section 24(2) was intended to protect.

There were a number of cases where the Court excluded non-conscriptive evidence essential to the prosecution case based on the reason that while admission did not go to trial fairness, the administration of justice would be brought into disrepute if the evidence was admitted. In *R v Buhay*, the Supreme Court of Canada upheld the trial judge's expressed concern that admitting the evidence in these circumstances may encourage similar police conduct in the future.<sup>81</sup> In that case, the police opened the accused's bus station locker without a search warrant after employees there had noticed a strong smell of marijuana coming from the locker. The accused had reasonable expectation of privacy and therefore his right to be protected from unreasonable search and seizure was violated. The Court noted that that non-conscriptive evidence, the gym bag full of drugs, that was essential to the prosecutor's case should not automatically be included. The focus of the inquiry was on whether the admission of the evidence would bring the administration of justice into disrepute. This does not have to be on a national scale before the courts will interfere to protect the integrity of the process.

In *R v Mann*, the accused was stopped by police on the street in their investigation into a reported break and enter.<sup>82</sup> During their pat down search for concealed weapons, they felt a soft object in Mr. Mann's pocket. The police officer reached into the pocket and found a small bag of marijuana and a number of small plastic baggies. Mr. Mann was charged with possession of marijuana for the purpose of trafficking. The Supreme Court held that while the police were entitled to detain Mr. Mann for investigative purposes and to conduct a pat-down search to ensure their safety, the search of his pockets was unjustified and the evidence discovered therein must be excluded. These cases seem to suggest that if the *Charter* violation is characterized as casual, gratuitous, blatant, deliberate, willful or flagrant rather than merely inadvertent, technical or trivial, then generally the evidence will likely be excluded.<sup>83</sup>

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<sup>81</sup> *R v Buhay* [2003] 1 S.C.R. 631.

<sup>82</sup> *R v Mann* [2004] SCJ No. 49.

<sup>83</sup> Gerard Mitchell, *supra* note 15.

*Charter* violations involving searches and seizures and the impact on the assessment of the seriousness of the violation will vary according to the expectation of privacy. In *Belnavis*, the Court held that expectation of privacy in a vehicle is not as high as that in one's physical person, home or office.<sup>84</sup> Also in that case, the Supreme Court of Canada was critical of the trial judge who had not considered society's interest in the effective prosecution of crime nor the reliability or discoverability of the evidence before excluding it on account of his conclusion that the breach was serious.

#### IV Critiques of the jurisprudence and calls for reform

##### 1. Development into a quasi-automatic exclusionary rule

One of the main criticisms of the development of the Supreme Court of Canada's jurisprudence is that the case law creates a quasi-automatic rule of exclusion.<sup>85</sup> Such a development is thought to be inconsistent with the words as well as spirit of section 24(2). It was in *Hebert* that the Court appeared to say that once it is determined that the admission of the evidence would undermine trial fairness there is no more need to consider the other factors enumerated in *Collins*. This is restated more clearly in *R v Mellenthin* where the Court held that once there is a finding relating to trial fairness, that is the end of the matter and there is no need to consider the other factors.<sup>86</sup> However the Courts did not clarify what sort of factors should be reviewed to determine trial fairness.

While the *Stillman* case was meant to clarify the growing confusion in this area, many commentators found it fell short of this objective.<sup>87</sup> While it clarified that the previous distinction between real and self-incriminatory evidence in assessing trial fairness was misleading, it only re-formulated the categories of evidence into conscriptive and non-conscriptive. Basically, if the evidence is conscriptive and obtained in violation of the accused's rights, then it goes toward trial fairness and should be excluded. Some argue that this basically affirms that the trial fairness test is a test of automatic exclusion.<sup>88</sup>

Such an automatic exclusionary rule does not follow the balancing envisioned by the framers of section 24(2). If only one set of factors determines admissibility, there is no balancing or consideration of "all the circumstances" as specifically set out in section 24(2). One commentator argues that if trial fairness was more broadly construed to include other factors than the nature of the evidence, the balancing approach would have been met.<sup>89</sup>

It has been argued that the rule of automatic exclusion allows evidence to be excluded even if the breach in question is of a trivial nature.<sup>90</sup> The public may feel that wrongdoers

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<sup>84</sup> *R v Belnavis* [1997] 3 S.C.R. 341.

<sup>85</sup> Parachin, *supra* note 14 at pages 35 and 36.

<sup>86</sup> *R v Mellenthin* [1992] 3 S.C.R. 615.

<sup>87</sup> Parachin, *supra* note 14.

<sup>88</sup> *Ibid.*

<sup>89</sup> *Ibid.*

<sup>90</sup> Parachin, *supra* note 14.

are getting away on technicalities and as a result their confidence in the criminal justice system may be reduced. When limiting the analysis to trial fairness, there is no allowance made for the seriousness of the breach, the consequences of the exclusion or the casual connection between the breach and the evidence. This results in the Court not considering victim's rights and the interests of the community. As one commentator explains this quasi automatic rule of exclusion "promotes individual rights at the cost of victim's rights".<sup>91</sup>

Dissenting opinions of the Court also raise concern of the creation of what they call an almost exclusionary rule. One judge suggests a different approach which in her view would result in the return to the spirit of section 24(2).<sup>92</sup> She suggests that evidence should be grouped into two categories, depending on whether a violation of *Charter* rights has resulted in the creation or discovery of unreliable or reliable evidence. Unreliable evidence should be excluded. Reliable evidence would be subject to a review of the seriousness of the breach, the seriousness of the charge, its probative value in the case and whether, in all the circumstances, its admission would bring the administration of justice into disrepute. However this was not accepted by the majority of the Court.

Calls for reform include going back to the balanced approach, which is what was envisioned by the wording of section 24(2).<sup>93</sup> This would allow the courts to balance between individual rights and societal interests in the effective prosecution of crime. This would allow the courts to balance what a fair trial is as seen by the victim and the community and not only the accused. As stated by one judge, "a fair trial must not be confused with the most advantageous trial possible".<sup>94</sup>

## **2. Differential treatment of Charter rights – creation of hierarchy of rights**

The jurisprudence of the Supreme Court of Canada regarding the assessment of whether to exclude evidence seems to be different depending on the type of rights that were violated in gathering the evidence. The rights most commonly violated in obtaining evidence through illegal or improper methods are the right to counsel (section 10(b)) and the right against unreasonable search and seizure (section 8). This is reflected in the distinctions in the case law between real and self-incriminatory evidence and then later to conscriptive and non-conscriptive evidence.

The nature of the right violated generally reflects the type of evidence gathered. Self-incriminating evidence or conscriptive evidence generally arises out of breaches to the right to counsel. Whereas, real evidence or non-conscriptive evidence are gathered when the right against unreasonable search and seizure is violated. However this is not always the case, as various cases illustrate that real evidence can include evidence emanating from the accused, which would be classified as conscriptive evidence as well as real evidence being obtained due to violation of the right to counsel.

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<sup>91</sup> Parfett, *supra* note 30.

<sup>92</sup> Justice L'Heureux-Dube in *R v Burlingham* and as discussed in Parfett, *supra* note 30.

<sup>93</sup> Parfett, *supra* note 30.

<sup>94</sup> *R v Harrer* [1995] 3 S.C.R. 562.

Some commentators have said that the *Collins* test and following cases make the right to counsel a “super right”.<sup>95</sup> Is the right to counsel of such fundamental importance that its denial must *prima facie* bring the administration of justice into disrepute, whereas this is not the case for unreasonable search and seizure? The right to counsel is linked to the accused’s right to pre-trial silence and the privilege against self-incrimination, as being key guarantees to a fair trial. It violates the “case to meet” principle where the burden of proof is on the prosecution, without the compelled participation of the accused. For some, self-incriminating should almost always trigger exclusion as it goes to the very heart of trial fairness.<sup>96</sup> However, some cases, such as DNA warrants, allow for compelled self-incrimination evidence to be accepted as evidence in court as long as there are procedures to ensure minimal intrusion to the person.<sup>97</sup> This would seem to suggest that admission at trial of compelled, self-incriminating evidence is not intrinsically unfair.

The right against unreasonable search and seizure is predicated on the right to privacy. The Courts have gotten around the right to privacy by articulating an expectation to privacy which in some cases they find can be quite low. For example in a car the accused borrowed from her boyfriend there is a relatively low expectation of privacy.<sup>98</sup> As one commentator notes, this jurisprudence has the effect of “reducing the pronouncement of section 8 standards to meaningless rhetoric”.<sup>99</sup> This seems to be particular so when dealing with drug cases.<sup>100</sup> In many cases, the Court has admitted narcotics obtained in violation of section 8 on the basis that the officers were acting in good faith in accordance with their training, police policy or established case law and that drug cases are very serious offences. In examining what is good faith, it appears some see the lack of bad faith to be equal to good faith.<sup>101</sup>

A dissenting opinion by one of the judges of the Supreme Court of Canada addresses his concern of the differentiating treatment of various *Charter* rights:

“In response, I underscore that we should never lose sight of the fact that even a person accused of the most heinous crimes, and no matter the likelihood that he actually committed those crimes, is entitled to the full protection of the Charter. Short-cutting or short-circuiting those rights affects not only the accused, but also the entire reputation of the criminal justice system. It must be emphasized that the goals of preserving the integrity of the criminal justice system, as well as promoting the decency of investigatory techniques, are of fundamental importance in applying section 24(2).”<sup>102</sup>

Some have argued that such differentiating between different kinds of evidence should not take place and that all evidence should be treated the same and only excluded following a full analysis of the *Collins* factors.<sup>103</sup>

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<sup>95</sup> Parachin, *supra* note 14 and Stephen Penney “*Unreal Distinctions: The Exclusion of Unfairly Obtained Evidence under S. 24(2) of the Charter*” (1994) 32 Alta L. Rev. 782.

<sup>96</sup> Parachin quotes both Lamer JC. in his argument that exclusion of evidence obtained in violation of the right to counsel would result in trial unfairness as well as Iacobucci J. held in *R v Elshaw*, *supra* note 14.

<sup>97</sup> Julianne Parfett “*Canada’s DNA Databank: Public Safety and Private Costs*” (2002) 29 Manitoba Law Journal 33.

<sup>98</sup> *R v Belnavis* [1997] 3 S.C.R. 341.

<sup>99</sup> Don Stuart “*Eight Plus Twenty-Four Two Equals Zero*” (1998) 13 C.R. (5<sup>th</sup>) 50.

<sup>100</sup> Parachin argues in his article that there seems to be a double standard on the treatment of narcotics. The Courts claim that narcotic offences are very serious crimes and this in many cases ensures that based on the 3<sup>rd</sup> branch of *Collins* that such evidence of narcotics will unlikely be excluded when obtained illegally or improperly by the police. See Parachin, *supra* note 14.

<sup>101</sup> Parachin, *supra* note 14.

<sup>102</sup> Justice Iacobucci in *R v Burlingham* [1995] 2 S.C.R. 206.

<sup>103</sup> Parachin, *supra* note 14.

### 3. Purpose of trial – truth or due process

Some argue that with the development of the quasi-automatic exclusionary rule this has resulted in a criminal justice system more concerned with police behavior than with the pursuit of truth.<sup>104</sup> Others have criticized the Court's jurisprudence as reflecting a failure to consider the consequences these exclusions have on the criminal justice system.<sup>105</sup> They believe that section 24(2) routinely lets guilty persons off because of procedural violations.<sup>106</sup> This line of thinking believes section 24(2) has been used to enable judges to suppress the truth by excluding trustworthy evidence.

However, other academics respond to these criticisms by saying that they are based on the assumption that trials are truth-seeking enterprises which can be argued is a relatively new concept of the trial process in Canada and departs from the traditional view of a criminal trial as a systematic testing of evidence to the requisite legal standard.<sup>107</sup> Others articulate a more middle ground. As one judge stated in *Buhay*, the essence of the *Collins* test is to "balance between the interests of truth on one side and the integrity of the judicial system on the other".<sup>108</sup>

Another criticism of the position of limiting the use of the exclusionary rule is that there appears to be a presumption of guilt of the accused even before the trial takes place. Using the accused's apparent guilt to influence the court's decision has been said to be linked to the trend in Canadian jurisprudence to characterize trials as truth-seeking enterprises.<sup>109</sup> However it must be remembered that until the accused is proven guilty according to law, the courts are under an obligation to presume the accused's innocence.

As the Courts have stated even a person accused of the most heinous crimes is entitled to full protection of the *Charter*.<sup>110</sup> One commentator is concerned that it appears from a review of some of the case law that the more serious the offence, the more serious breach of the Charter is required before the evidence will be excluded. Should the accused person only have rights if a matter proves in retrospect to be trivial.<sup>111</sup> It is argued that this dilutes the scope of everyone's *Charter* rights.

### 4. The rights of third parties

The Supreme Court of Canada has interpreted section 24(2) to mean that only the accused can seek exclusion if his or her rights were denied.<sup>112</sup> This can mean that if the evidence was obtained as a result of a violation of the rights of third parties, the courts will not

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<sup>104</sup> Parfett, *supra* note 30.

<sup>105</sup> Fraser, *supra* note 39.

<sup>106</sup> Fraser, *supra* note 39.

<sup>107</sup> J. Andres Hannah-Suarez "Bringing the Administration of the Charter into Disrepute: A Critique of the Third Branch of the Collins Test for Excluding Evidence Under Section 24(2) of the Charter" (2004) 18 Windsor Review of Legal and Social Issues 63 and Kilback and Tochor, *supra* note 34.

<sup>108</sup> *R v Buhay*, *supra* note 81.

<sup>109</sup> Hannah-Suarez, *supra* note 107.

<sup>110</sup> *R v Burlingham*, *supra* note 71.

<sup>111</sup> Hannah-Suarez, *supra* note 107.

<sup>112</sup> *R v Wijesinha* 42 C.R. (4<sup>th</sup>) 1 and *R v Edwards* [1996] 1 S.C.R. 128.

have to determine whether the evidence should be excluded. It will be included. It follows then that this can mean that where the police believe evidence might be obtained at a location where that suspect has no reasonable expectation of privacy, the police can proceed to obtain that evidence illegally or improperly, perhaps flagrantly infringing someone else's rights, without worrying about whether the evidence will be excluded at trial.

Some have argued that the Courts should have the means to exclude such evidence in order to deter police from such conduct and to protect the rights of privacy of innocent third parties.<sup>113</sup> The current jurisprudence provides greater protection to the rights of the accused person over persons who are not under any reasonable suspicion of wrongdoing. Some see that the purpose of exclusion of such evidence is not to achieve compensation for the accused person, but rather to deter violations of rights in general.<sup>114</sup>

### **5. Failure to take into account victim's rights and community interest**

Some argue that the Court's approach to section 24(2) when questioning whether or not the admission of evidence would bring the administration of justice into disrepute does not give enough weight to the community interest.<sup>115</sup> The community is interested in enabling criminal investigations, bringing out the truth at trial and in protecting the security and equality rights of crime victims. The approach taken in *Collins* does not adopt the "reasonable man test" but rather the "reasonable judge test". The main reason for this is that the *Charter* is designed to protect the accused from the majority, so the enforcement of the *Charter* must not be left to that majority. The Court held that the public is not typically conscious of the importance of protecting civil liberties until they are somehow brought into contact with the criminal justice system.<sup>116</sup>

The reasonable man test has been seen as a useful approach to developing legal standards that concur with social attitudes.<sup>117</sup> Using the prevailing attitude of reasonable Canadians as a benchmark is a check against judges simply imposing their own views of how the *Charter* should apply. It reminds them to take into account the community's interests. For example, Canadian opinions were recently surveyed to determine what they think about recent cases on exclusion of evidence by the Institute for Research on Public Policy. Two-thirds felt that the evidence should have been admitted in the *Feeney* case.<sup>118</sup> So perhaps it might be true what the Court stated in *R v Strachen*:

"If due regard is had to community values the remedy of exclusion will likely be confined to those relatively rare cases where there is some real reason for describing a denial of rights as flagrant and in which exclusion would not unduly prejudice the public interest in law enforcement".<sup>119</sup>

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<sup>113</sup> Penney, *supra* note 36.

<sup>114</sup> Penney, *supra* note 36.

<sup>115</sup> Fraser, *supra* note 39 and Parfett, *supra* note 30.

<sup>116</sup> *R v Collins*, *supra* note 52.

<sup>117</sup> Fraser, *supra* note 39.

<sup>118</sup> As cited by Fraser, *supra* note 39.

<sup>119</sup> *R v Strachen* [1988] 2 S.C.R. 980.

## V. Conclusion

The exclusion of illegally or improperly obtained evidence is a powerful remedy for the violation of constitutional rights. In Canada, as signatories to the *International Covenant on Civil and Political Rights*, we must ensure that individuals have an effective remedy when their rights are violated. This is vital to ensure their protection. This obligation has been implemented through the *Canadian Charter of Rights and Freedoms*, specifically through section 24(2). Such a provision demonstrates the importance of guaranteeing and protecting all the rights in the *Charter*.

The ability to exclude illegally or improperly obtained evidence according to the test set out in section 24(2) has resulted in much litigation and has resulted in sometimes confusing and differing interpretations. This may be due to the various and differing theories put forward to explain the underlying basis for such a rule: providing compensation to victims of violation; deterring constitutional violations; and avoiding judicial condonation of police misconduct. Many academics have weighed into this debate and highlighted a number of concerns. Some expressed concern that the jurisprudence has developed a quasi-automatic exclusionary rule while others raise concerns that the courts appear to distinguish between a hierarchy of rights. Still others expressed concern that community interests and victims' rights are not fully recognised in the application of the exclusionary rule and that the rights of third parties to be protected against police misconduct are not protected by the courts' interpretation of this rule. The wording of section 24(2) calls for a review of all the circumstances and what appears to be recommended by many of the academics is the return to the balancing as initially envisioned by the drafters of the *Charter*.

## Appendix A\*

### Summary of Section 24(2) Cases decided by the Supreme Court of Canada up to the end of 2004

\* Appendix is taken from Gerald Mitchell, “The Supreme Court of Canada on Excluding Evidence Under s. 24(2) of the Charter” (2005) (see footnote 15).

No.	NAME	OFFENCE	CHARTER	TYPE OF EVIDENCE	24(2) RESULT
1	Therens	Driving over .08	10(b)	Breathalyzer	Excluded
2	Rahn	Driving over .08	10(b)	Breathalyzer	Excluded
3	Trask	Driving over .08	10(b)	Breathalyzer	Excluded
4	Clarkson	Murder	10(b)	Statement	Excluded
5	Collins	Drug trafficking	8	Finding of drugs	Excluded
6	Hamill	Drug trafficking	8	Finding of drugs	Admitted
7	Sieben	Drug trafficking	8	Finding of drugs	Admitted
8	Pohoretsky	Driving over .08	8	Blood sample tests	Excluded
9	Manninen	Armed robbery	10(b)	Statement	Excluded
10	Tremblay	Driving over .08	10(b)	Breathalyzer	Admitted
11	Dairy Products	Violation of investigation act	8	Documents	Admitted
12	Upton	Drug trafficking	10(b)	Statement	Admitted
13	Dyment	Driving over .08	8	Blood test results	Excluded
14	Simmons	Importing narcotics	8, 10(b)	Narcotics	Admitted
15	Jacoy	Importing narcotics	8, 10(b)	Narcotics	Admitted
16	Strachan	Trafficking	10(b)	Narcotic, \$, etc	Admitted
17	Ross	Break and enter	10(b)	Line-up	Excluded
18	Duguay	Break, enter, theft	10(b)	Statement, fingerprints	Excluded
19	Genest	Possession illegal weapons	8	Illegal weapons	Excluded
20	Lamb	Narcotic trafficking	8	Narcotics, knife, scales	Admitted
21	Mohl	Driving over .08	10(b)	Breathalyzer	Admitted
22	Ledue	Refusing breathalyzer	10(b)	Refusal	Excluded
23	Black	Murder	10(b)	Statements, knife	Excluded
24	Joey Smith	Robbery	10(b)	Statement	Admitted
25	Szlovak	Bank robbery	9, 10(a)	Money, statement	Admitted
26	Debot	Poss'n drug	10(b)	Drugs	Admitted
27	Duarte	Conspiracy import narcotic	8	Recorded conversation	Admitted
28	Wiggins	Conspiracy import narcotic	8	Recorded conversation	Admitted
29	Brydges	Murder	10(b)	Statement	Excluded
30	Greffe	Narcotics trafficking	8	Narcotics	Excluded
31	Hebert	Robbery	10(b)	Statement	Excluded
32	Thompson	Conspiracy import narcotic	8	Intercept conversation	Admitted
33	Kokesch	Cultivation marijuana	8	Narcotics	Excluded
34	Wong	Gaming house	8	Video recording	Admitted
35	Norman Smith	Murder	10(a)	Statement	Admitted
36	Evans (W.)	Murder	10(a) (b)	Statement	Excluded
37	Elshaw	Attempted sexual assault	10(a)	Statement	Excluded
38	Broyles	Murder	7	Taped conversation	Excluded
39	Tessier	Impaired driving	8	Blood sample	Admitted
40	Genereux	Drug trafficking	8	Narcotics	Admitted
41	Wise	Mischief to property	8	Evidence about accused's whereabouts	Excluded
42	Duncanson	Drug trafficking	8	Drugs	Admitted
43	Mellethin	Possession marijuana	8	Marijuana	Excluded

44	Grant	Cultivation marijuana	8	Indications cultivation	Admitted
45	Plant	Cultivation marijuana	8	Computer data	Admitted
46	Wiley	Cultivation marijuana	8	Indications cultivation	Admitted
47	Dersch	Crim neg causing death	8	Blood test results	Excluded
48	Goncalves	Cultivation marijuana	8	Indications cultivation	Excluded
49	I and T	Murder	10(b)	Statement	Excluded
50	Colarusso	Impaired driving – death	8	Blood test	Admitted
51	Bartle	Driving over .08	10(b)	Breathalyzer	Excluded
52	Cobham	Refusing breathalyzer	10(b)	Refusal	Excluded
53	Prosper	Driving over .08	10(b)	Breathalyzer	Excluded
54	Ponziak	Driving over .08	10(b)	Breathalyzer	Excluded
55	Harper	Spousal assault	10(b)	Statement	Admitted
56	Borden	Sexual assault	10(b)	DNA	Excluded
57	Burlingham	Murder	10(b)	Statement, weapon, 3 <sup>rd</sup> party statement	Excluded
58	Silveria	Trafficking	8	Drugs, money	Admitted
59	Wijensinha	Obstructing justice	8	Affidavits, tapes	Admitted
60	Evans (C and R)	Cultivation marijuana	8	Marijuana plants	Admitted
61	Calder	Attempting purchase of sex services of person under 18	10(b)	Statement	Excluded
62	Dewald	Over .08	10(b)	Breathalyzer test	Admitted
63	Martin	Cultivation marijuana	8	Marijuana	Admitted
64	Goldhart	Cultivation of marijuana	8	Oral testimony witness	Admitted
65	Keshane	Possession marijuana	8	Marijuana	Admitted
66	Stillman	Murder	8	Hair samples, buccal swab. Teeth impressions, discarded tissue	Tissue admitted, rest excluded
67	Feeney	Murder	8, 10(b)	Statements, cash fingerprints, bloody shirt, shoes, cigarettes,	Excluded
68	Belnavais	Possession stolen goods	8	Bags of clothing	Admitted
69	Caslake	Drug trafficking	8	Drugs	Admitted
70	Cook	Murder	10(b)	Statement	Excluded
71	Fliss	Murder	8	Illegal recording	Admitted
72	Law	Tax evasion	8	Business documents	Excluded
73	Buhay	Drug trafficking	8	Bus depot locker contents	Excluded
74	Mann	Possession drugs	8	Contents of pants pocket	Excluded