

**A COMPREHENSIVE ANALYSIS OF SECTION 24(2) OF THE CANADIAN CHARTER  
OF RIGHTS AND FREEDOMS AND THE EVOLVING EVIDENTIARY RULE**

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### **Abstract**

The Supreme Court of Canada's (SCC) evolving understanding of section 24(2) of the *Canadian Charter of Rights and Freedoms* has been informed largely by three landmark cases. In *R. v. Collins* (1987), *R. v. Stillman* (1997), and *R. v. Grant* (2009), the Court was required to consider the scope, applicability, and impact of the Charter. The Court's most recent decision, *R. v. Grant* (2009), represented a major change to Canada's constitutional exclusionary rule. A critical analysis of the *Grant* test will evaluate whether s. 24(2) provides a test that is rigorous enough to preserve the integrity of the administration of justice. This thesis will address criticism relating to the notion that the police conduct inquiry has become a determinative factor governing the admissibility of evidence. Under the first line of inquiry, the Court provides greater leeway for police conduct at the expense of individual rights and freedoms. This creates an imbalance between competing societal and state interests. A newly articulated s. 24(2) test that expands the scope of Charter-protected rights and constrains police powers will attempt to resolve this tension. This will be achieved by incorporating privacy interests into the s. 24(2) consideration and placing limitations on the concept of good faith. In doing so, this test will allow the Constitution to progressively adapt to changing societal needs, increasing knowledge, and technological advancements. These modifications will achieve a better balance between the rights-protection and truth-seeking functions of s. 24(2).

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## **A Comprehensive Analysis of Section 24(2) of the Canadian Charter of Rights and Freedoms and the Evolving Evidentiary Rule**

The inadequacies of the *Canadian Bill of Rights* provided much impetus for the movement to entrench a Charter of Rights in our Constitution (Elman, 1987, p. 477). Since its enactment in 1982, some provisions of the *Canadian Charter of Rights and Freedoms* have been the subject of intense judicial interpretation and academic commentary (Santoro, 2015, p. 2). Few sections have received greater scrutiny than s. 24(2) of the Charter. This is based on the proposition that s. 24(2) jurisprudence has failed to provide a coherent framework to redress Charter violations. Without a proper mechanism for evidentiary suppression, the judiciary risks operating with diminished legitimacy.

By providing historical and comparative context this thesis will represent an attempt to understand the philosophical underpinnings informing the evidentiary rule. A comprehensive approach will begin by establishing the extent to which American and British jurisprudence have influenced the Supreme Court of Canada's (SCC) interpretation of s. 24(2). An examination of pre- and post-Charter jurisprudence will delineate the evolving scope of the Charter. This thesis will then identify the inconsistencies in the Court's interpretation of s. 24(2) and provide a revised framework that addresses these limitations.

### **Defining Section 24(2) of the Charter**

The success of a defendant's application to have inculpatory evidence excluded is one of the most determinative factors to the outcome of a trial. The exclusion of probative evidence can eliminate the Crown's ability to sustain a prosecution making the evidentiary rule one of the most formidable means of upholding individual rights and freedoms within the criminal justice system (Eberdt, 2011, p. 65). Section 24(1) of the Charter empowers courts to redress rights

violations by offering claimants a broad range of remedies (MacIvor, 2012, p. 83). Section 24(2) confers on the courts the discretionary power to rectify Charter transgressions by the state, giving those who have suffered rights infringements recourse to a remedy (Mitchell, 2014, p. 3). Unlike its predecessor, the Charter expressly confers remedies for breaches under section 24:

(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances. (2) Where, in proceedings under section (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. (Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c11 s 24)

There are three preconditions that must be satisfied before a claimant can pursue a s. 24(2) application (Department of Justice, 2021, Analysis section). First, it must be established that the applicant's rights or freedoms, as guaranteed by the Charter, have been unjustifiably limited or denied. Second, the evidence must have been obtained in a manner that infringed upon a guaranteed right or freedom. Lastly, having regard to all the circumstances, the admission of the evidence in the proceedings must be capable of bringing the administration of justice into disrepute (*R. v. Collins*, 1987, para.19).

### **Methodology**

The purpose of this thesis is to provide a comprehensive analysis of s. 24(2) of the Charter and to demonstrate an in-depth understanding of how *R. v. Grant* (2009) has influenced



the exclusion of evidence. The purpose of a historical research design is to collect, verify, and synthesize evidence from past research to establish facts that will make conclusions about my hypothesis (Savitt, 1980, p. 53). It uses secondary sources and primary data. After looking at American and British case law, and the landmark cases which have shaped s. 24(2), this thesis will also engage with an exploratory design. An exploratory research design is used to establish a baseline understanding of an issue that is not clearly defined (University of Southern California, 2021, Exploratory Design section). The *Grant* decision came out in 2009, however, there is a lack of current data evaluating the implications of the Court's new framework for determining the admissibility of evidence. This will be the most practical design as it allows researchers to become familiar with s. 24(2), and then make assumptions and hypotheses relating to how the *Grant* test has affected legal discourse.

To analyze and interpret the evolution of s. 24(2) of the Charter, a historical case analysis and an integrative literature review will be used to examine SCC cases and secondary peer-reviewed data. A historical analysis uses different forms of primary documentation and secondary sources to provide unobtrusive data. On the other hand, an integrative review aims to critique and synthesize literature on a research topic in a way that potentially reconceptualizes the theoretical framework guiding an issue (Snyder, 2019, pp. 335-336; Torraco, 2016, p. 404). This approach proposes that a comprehensive interpretation of original insights be used to expand our understanding of Charter jurisprudence (Lachal, Revah-Levy, Orri & Moro, 2017, p. 3). This process will highlight emerging topics of discussion and where existing research is lacking. Findings will be interpreted then meaningfully applied to inform public policy relating to the effectiveness of remedial provisions within the Charter (Finfgeld-Connett, 2010, p. 247; Ring, Ritchie, Mandava & Jepson, 2011, p. 18). A synthesis of secondary data and critical

academic commentary will provide the impetus for statutory reform (Lachal, Revah-Levy, Orri, & Moro, 2017, p. 2).

Primary documentation will be derived from court and legal documents. This thesis will look at several cases including *R. v. Therens* (1985), *R. v. Collins* (1987), *R. v. Elshaw* (1991), *R. v. Stillman* (1997), *R. v. Tessling* (2004), and *R. v. Grant* (2009). Each case is an authentic legal document stored in the CanLII and Lexum databases. Secondary data and academic commentary will be retrieved from Google Scholar, Google Book, American and Canadian law journals, and the Mount Royal University library database. Information from government websites including Public Safety Canada, Department of Justice Canada, and Correctional Service Canada will also be referred to.

### **Limitations**

Citing prior research studies forms the basis for understanding a research problem and can accelerate the pace of research (Johnston, 2017, pp. 619, 625). However, relying on pre-existing data should be done cautiously. A disadvantage relating to an exploratory research design is its qualitative nature. It may be difficult to derive accurate insights from secondary sources that may be subjective. The bias and variability inherent to qualitative data may make the process of analyzing data as well as hypothesizing the future implications of s. 24(2) a rigorous and lengthy process (Singh, 2007, pp. 63-64). To ensure that findings are developed from and grounded in empirical data, the research will satisfy a stringent criterion for evaluating qualitative studies set out in the grounded theory. Guba and Lincoln (1989) propose that research should follow four criteria: “credibility, transferability, dependability, and confirmability” (Guba, & Lincoln, 1989, p. 242; Maher, Hadfield, Hutchings, & Eyto, 2018, p. 2-3). Strict

adherence to the systematic framework set out in the grounded theory of data analysis will improve the quality of data collected (Charmaz, 2011, p. 293).

### **Common Law Approaches to the Exclusion of Evidence: Historical Context**

An examination into the treatment of improperly obtained evidence in other common law jurisdictions will provide a historical and comparative context for the Supreme Court of Canada's approach to the exclusion of evidence. In doing so, a determination will be made regarding the extent to which Canada's interpretation of s. 24(2) has been influenced by American and British jurisprudence.

### **The American Approach**

The United States Supreme Court has long adopted the position that a violation of a suspect's Constitutional rights could taint any evidence gathered in an investigation. Such tainted evidence should not be admitted at trial regardless of its probative value. The "fruit of the poisonous tree" doctrine, first espoused in *Silverthorne Lumber Co. v. U.S.* (1920), prevents the prosecution from introducing illegally obtained evidence (Kaylor, 2014, p. 3). As the metaphor suggests, if the evidential "tree" is tainted, so is its "fruit" (Maguire, 1964, p. 308). In *Silverthorne Lumber Co. v. U.S.* (1920), police admitted to illegally seizing company documents and attempting to use the knowledge gained from those papers to frame a new case against the company.

The Court held that the Constitution not only prohibits the admission of improperly obtained evidence but all evidence resulting from an unreasonable search and seizure (Bain & Kelly, 1976, pp. 616-617). Permitting derivative evidence would encourage police to circumvent the Fourth Amendment in ways that would undermine the integrity of the justice system and rights protection (Merin, 2015, p. 275). The suppression of illegally obtained evidence is

therefore a necessary means of removing the incentive to violate the law (Merin, 2015, p. 282). Excluding tainted evidence from admission is a way of sanctioning police misconduct and deterring law enforcement from violating rights (Morissette, 1983, p. 532; *Terry v. Ohio*, 1968, para. 12)

Unfortunately, the exclusionary rule had a detrimental effect on the judicial system. It caused society to become “enraged with the legal process” as it allowed criminals to go free due to small errors (Cooper, 1986, p. 96). In fact, it was dissatisfaction with the American exclusionary rule which influenced the Canadian Court’s decision to limit the scope of the rule (*R. v. Collins*, 1987, para. 29).

### **The British Approach**

During the nineteenth century, English courts were reluctant to discuss the exclusion of illegally obtained evidence (Weinberg, 1975, p. 13). At that time, the investigative method employed to obtain evidence was not relevant to its admissibility. This position allowed for the admission of evidence in most circumstances irrespective of whether deceitful or fraudulent means contravened individual rights. Two exceptions to this rule were the exclusion of guilty confessions and evidence obtained by an act in contempt of court (Penney, 1994, p. 784). Testimonial evidence of this nature was inadmissible not because it was improperly obtained but because the manner of its acquisition disputed its trustworthiness. Regardless of how egregious investigative tactics were, the exclusion of evidence was rare unless the admission of that evidence would compromise the accused's right against self-incrimination (p. 788). The English approach favoured the admission of illegally obtained evidence, subject to exclusion in narrowly defined circumstances.

### **The Canadian Approach: Where Does Canada Sit?**

Prior to the enactment of the Charter, the Supreme Court of Canada adopted the English common law approach to the admissibility of evidence (McGuinty, 2018, p. 176). This approach strongly endorsed the truth-seeking function of the court system in a way that diminished procedural fairness and rights protections (McGuinty, 2018, p. 277; *R. v. Wray*, 1971, p. 274). In adopting an English standard from *Kuruma v The Queen* (1954), the SCC decided to “turn a blind eye to the manner in which the evidence was obtained” (Charles, Cromwell, & Jobson, 1989, p. 201). Decades later the SCC maintained their position in *R. v. Wray* (1971) where it held that there “is no judicial discretion permitting the exclusion of relevant evidence, on the ground of unfairness to the accused.” (p. 274). Even if evidence were improperly obtained and could bring the administration of justice into disrepute, common law authority denied a trial judge the discretion to exclude reliable and real evidence. Real evidence is physical evidence that includes fingerprints, bloodstains, mucous, etc. (Mitchell, 2014, p. 50).

After the enactment of the Charter, Canada elected to adopt an approach to s. 24(2) that was not extreme. On one end of the spectrum, the Americans developed an absolute protection for infringements of certain rights, including the right to silence and the right to counsel. On the other end, the English placed too much emphasis on the truth-seeking function of the courts to the extent that fundamental principles that protected the integrity of the judicial process were undermined. Both Countries failed to recognize the competing societal and state interests. As a result, Canada chose a balancing approach that takes into consideration all the circumstances of a case. Based on these observations, the Court concluded that s. 24(2) of the Charter should be interpreted as a modified exclusionary rule wherein evidence obtained in conjunction with a

Charter infringement should be excluded if it could bring the administration of justice into disrepute.

### **The Need to Balance Individual Rights and State Interests**

The conflict between competing rights is settled through a delineation of the scope of the rights at stake (Wray, 2012, p. 299). Section 1 of the Charter balances the severity of a Charter interference with statutory objectives. At times, it is necessary and justifiable to limit rights and freedoms relative to the interests of others in society. This must be done in such a way that the resolution reflects a compromise between the rights holder and the state (Boucher & Landa, 2005, p. 89). Here, a court must determine if society's interests (e.g., crime control) outweigh an individual's interests (e.g., privacy interests) (Santoro, 2015, p. 2).

Section 24(2) Charter applications typically involve situations where the state oversteps the permissible bounds of investigative conduct violating individual rights in the process. The literature expresses differing perspectives on the primary objectives of the Canadian criminal justice system. These perspectives are important for understanding the context in which *Collins*, *Stillman*, and *Grant* take place. On the one hand, there are those who believe that the exclusion of reliable evidence on the basis that it was obtained improperly detracts from the truth-seeking function of court proceedings. This would make it easy for factually guilty defendants to evade conviction and punishment (Penney, 2003, p. 107). On the other hand, the admission of evidence obtained as a result of a serious Charter violation will send the message that individual rights and freedoms count for little (*R. v. Grant*, 2009, para. 71).

One significant analysis came from Criminologist Herbert Packer who sought to identify the political principles that shape criminal justice policy (Packer, 1964, p. 5; Roach, 1999, p. 672). Packer identified two main models that represent the competing value systems operating

within the Canadian criminal justice system. According to Packer, the crime control model is based on the proposition that the repression of crime is the most important function to be performed by the justice system (Packer, 1964, p. 9). This is to be achieved by placing fewer restrictions on the police. However, the idea that “the criminal process operates as a crime-control assembly line culminating in the guilty plea” buttressed Packer's efforts to promote a model of due process (Roach, 1999, p. 687). The due process model emphasizes the need to provide greater protections for individual rights by limiting and constraining official power (Santoro, 2015, p. 30; Packer, 1964, p. 26).

The enactment of the Charter was long-overdue in terms of its recognition of due process and individual rights. The majority approach in and subsequent to *Collins* was a response to the predominating crime-control mentality whereby the Court pledged to uphold the rights of all, even those accused of heinous crimes. Both criminal justice models possess advantages and disadvantages and for that reason, there is a need to reconcile the conflicting crime control and due process principles that are fundamental to s. 24(2) of the Charter. The best approach is that which avoids polarity and flawed propositions about how the interests of individuals are always opposed to those of the state and vice versa. Instead, the best method appears to be one where the two approaches overlap.

### **The Necessity of a Progressive Interpretation of Section 24(2)**

*Edwards v. Canada* (1929), also known as the ‘Persons Case’ was a cornerstone decision in the area of constitutional interpretation as it introduced the living tree metaphor (Pierdominici, 2017, p. 93). This case highlighted the Courts’ need to interpret the Constitution more broadly and in a progressive manner so as to adapt it to the changing times and the realities of modern life (*Reference re Same-Sex Marriage*, 2004, para. 22; Santoro, 2015, p. 3). Later, Justice

Dickson (as he then was), in *Hunter v. Southam Inc.* (1984) reiterated this analysis of the Charter with his famous words: “I begin with the obvious. The Canadian Charter of Rights and Freedoms is a purposive document. Its purpose is to guarantee and to protect, within the limits of reason, the enjoyment of the rights and freedoms it enshrines. It is intended to constrain governmental action inconsistent with those rights and freedoms” (p. 156). Dickson J.’s conceptualization is relevant to s. 24 of the Charter which establishes a remedial provision to redress Charter infringements and prevent the excesses of government action.

The Constitution was not designed to be interpreted with rigid adherence to the original intentions. Boundaries must be placed on judicial interpretation to ensure it is “anchored in the historical context of the provision” (*R. v. Blais*, 2003, para. 40). The Persons Case captures this dichotomy by stating that while the constitution should be read in a liberal fashion, an expansive interpretation must not exceed its “natural limits” (*Edwards v. Canada*, 1930, paras. 134-135). Too elastic and generous a definition would “overshoot” the purpose of a provision (Kennedy, 1937, p. 395). Conversely, an unduly narrow interpretation would “undershoot” the purpose of a right or freedom (*R. v. Stillman*, 2019, para. 22). A narrow and originalist interpretation would have the effect of constricting rights in such a way that would prevent an individual from receiving the “full benefit of the Charter’s protection” (*R. v. Big M Drug Mart Ltd.* 1985, para. 117).

When examining the evolution of s. 24(2) of the Charter, each of the landmark cases – *Collins*, *Stillman*, and *Grant* – required the Court to revisit the evidentiary rule. This was to ensure that modifications to s. 24(2) were consistent with the wording of the Charter and the intentions of Parliament. In each case, the Court was required to consider the scope of the Charter hence to not confer authority that was beyond what the judiciary was intended to have



(*Law Society of Upper Canada v. Skapinker*, 1984, paras. 11, 18; Parfett, 2002, p. 301).

Considering post-Charter developments, the Court also considered the implications of strictly adhering to the framer's intent rather than progressivism (*Doucet-Boudreau v. Nova Scotia*, 2003, para. 23; Santoro, 2015, p. 4).

***R. v. Collins*, [1987] 1 S.C.R. 265**

The *Canadian Bill of Rights* failed to provide adequate remedies for breaches (Elman, 1987, p. 477). This provided much impetus for the movement to entrench a Charter of Rights in our Constitution. Prior to *R. v. Collins* (1987), there had been no s. 24(2) cases decided by the SCC. Therefore, the SCC had yet to decide how to interpret s. 24(2) and the lower court judges in *Collins* received no guidance on the way their decision ought to be framed (Deutscher, 1990, p. 194). Absent any Charter-era interpretation of s. 24(2), when the trial judge and the Court of Appeal heard the *Collins* case, both courts continued to use the pre-Charter common law test related to the exclusion of evidence. This was established in *Rothman v. R* (1981). In *Rothman*, the SCC indicated that evidence should be excluded if its inclusion at trial *would* "bring the administration of justice into disrepute". Similarly, it shouldn't be excluded if the exclusion *would* "bring the administration of justice into disrepute" (Mitchell, 2014, p. 4). The "community shock test" set a high threshold for the admission of evidence. The language used in *Rothman* was stringent in that the use of the word "would" holds a more definitive meaning than "could". In other words, evidence is excluded if the court is certain, that its admission would shock the community. It was thus imperative to the SCC in *Collins* that s. 24(2) be read as "the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings *could* bring the administration of justice into disrepute" (*R. v. Collins*, 1987,

para. 43). This is a less onerous approach that rejects the test enunciated in *Rothman*. The language of s. 24(2), furthermore, indicates a lower threshold.

*R. v. Collins* (1987) was one of the first cases in which the Supreme Court of Canada extensively discussed and developed s. 24(2) jurisprudence. The Court employed the evidentiary rule as a means of demonstrating the importance of Charter rights that are closely tied to the administration of justice (Rosenberg, 2009, Therens section).

### **Facts of the Case**

The appellant Ruby Collins was being surveilled by two members of the R.C.M.P. Drug Squad at the Ritz Motel in Gibsons, British Columbia (*R. v. Collins*, 1987, para. 4). Police had engaged in the surveillance of the appellant based on hearsay (para. 10). Constables Rodine and Woods saw the appellant and another woman in the pub when Richard Collins, the appellant's husband, and another man joined them. Shortly after, Richard Collins and the man left the pub (para. 5). The officers followed and arrested them at a nearby trailer park. Richard Collins was searched and was found to be in possession of heroin. After arresting Richard Collins, the police returned to the pub where the appellant remained. One of the police officers approached Collins, laid hold of her, identified himself, grabbed her throat and pulled her to the floor with considerable force (para. 6). The throat hold was used to prevent Collins from swallowing any drugs that she may have had (para. 2). Once pinned on the ground, the officer directed her to release an object in her hand, a green balloon, that he had suspected contained heroin. Collins was arrested and the heroin was seized (para. 9).

### **Lower Court Decision**

At trial, the judge found that the officer did not have reasonable grounds as required under s. 10 of the *Narcotic Control Act* to arrest Collins because the evidential basis for his

suspicion was not admitted following an objection to that line of questioning (*R. v. Collins*, 1987, para. 7). The search was found to be unlawful and therefore unreasonable and in violation of s. 8 of the Charter. The evidence was nevertheless admitted as Judge Wong, relying on the judgement in *Rothman v. R (1981)*, held that the defendant had failed to demonstrate to the court that evidence should be excluded pursuant to s. 24(2) of the Charter (Elman, 1987, p. 478). Neither the trial judge nor the Court of Appeal felt that including the heroin would "shock the community". Collins was found guilty and charged with possession for the purpose of trafficking.

### **The Court of Appeal**

Ruby Collins appealed to the British Columbia Court of Appeal seeking the exclusion of evidence alleging that the heroin was discovered pursuant of a search that was unreasonable under s. 8 of the Charter. Seaton J.A. and Craig J.A. upheld the trial judge's finding to admit the evidence. In a unanimous decision, the Court of Appeal dismissed her case (*R. v. Collins*, 1987, para. 13)

### **Decision & Supreme Court Rationale**

In a five-to-one decision, the Supreme Court of Canada ruled that the evidence ought to be excluded. The appeal was allowed, and a new trial was ordered. Justice Lamer, writing for the majority, identified two issues confronting the Court. The first was whether the search was unreasonable. The second was whether the admission of the evidence would bring the administration of evidence into disrepute. Upon deliberation of these two criteria, the majority in *Collins* set out a philosophical framework for the application of s. 24(2) of the Charter.

### ***Was the Search Unreasonable?***

To determine whether the search of Collins was unreasonable Lamer J., dealt with the question of onus holding that the person applying to have the evidence excluded holds the onus of proof. While evidence improperly obtained is *prima facie* admissible the accused must establish on a balance of probabilities that the admission of the evidence, in this case, heroin, would bring the administration of justice into disrepute (Deutscher, 1990, p. 9). However, the courts developed certain presumptions for a reasonable search in *Hunter v. Southam Inc.* (1984). A search must be authorized by a judicious official with no investigative or prosecutorial powers which would vitiate their capacity to act impartially, the law itself must be reasonable, and the search must be conducted in a reasonable manner (*R. v. Collins*, 1987, para. 23). Once the appellant has shown that the search could not be demonstrably justified, the burden of persuasion is shifted from the appellant to the Crown. In *Collins*, the Crown argued that the search was conducted under s. 10(1) of the *Narcotic Control Act*, however, they failed to establish the reasonableness of the constable's belief. Lamer J. decided that the best resolution would be to order a new trial due to the lower court's incorrect ruling.

### ***Would the Evidence Bring the Administration of Evidence into Disrepute?***

The Charter directs the court to consider "all the circumstances" when conducting a s. 24(2) analysis (*R. v. Collins*, 1987, para. 19). Lamer J. identified three factors of overriding importance when determining whether the admission of evidence obtained in violation of the Charter would bring the justice system into disrepute: (1) the effect of admitting the evidence on the fairness of the trial, (2) the seriousness of the Charter violation, and (3) the effect of excluding the evidence on the administration of justice.

**Fairness of the Trial.** The first factor in *Collins* requires the trial judge to consider the nature of the evidence and the effect that its admission would have on the fairness of the trial (*R. v. Collins*, 1987, para. 36). This inquiry focuses on the disrepute which will result from the judicial condonation of the police misconduct by the acceptance of the evidence. The reliability of the evidence, whether the evidence was obtained independently of the Charter violation, and whether the evidence was discoverable are all essential elements to consider under the first factor. Here, Lamer J. draws a distinction between self-incriminating evidence and pre-existing real evidence. Evidence in the form of self-incriminatory statements or other conscripted evidence acquired from the accused (Penney, 1994, p. 783). On the other hand, real evidence is obtained in a manner that violated the Charter (*R. v. Collins*, 1987, para. 37). While prejudicial to the accused, the inclusion of such evidence will not render the trial unfair. Instead, real evidence would have to be considered in light of other factors.

**Good Faith.** The second factor requires judges to consider the seriousness of the violation. Under this heading, trial judges are to consider whether the determination was serious, technical, willful, deliberate, inadvertent, or made in good faith (*R. v. Collins*, 1987, para. 38). Additionally, they must also investigate whether there were alternate, less infringing, investigatory techniques available. The availability of other investigatory techniques that could have resulted in the evidence being obtained in an otherwise more lawful manner tends to render the breach more serious in that it is indicative of a blatant disregard for the accused's Charter rights (Eberdt, 2011, p. 67). This was one of the first times that "good faith" policing was mentioned in case law. When the superior court delineated what is meant when a judge is to consider "all the circumstances" judges are to evaluate the nature of the Charter infringing

conduct (Cory, 1998, p. 242). The Court argued that where the police have acted in "good faith" there is no need to provide the remedy of exclusion of evidence for their misconduct.

**Disciplining the Police.** The third factor required the trial judge to consider the effect of excluding the evidence. This factor calls on the Court to consider whether excluding evidence essential to substantiate the charge that would result in the acquittal of the accused due to a trivial breach of the Charter. Such disrepute would be greater if the offence was more serious (*R. v. Collins*, 1987, para. 39). According to Lamer J., of prime concern is the integrity of the judicial process. Thus, the focus of a s. 24(2) inquiry is not on the conduct of the police officers (*R. v. Collins*, 1987, para. 31). However, disrepute can result from the admission of evidence that would condone prosecutorial or police misconduct. Therefore, there is a need for the courts to dissociate themselves from the behaviour of the officer towards Collins. Lamer J. explained the purpose of the exclusionary rule as follows:

“It is whether the admission of the evidence would bring the administration of justice into disrepute that is the applicable test. Misconduct by the police in the investigatory process often has some effect on the reputation of the administration of justice, but s. 24(2) is not a remedy for police misconduct, requiring the exclusion of the evidence if, because of this misconduct, the administration of justice was brought into disrepute. Section 24(2) could have very well been drafted in that way, but it was not. Rather, the drafters of the Charter decided to focus on the admission of the evidence in the proceedings, and the purpose of s. 24(2) is to prevent having the administration of justice brought into further disrepute by the admission of the evidence in the proceedings. This further disrepute will result from the admission of evidence that would deprive the accused of a fair hearing, or from

judicial condonation of unacceptable conduct by the investigatory and prosecutorial agencies.” (Para. 33).

Lamer J. frames disrepute in terms of the social policy concerns underlying s. 24(2) of the Charter. When the Crown seeks to have unconstitutionally obtained evidence admitted at trial, it is necessary to consider any disrepute that may arise from the exclusion of evidence. Lamer J. goes on to define disrepute as a concept that requires a consideration of the community's views. Disrepute, as Lamar J. puts it, must be looked at through the eyes of the reasonable person "dispassionate and fully apprised of the circumstances of the case." (*R. v. Collins*, 1987, para. 32). It is the inability to maintain public support due to an eroded system of justice.

The evidence obtained as a result of the search was real evidence, and, while prejudicial to the accused it likely would not render the trial unfair. The cost of excluding the evidence would be high and based on the elucidated test, having the appellant evade conviction for a serious offence is more likely to bring the administration of justice into disrepute than not. However, in the case at hand, the administration of justice would be brought into greater disrepute, if this Court admitted the evidence and did not dissociate itself from the conduct of the flagrant police conduct.

## **Dissent**

Justice McIntyre, dissenting, believed that the appeal should have been allowed and a new trial ordered. McIntyre J. disagreed with Seaton J.A. who applied the community shock test which has a higher threshold for exclusion (*R. v. Collins*, 1987, para. 41). Instead, he suggested the Court adopt a method akin to the reasonable person standard (para. 51). The Court should ask whether the admission of the evidence would bring the administration of justice into disrepute

“in the eyes of a reasonable man, dispassionate and fully apprised of the circumstances of the case” (*R. v. Collins*, 1987, para. 51). Both Lamer J. and McIntyre J. adopted the reasonable person test but came to opposite conclusions about the reaction of the reasonable person to the admission of the evidence. Applying this test to the case, Lamer J. concluded that the administration of justice would fall into disrepute if the evidence was admitted but McIntyre J. thought it would not be due to the seriousness of the offence. Ruby Collins was not in possession of narcotics for personal use but for the purpose of trafficking.

***R. v. Stillman*, [1997] 1 S.C.R. 607**

Ten years after Justice Lamer’s original framework was introduced in *Collins*, the Court returned to the s. 24(2) inquiry. In *Stillman*, the concept of trial fairness was expanded to include conscriptive and non-conscriptive evidence (Eberdt, 2011, p. 68). This terminological shift broadened the category of conscriptive evidence while preserving the basic structure of the *Collins* test.

**Facts of the Case**

On April 19, 1991, the appellant, William Wayne Dale Stillman, was arrested for the murder of Pamela Bischoff. An autopsy revealed that the victim had died due to wounds to her head (*R. v. Stillman*, 1997, para. 4). Semen was also found in the victim’s vagina and a human bite mark was located on her chest. The appellant retained counsel to which he was advised not to consent to or provide bodily samples or statements to the police (para. 5). Despite these instructions, once the lawyers left, Stillman was subjected to intense and manipulative interrogation by the police. Over the next few hours, hair samples, buccal swabs, and dental impressions were taken from the accused despite his refusal and the explicit written directions of his lawyers.



### **Lower Court Decision**

Following a *voir dire*, the trial judge found that the hair samples, buccal swabs, teeth impressions, and discarded tissue containing mucous had been obtained contrary to Stillman's Charter rights but concluded that the evidence was nevertheless admissible (*R. v. Stillman*, 1997, para. 18). The trial judge went on to state that the search and seizure of the evidence were legal and incidental to the arrest. The search and seizure were conducted in a reasonable manner given the nature of the offence. The police believed that, in all the circumstances, it was necessary to obtain bodily substances and dental impressions from the accused to establish innocence or guilt. Due to the seriousness of the crime, securing a conviction was of utmost importance, thus the police acted in good faith (para. 173). The trial judge was of the view that the search and seizure constituted minimal affronts to the accused's bodily integrity. Indicating that by admitting the evidence, the accused would not be deprived of a fair trial (para. 14). Rather, because the crime involved a brutal sexual assault and murder, society has a heightened interest in seeing someone removed from society for such a crime. The court argued that failing to admit the evidence would bring the administration of justice into greater disrepute than its admission as police could not have charged the accused without the evidence.

### **The Court of Appeal**

On appeal from the Court of Appeal for New Brunswick. The majority upheld the trial judge's ruling and affirmed the verdict by dismissing the accused's appeal (*R. v. Stillman*, 1997, para. 11).

### **Decision & Supreme Court Rationale**

In a divided Court, Cory J. writing for the majority held that the trial judge erred in concluding that the hair samples, buccal swabs, and dental impressions existed independent of a

Charter breach (*R. v. Stillman*, 1997, para. 70). Contrary to the trial judge's ruling and the judgement of the Court of Appeal, the evidence was obtained in breach of Stillman's ss. 7, 8 and 10(b) Charter rights (para. 134). The appeal was allowed, and a new trial was ordered in which the hair samples, dental impressions and buccal swabs were excluded, while the mucous sample was admitted (para. 129).

The Court considered the following in their deliberations: (1) whether the discarded tissue and the taking of hair samples, buccal swabs and teeth impressions without the accused's consent, while he was in custody, was a violation of the accused's right against unreasonable search and seizure under s.8 of the Charter; (2) whether as a result of the police conduct, the accused's right to security of the person was infringed in a manner inconsistent with the principles of fundamental justice under s. 7 of the Charter; (3) whether or not the appellant was denied his right to counsel guaranteed by s. 10(b) of the Charter; and (4) whether the evidence should be excluded under s. 24(2) if it is determined that the accused's rights had been unjustifiably denied.

### ***The Scope of the Common Law Power of Search Incident to Arrest***

First, the Court identified whether the seized evidence was obtained under the Criminal Code. In *Hunter v. Southam Inc.* (1984) it was held that a search conducted without prior authorization is presumptively unreasonable. However, the exception to the rule delineated by Chief Justice Dickson is the power of a search incident to an arrest which is predicated on the exigent considerations inherent to the unique circumstances of an arrest (McGuinty, 2018, p. 283). In most cases, this is done to protect the arresting officer and to prevent evidence from being destroyed (*R. v. Stillman*, 1997, para. 33). Informed by clear guidelines, a search incidental to an arrest cannot be so broad as to encompass the seizure of bodily samples in the absence of

valid statutory authority (para. 33). The broad application of this represents a failure to balance society's interest in detecting and punishing crime and the individual's interests in personal privacy and bodily autonomy (*Hunter v. Southam Inc.*, 1984 p. 167; *R. v. Stillman*, 1997, para. 164-169). In other words, the privacy interests of an accused should not be reduced to such an extent that justifies seizures of bodily samples without consent, particularly when involving a young offender who is detained and presumed innocent (*R. v. Stillman*, 1997, para. 61).

Altogether, there was an absence of evidence to substantiate the exercise of such powers. For these reasons, the Court sided with the judgement of Rice J.A, in that the police were not permitted to gather Stillman's bodily samples and that their subsequent actions contravened the accused's s.8 right against unreasonable searches and seizures (para. 19).

### ***What Kind of Evidence Will Render a Trial Unfair?***

The primary aim and purpose of the trial fairness factor is to prevent an accused person whose Charter rights have been infringed from being forced against their will to provide self-incriminating evidence (Cory, 1998, p. 234). It is a precautionary measure in place to prevent the administration of justice from being brought into further disrepute (*R. v. Collins*, 1987, para. 31).

The Court turned to discuss what type of evidence affected trial fairness. The majority re-examined the purpose of the trial fairness making a distinction between conscriptive and non-conscriptive based upon the method that the evidence was obtained. Conscriptive evidence is evidence obtained in a manner that compels an individual to incriminate themselves at the behest of the state using force, threats and coercion (*R. v. Stillman*, 1997, para. 80; Stewart, 2011, p. 255). If evidence is non-conscriptive it will rarely render the trial unfair, and a judge should proceed to consider the seriousness of the breach and the effect of exclusion on the reputation of the administration of justice. However, evidence characterized as conscriptive will generally render

the trial unfair if the Crown fails to demonstrate on a balance of probabilities that the evidence would have been discovered by alternative means (*R. v. Stillman*, 1997, paras. 73, 115). This relates to the Crown's need to establish the discoverability of evidence. For example, could an independent source have been used to obtain the evidence or was the discovery of the evidence inevitable (Dostal, 2021, Pre-Grant Analysis section; *R. v. Stillman*, 1997, para. 102)? If the evidence is conscriptive but it would have been discovered independent of the unlawful conscription, then its admission will generally not render the trial unfair (Fuerst, 2009, p. 147). The impact of a breach is lessened, and the admission of derivative evidence is more likely where it was otherwise discoverable.

***When Should Evidence Obtained as a Result of a Charter Breach Be Inadmissible?***

A balancing inquiry is employed by judges to determine the admissibility of evidence where a Charter breach is alleged. First, it must be established that Charter infringement took place. If this is the case and a rights violation could not be reasonably justified under s. 1 of the Charter, a judge must go on to consider whether the evidence should be excluded under s. 24(2) of the Charter. Here, the judge must consider all the circumstances of the case and balance the effect of admitting the impugned evidence on the repute of the administration of justice against the effect of excluding it (Paciocco & Stuesser, 2005, p. 343). As we know, the three factors set out in *Collins* are (1) fairness of the trial, (2) seriousness of the violation and (3) the effect of excluding the evidence. The first two factors relate to disrepute which may arise from the admission of dental impressions, hair samples, buccal swabs, and the discarded tissue and the third group addresses the adverse impact that excluding the evidence will have on the integrity of the justice system.

**Right to Life, Liberty, and Security of the Person.** The taking of the dental impressions, hair samples and buccal swabs violated the appellant's s. 7 Charter right. The seizure was highly intrusive and violated the sanctity of the body which is essential to the maintenance of human dignity (Cory, 1998, p. 236). It was the ultimate invasion of the appellant's privacy and should have demanded a higher standard of justification (*R. v. Stillman*, 1997, para. 51). The taking of the samples without authorization exacerbated the severity of the violation to such a degree that it contravened the principles of fundamental justice (para. 67).

**The Discarded Tissue.** Most justices found that the discarded tissue was seized in violation of s.8 of the Charter because Stillman was in custody. Although the police did not request a mucous sample, the tissue would not have been discovered had it been for the interrogation. By discarding the tissue, Stillman relinquished any meaningful privacy interests (*R. v. Stillman*, 1997, para. 275). However, despite the police acting surreptitiously and in disregard for the accused's explicit refusal to provide bodily samples, the violation of the accused's Charter rights was not serious, nor did it interfere with the appellant's bodily integrity (para. 128). As a result, the tissue containing the mucous was admitted.

### **McLachlin Dissent**

McLachlin, L'Heureux-Dubé and Gonthier JJ. each gave separate dissenting opinions but concluded that all the evidence should have been admitted. It would do more harm to the reputation of the administration of justice if relevant and probative evidence was excluded.

### ***The Scope of the Principle of Self-incrimination***

The most critical dissent came from Justice McLachlin as she took issue with the majority's overly broad approach. McLachlin J. signals concern about the scope of the common law right against self-incrimination (Hirschorn, 2011, p. 16). The majority determined that the

seizure of bodily substances violated s. 7 of the Charter on the basis that the seizure offended the privilege against self-incrimination (Parfett, 2002, p. 316). McLachlin J. held a conflicting view, refusing to expand the principle against self-incrimination to physical evidence or real evidence (*R. v. Stillman*, 1997, para. 212). In her view, real evidence refers to anything which is tangible and exists as an independent entity (Cory, 1998, p. 234). This form of evidence can never be conscriptive evidence. McLachlin J. went on to reference the following comment made in *R. v. S. (R.J.)* (1995):

“Both the common law and the Charter draw a fundamental distinction between incriminating evidence and self-incriminating evidence: the former is evidence which tends to establish the accused's guilt, while the latter is evidence which tends to establish the accused's guilt by his own admission or based upon his own communication. The s.7 principle against self-incrimination that is fundamental to justice requires protection against the use of compelled evidence which tends to establish the accused's guilt on the basis of the latter grounds, but not the former.” (p. 459)

McLachlin J. held that extending the principle of self-incrimination beyond its recognized ambit would be against the framer's intent. McLachlin J.'s dissent represented a discontent between testimonial evidence, privacy interests and trial fairness. She argued that real evidence was not linked to trial fairness and that the privilege against self-incrimination was confined to testimonial evidence and was never intended to encompass evidence derived because of involuntary or compelled testimony (*R. v. Stillman*, 1997, para. 198).

The jurisprudence which emerged after *Stillman*, in *R. v. Tessling* (2004), paints a different picture in terms of conscriptive physical evidence and the need to afford individuals more protection when state infringements confer with issues of privacy. In *Tessling*, the Court

determined that there are three distinct spheres of privacy interests that inform the right to be protected from unreasonable search and seizures (para. 20-24). The spheres are as follows: (1) Privacy of Person which involves searches of a person and the securing of hair, blood or tissue samples; (2) Territorial Privacy involving the search of vehicles, residences, businesses, private property and discarded items; and (3) Informational Privacy involving the search of personal data and the interception of different modes of communication (e.g., wireless Internet, cellphone, etc.) (MacIvor, 2012, p. 278). Each sphere requires different considerations. Personal privacy interests deserve the strongest protection under the Charter as they involve the security of one's physical and psychological self from government intrusion. In this way, personal privacy concerns are grounded in the right of the security of a person and s. 7 of the Charter. For example, the taking of hair samples, buccal swabs, and teeth impressions from Stillman were unreasonable breaches of personal privacy that violated the sanctity of the accused's body (King, 2020, Are All Privacy Interests the Same? section).

However, even with this new jurisprudence, McLachlin J. continued to refer to pre-Charter common law in *R. v. Grant* (2009). Again, McLachlin indicated that physical evidence, in the form of bodily samples, should not be afforded Charter protection related to self-incrimination. McLachlin J., citing Professor Paciocco, stated that conscriptive evidence such as bodily samples should not be equated with testimony (*R. v. Grant*, 2009, para. 106). Instead, bodily samples are protected by issues of privacy and human dignity informed by s. 8 of the Charter. According to McLachlin, concerns for privacy and human dignity are not a part of a s. 24(2) consideration.

Using the pre-Charter common law as a basis to narrowly define the meaning of self-incriminating evidence is questionable and has a couple implications. First, it seems to fly in the

face of one of the foundational expressions of Justice Dickson in *Hunter v. Southam* (1984) that Charter rights should not be fixed in pre-Charter interpretations of those rights and that rights should be interpreted liberally and expansively in favour of the rights holder. Second, scientific advancements in the area of forensic DNA analysis have developed significantly since the common law rule McLachlin relied on (Quinlan, Fogel & Quinlan, 2010, p. 102). Science has in recent decades played an important role in advancing the truth-seeking function throughout the judicial process (Pilon & Moller, 2000, Common Law Power of Search Incidental to Arrest section). Accordingly, conscriptive bodily samples hold a much higher probative value when it comes to solidifying a conviction. These factors place McLachlin's ruling in a problematic and rather illiberal view.

### ***Automatic Exclusionary Rule and the Framers***

Cory J.'s decision was influenced by the common law notion that an accused ought not to be compelled to produce evidence against themselves (*R. v. S. (R.J.)*, 1995, p. 456); he decided it would generally not be possible to have a fair trial based on conscriptive evidence derived from a Charter breach. McLachlin J. argued that the framers of the Charter did not intend s. 24(2) to act as an automatic exclusionary or quasi-exclusionary rule and, accordingly, the view that any evidence which affects the fairness of the trial must be excluded under s. 24(2) should be rejected (*R. v. Stillman*, 1997, para. 144). Not only does it run counter to the spirit and wording of s. 24(2), but it elevated trial fairness making it a determinative factor. This would have the potential to assume that "anything that affects trial fairness automatically renders the trial so fundamentally unfair that other factors can never outweigh the unfairness" (para. 250). It becomes unnecessary to consider other factors as they could never outweigh the harm that would



be done by its admission. In other words, *Stillman* reduced the trial judge's ability to consider all the circumstances associated with the obtainment of evidence.

After *Stillman*, conscriptive evidence would be excluded at a higher rate. To many, including McLachlin J., this represented an automatic exclusionary rule for non-discoverable conscripted and derivative conscripted evidence (Fuerst, 2009, p. 148; Santoro, 2015, p. 1). This decision would be reconstructed over a decade later in *R. v. Grant* (2009) where the Court addressed the critical commentary surrounding *Stillman*.

### ***R. v. Grant*, [2009] 2 S.C.R. 353**

Before *R. v. Grant* (2009), there was an accumulation of legal commentary discrediting the pre-existing framework created in *R. v. Collins* (1987) then modified in *R. v. Stillman* (1997) (Eberdt, 2011, p. 66). The approaches in both precedent-setting cases were criticized for the legal uncertainty that they created. The uncertainty in the law and its application was especially exacerbated in *Stillman* which created a virtually automatic exclusionary rule (Stewart, 2011, pp. 256). The notion that evidence should be excluded without further consideration because it was illegally obtained is controversial. American jurist Benjamin Cardozo captured this sentiment by questioning whether it is fair that “the criminal go free because the constable has blundered” (Simon, 2020, p. 793).

By developing a new approach in *Grant*, the majority ensured that focus was placed back on balancing all the various elements of a case. This is because the emphasis on trial fairness had unintentionally rendered the exclusion of non-discoverable conscriptive evidence nearly automatic (*R. v. Stillman*, 1997, para. 144). In the eyes of the Chief Justice and Charron J., this appeared incongruous with the wording of s. 24(2) of the Charter, which specifies that the determination must be made “having regard to all the circumstances” (*R. v. Therens*, 1985, para.

11). In departing from the legal foundations established in the *Collins-Stillman* tests, the Court took the opportunity to refine its previous decisions by offering a revised test that is more flexible and less categorical when conducting a s. 24(2) analysis (Monahan & Yap, 2012, p. 7).

### **Facts of the Case**

On November 17, 2003, three Toronto police officers were monitoring a high-crime area near four schools to provide student reassurance and to deter crime (*R. v. Grant*, 2009, para. 4). Upon driving past Donnohue Grant, a young Black man, two undercover officers, Constable Worrell and Constable Forde directed a nearby uniformed officer to “have a chat” with Grant as he was fidgeting and staring at them in a way that aroused suspicion (para. 5). Constable Gomes approached Grant and stood in his intended path (para. 5). He directed Grant to “keep his hands in front of him,” asked for identification and proceeded to question him (para. 6). After a brief period, Constable Worrell and Constable Forde approached and identified themselves to the accused, then stood behind Constable Gomes, obstructing the way. When Grant continued to fidget, Constable Gomes asked the accused whether he had ever been arrested before and “if he had anything he should not” (para. 7). The exchange culminated in Grant admitting that he was in possession of marijuana and a firearm. At that point, the officers arrested and searched the accused, seizing the evidence (para. 8).

### **Lower Court Decision**

At trial, Grant argued that the police breached his ss. 8, 9 and 10(b) Charter rights (*R. v. Grant*, 2009, para. 11). He sought to have his inculpatory statements and the seized gun excluded under s. 24(2). Since it was undisputed that the police did not have sufficient grounds to lawfully detain him for investigative purposes before he answered their questions, the threshold question was whether he was detained before he made self-incriminating utterances (para. 12). The trial

judge concluded that Grant was not detained, characterizing the encounter as a mere chat. The trial judge found no Charter breach and admitted the firearm. The accused was convicted of five firearms offences.

### **The Court of Appeal**

The Ontario Court of Appeal disagreed with the lower courts and dismissed the appeal (*R. v. Grant*, 2009, para. 10). Laskin J.A. concluded that a detention had solidified when Constable Gomes instructed Grant to “keep his hands in front of him” (para. 52). However, the gun was still to be admitted under s. 24(2) because the Court had previously ruled against an automatic exclusionary rule for derivative conscriptive evidence (Dawe & McArthur, 2010, p. 385). The appeal court elaborated by stating that while the admission of the gun impacted trial fairness, that alone would not bring the administration of justice into disrepute (*R. v. Grant*, 2009, para. 11). When balancing the seriousness of possessing a loaded firearm in public with the reliability of the evidence, and the absence of willful or flagrant police conduct, the scale tips in favour of admission (Fuerst, 2009, p. 148). This means that excluding the evidence would have a more serious impact on the repute of the administration of justice than its admission (Fuerst, 2009, p. 149).

### **Decision & Supreme Court Rationale**

A unanimous Court with two partially concurring reasonings rejected the conscriptive and non-conscriptive dichotomy articulated in *Collins* and *Stillman* for being too rigid and inconsistently applied. The Court introduced a revised approach that abandoned the trial fairness factor due to its determinative nature (Stuart, 2012, p. 25).

The Court dismissed Grant's appeal and upheld four of the five convictions excluding the trafficking charge which was to be thrown out as Grant did not “transfer” the firearm within the

meaning of s. 100 of the *Criminal Code of Canada* (*Criminal Code*, RSC 1985, c C-46, s 100; *R. v. Grant*, 2009, para. 140). The Court agreed that the police had breached Grant's ss. 9 and 10(b) Charter rights (para. 131). However, when balancing the impact of the breach on Grant's Charter-protected rights against the public's interest in adjudicating the case on its merits, the seriousness of the breach weighs strongly in favour of admitting the gun. The gun was therefore admitted as evidence (para. 140).

### ***Supreme Court of Canada's Detention Analysis***

First, the Court addressed whether the appellant was detained before incriminating himself. This required a judgement to be made relating to the nature of the encounter and if a reasonable person in the accused's position would have concluded that they were not free to go and had to comply with police demands (*R. v. Grant*, 2009, para. 31). A detention triggers two important Charter rights: the right not to be detained arbitrarily, under s 9 and the right to counsel, under s 10(b).

To determine whether the accused was detained, an appraisal of the entire interaction must take place. This involves the circumstances that gave rise to the encounter as perceived by the individual, the nature of the police conduct, and the characteristics or circumstances of the individual (*R. v. Grant*, 2009, para. 32). A detention under ss. 9 and 10 of the Charter refers to a suspension of one's liberties by a significant physical or psychological force (Penney & Stribopoulos, 2010, p. 445). A psychological detention can materialize in two scenarios: (1) where an individual has a legal obligation to comply with a request or demand, and (2) where there is no legal compulsion but where the circumstances are such that "a reasonable person would conclude by reason of the state conduct that he or she had no choice but to comply" (Paciocco, 2010, p. 97; *R. v. Grant*, 2009, para. 44). In this case, the accused was detained

contrary to ss. 9 and 10(b) of the Charter before disclosing his possession of the firearm. By approaching the accused and questioning him the encounter took on the character of an interrogation. The police initiated a psychological detention when they employed tactics that were “coercive enough to effectively remove the individual’s choice to walk away from the police” (*R. v. Grant*, 2009, para. 39). As a result, Grant was deprived by the state of his liberty of choice.

Grant argued that the appeal court erred in finding that there was no s. 8 Charter violation because officers lacked reasonable grounds to detain him (*R. v. Grant*, 2009, paras. 10, 53). Their actions did not satisfy the preconditions of an investigative detention elaborated in *R. v. Mann* (2004). In *R. v. Mann* (2004), the Court examined warrantless police searches within the context of investigative detentions and set boundaries on police power (Jochelson & Ireland, 2019, p. 87). The SCC argued that the police could detain an individual if there are reasonable grounds to suspect in all the circumstances that the individual is connected to a particular crime and that the detention is reasonably necessary (*R. v. Mann*, 2004, para. 45).

The Court determined that the appellant was detained prior to his arrest and the arrest was arbitrary in nature (*R. v. Grant*, 2009, para. 57). Grant was detained when Constable Gomes told him to “keep his hands in front of him” (paras. 49-50). At that point, Grant’s liberty was constrained as the nature of the questioning changed from ascertaining the appellant’s identity to determining whether he “had anything that he should not” to elicit incriminating information (para. 52). The Court, therefore, concluded that the impact of the breach on Grant’s Charter rights was not severe but more than minimal (para. 135).

### ***When Must Evidence Obtained in Violation of Charter Rights Be Excluded?***

In a joint judgment, McLachlin C.J.C. and Charron J. found it necessary to clarify the criteria relevant to determining when, in “all the circumstances,” admission of evidence obtained as a result of a Charter breach “would bring the administration of justice into disrepute”. To prevent the Charter from being interpreted in a broad and imprecise manner, the Court reframed the s. 24(2) Charter test by laying out three new factors to be considered in deciding when to exclude probative evidence (*R. v. Grant*, 2009, para. 60). When faced with an application for exclusion, a court must assess and balance the effect of admitting the evidence on society’s confidence in the justice system having regard to (1) the seriousness of the Charter-infringing state conduct, (2) the impact of the breach on the Charter-protected interests of the accused, and (3) society’s interest in the adjudication of the case on its merits (para. 71). A court’s role is to balance the assessments under each of these lines of inquiry. Many of the considerations under the *Collins-Stillman* framework became subsumed into one of these factors (Monahan & Yap, 2012, p. 7). However, due to the automatic exclusionary rule for undiscoverable conscriptive evidence, trial fairness is no longer a discrete stage of the s. 24(2) analysis. Rather, the majority believed that trial fairness would be “better conceived as an overarching systemic goal than as a distinct stage of the 24(2) analysis” (*R. v. Grant*, 2009, para. 65).

**The Seriousness of the Charter-infringing State Conduct.** At the first stage of the new test, the Court considered the nature of the Charter-infringing police conduct that led to the discovery of the evidence. This requires an examination of an officer's mental state. Under the first category, the Court must gauge the state’s culpability along a spectrum ranging from minor and inadvertent errors to reckless and deliberate wrongdoing (*R. v. Grant*, 2009, para. 74). The more severe the state conduct, the greater the need to dissociate from that conduct (para. 72). In

preserving public confidence and ensuring state adherence to established Charter standards and the rule of law, the Court must exclude improperly obtained evidence that can potentially bring the justice into disrepute (Guo, 2011, Exclusion of Evidence and The Grant Test section; *R. v. Grant*, 2009, paras. 72-75). However, this factor was not created to punish the police but instead is meant to positively guide police conduct.

**The Impact of the Charter Violation on the Charter-protected Interests of the Accused.** The second stage of the inquiry is an evaluation of the extent to which a Charter breach undermines an individual's rights (*R. v. Grant*, 2009, para. 71). This line is in place to ensure that Charter-protected interests maintain their value. The significance of the impact is measured based on the type of evidence obtained. This is because common law has long directed the judiciary to react more strongly towards compelled statements than to compelled bodily samples. To assess the degree of intrusion, the Court must determine whether the impact of the Charter breach was “fleeting and technical” or “profoundly intrusive” (Paciocco, Paciocco & Stuesser, 2020, p. 500). Like the first stage, the more serious the intrusion, the greater the risk that admission of the evidence would bring the administration of justice into disrepute (*R. v. Grant*, 2009, para. 76).

**Society's Interest in an Adjudicating of a Case on the Merits.** In the third stage, the Court asks whether the admission or exclusion of evidence would better serve the truth-seeking function of the justice system (*R. v. Grant*, 2009, para. 79). This determination varies according to the reliability of evidence, the importance of that evidence to the Crown, and the seriousness of the offence (Paciocco, Paciocco & Stuesser, 2020, p. 510; *R. v. Grant*, 2009, para. 83). Where the evidence is reliable and important, the seriousness of the offence can enhance the case for admission, especially in cases where evidence was discovered in good faith.

***Should the Gun be Admitted as Evidence at Trial?***

The Court analyzed Grant's situation considering the three lines of inquiry and determined that the evidence in question, the gun, should not be excluded at trial. The SCC found that although the police violated Grant's ss. 9 and 10(b) rights, the violations were not flagrant (*R. v. Grant*, 2009, para. 133). In other words, the officers, acted "in good faith" as there was no indication that they had wilfully disregarded his Charter rights (para. 133). However, in terms of Grant's individual interests, the Court found that the gun would not have been discovered had it been for the arbitrary detention. The fact that the evidence was non-discoverable aggravated the impact of the breach on Grant's interest (paras.136-137). The Court considered these breaches to be significant, weighing towards the exclusion of the evidence (para. 138). Lastly, the reliability of the gun and the public interest in the adjudication of a gun-related case weighed strongly in favour of its admission (paras. 133, 140). While the significant breach of the accused's Charter-protected rights weighed strongly in favour of excluding the gun, the public interest in the adjudication of the case on its merits weighed strongly in favour of its admission. When all the factors were balanced against each other, the Court noted that the gun was reliable physical evidence and was essential to establishing guilt and obtaining a conviction.



In this case, to admit the weapon in evidence would have a positive effect on the reputation of the administration of justice. The nature of the offence and the need to prevent fire-arm-related offences tipped the scale in favour of admission (paras. 228-229).

### ***Grant* Test Critique**

The Supreme Court of Canada's decision in *R. v. Grant* (2009) made substantial changes to the test governing the exclusion of unconstitutionally obtained evidence. In assessing the implications of these changes, research has pointed toward the need to demarcate firmer boundaries between permissible and impermissible conduct (McGuinty, 2018, p. 297).

### **Good Faith Policing**

The *Grant* test has been criticized for not balancing the rights of individuals with the interests of the state. This has arguably made it easier for the courts to admit evidence that was obtained improperly under s. 24(2) of the Charter. This is due to a trend favouring the admission of evidence when police act in good faith. This means that if an officer honestly and reasonably believed they were acting lawfully, a court is more likely to admit the evidence. However, Justice Iacobucci in *R v. Elshaw* (1991), a case that predates *Grant* by 20 years, states that "the fact that the police thought they were acting reasonably is cold comfort to an accused if their actions result in a violation of his or her right to fair criminal process" (*R. v. Elshaw*, 1991, paras. 59). This quote would leave one to view *Grant* as a regressive development in the context of s. 24(2) of the Charter. The consideration of "good faith" under the first line of inquiry threatens to determine the analysis in a manner that resembles the exclusionary rule for conscriptive evidence articulated in *Stillman*. When deciding to admit impugned evidence, careful attention must be paid to the impact of the breach on the rights of the accused to prevent good faith from overwhelming the s. 24(2) analysis (McGuinty, 2018, 296).

### ***The Broad Impact of Admission on the Long-Term Repute of the Justice System***

Before *R. v. Grant* (2009), the SCC had held that if the government and its representatives “act in good faith and without abusing their power under prevailing law and only subsequently are their acts found to be unconstitutional, they will not be liable.” (*Mackin v. New Brunswick*, 2002, para. 79). The Supreme Court relied on this presumption of good faith in *Grant*, where they clarified that the exclusion of evidence need not occur unless flagrant misconduct on the part of the police can be demonstrated (Dawe, & McArthur, 2010, p. 434). Inadvertent police conduct will not impact public confidence in the judicial system since the rights are still protected against intentional state action (Radcliffe, 2009, Per the Majority section). However, regardless of whether police misconduct is intentional or unintentional, if such conduct results in a serious Charter infringement, to preserve public confidence, the Court must disassociate itself from the impugned conduct.

This proceeds from the assumption that the test articulated in *Grant* fails to sufficiently consider the long-term societal interest in the protection of constitutional rights. Instead, it is overly focused on the effect of police misconduct on a criminal trial than the broad impact of the admission of evidence and its lasting effect on the repute of the justice system (*R. v. Grant*, 2009, para. 69-70; *R. v. Le*, 2019, para. 140). Section 24(2) is based on the proposition that a “Charter breach signifies, in and of itself, injustice, and a consequent diminishment of administration of justice” (*R. v. Le*, 2019, para. 140). When a Charter breach occurs, damage has already been done to the administration of justice and it is in the hands of the court to prevent further damage to the repute of the justice system by determining the admissibility of evidence.

The *Grant* majority failed to give lower courts appropriate guidelines for determining what types of conduct should and should not be captured under good faith. Failing to define what

constitutes good faith, leaves open the question of when an officer is acting in a manner that is above reproach. It also leaves trial judges with the presumption that officers are ordinarily acting with good faith (Pearn, 2011, pp. 165-166). To determine the acceptable circumstances where the state may benefit from illegally obtained evidence when individual rights are in peril requires an examination of the scope of good faith policing. Without a clear and comprehensive definition of good faith, the balancing framework under s. 24(2) is susceptible to a significant measure of discretion which can, in turn, introduce uncertainty and unpredictability into the trial process.

### **The Diminished Protection of Individual Rights**

The Court's application of good faith in *R v. Grant* (2009) potentially diminished the legitimacy of the judiciary and its ability to dispense justice. To preserve the integrity of the administration of justice, the courts must distance themselves from unlawful conduct to avoid sending the message to the public that the end justifies the means. It would be incongruous for the state to condone illegal conduct on the part of the police, and at the same time to require others to adhere to the law. This creates an asymmetry between the standard expected of an average citizen and that applied to law enforcement (Ngov, 2018, p. 175). Such incongruity undermines the perceived legitimacy of the courts as police officers should be held to a higher standard of legal awareness than the average person.

The approach in *Grant* significantly shifted the Court in the direction of favouring the admissibility of derivative evidence obtained because of a Charter breach (Monahan & Yap, 2012, p. 8). The Court expanded the scope of admissibility provided that the evidence is reliable and was discovered as a result of a good faith infringement (Jochelson, Huang & Murchison, 2015, p. 184). As previously discussed, it is in the Court's view, that the taking of bodily samples does not trench on the accused's autonomy in the same way that a coerced statement would (*R v.*

*Grant*, 2009, para. 105). This is because evidence has traditionally been evaluated narrowly and without much consideration for privacy interests (Monahan & Yap, 2012, p. 8). Madden (2011) claims that with the Court's increased emphasis on the reliability of bodily samples, will lead to such evidence being admitted at a greater frequency than in the past (p. 232). Due to the reliability of this category of evidence, *Grant* weakens the remedial protection for violations of Charter rights, specifically, an accused person's right against self-incrimination (Stewart, 2011, pp. 257-258).

It can be argued that although not explicitly stated, the majority's decision downplays the serious impact that self-incriminating evidence can have on an individual and their reasonable expectation of privacy. This would imply that the values enshrined in the Charter as well as protected rights, hold a diminished level of significance post-*Grant*. This idea is advanced by Chief Justice McLachlin and Justice Charron as they discussed society's interest in the adjudication of a case on its merits. Instead of focussing on the seriousness of a breach, the majority questioned: "whether the truth-seeking function of the criminal trial process would be better served by admission of the evidence, or by its exclusion" (*R. v. Grant*, 2009, para. 79). They concluded that the more reliable the evidence, the stronger the perceived public interest in seeing it admitted at trial. While this may have been an attempt to correct the broad nature of the trial fairness requirement introduced in *Collins*, it is an overcorrection that can foreseeably create an imbalance between the competing interests of the court and individual rights and freedoms.

Taken together, these changes signal a shift by the Court favouring greater leeway for law enforcement discretion while simultaneously narrowing the scope of applicable Charter protections.

In the absence of a meaningful test to exclude evidence, the breach of a defendant's Charter rights becomes a breach without any other means of recourse (Eberdt, 2011, p. 65). However, imposing a test that weighs too heavily in favour of exclusion can give rise to negative perceptions of the administration of justice. It is for these reasons that s. 24(2) must balance the importance of Charter rights against the repute of the administration of justice.

## **Discussion**

### **Why Was Fairness of the Trial Dropped?**

In *Grant*, trial fairness was abandoned by the majority as it was in their view that trial fairness was better conceived as an “overarching systemic goal than as a distinct stage of the 24(2) analysis” (*R. v. Grant*, 2009, para. 65). In doing so, the Court elected to treat trial fairness as an abstract standard of analysis under s. 24(2) of the Charter. They determined that the trial fairness criteria introduced in the *Collins* test were often misinterpreted and its scope applied either too narrow or broad (para. 106). Defined narrowly, the reliability of evidence would only be considered. Defined broadly, any evidence obtained in violation of an accused's constitutional right, regardless of its quality, would result in a breach of trial fairness (para. 107).

L'Heureux-Dubé J.'s vigorous dissent in *R. v. Burlingham* (1995) directed expressed concern relating to the Court's broad interpretation of trial fairness. She felt that the first branch of the *Collins* test resulted in an automatic exclusion whenever there was a finding of “trial unfairness.” In the same judgement, Sopinka J. argues that an unfair trial resulting in a conviction would depreciate the repute of our justice system (para. 145). The Court was critical of the fact that the trial fairness inquiry took away from a judge's ability to consider all the circumstances of a case. The police conduct inquiry seems to have had the same effect as it put the “all the circumstances approach” into a “straitjacket” (McGuinty, 2018, p. 290).

## **A Reformulation of Section 24(2) of the Charter**

Grant attempted to remedy the issues that emerged from *Collins* and *Stillman* in a way that gave the lower courts more certainty and guidance. In *Stillman*, Lamer C.J. explains that “if the evidence has been classified as non-conscriptive the court should move on to consider the second and third *Collins* factors” (*R. v. Stillman*, 1997, para. 74). This statement along with the majority’s previous approach to the trial fairness factor, although not intentional, made it so that the test was read like the Oakes test. In the Oakes test, if at any point, the measure fails a step, the limit cannot be justified, and the Court does not proceed with the next step of the test. While the majority in *Grant* ensured that the overall balancing of factors took place in the end, due to the over-emphasis on police conduct a slight adjustment must be made to prevent one factor from being more determinative than the others. To balance competing interests, equal weight must be placed on each factor.

A newly articulated s. 24(2) Charter test will incorporate privacy interests and place limitations on the concept of good faith. These changes will expand the scope of Charter-protected rights and constrain police powers. This will be done in a progressivist way that allows the Constitution to adapt to changing societal needs, increasing knowledge, and technological advancements (Santoro, 2015, p. 4). Modifying the test is critical for the purposes of preventing judicial misinterpretation and ensuring that lower courts interpret the Charter the way it was intended to be read.

### ***1. Impact of the Breach on Charter-Protected Rights***

**1.1 The Means by Which Evidence Was Obtained.** The first portion of this step relates to the presence or absence of coercive means employed by the police. The concepts of conscription and discoverability will remain a part of the s. 24(2) analysis. However, the

classification of evidence (i.e., real, or testimonial evidence) is irrelevant. Instead, a s. 24(2) inquiry should be concerned with any undue pressure placed on an accused to incriminate themselves. The relevant question should not be “is the evidence ‘real’ evidence?” but rather, “is the evidence conscriptive or non-conscriptive?”. While the nature and degree of intrusiveness vary between various kinds of evidence, there is a need to abandon the notion that testimonial evidence is self-incriminatory whereas bodily samples are not. This must be done in a way that maintains the common law confession rule that testimonial evidence be looked at in a special light. Common law operates primarily to set limits on the scope of police interrogations (Dufraimont, 2008, p. 250). By preventing wrongful convictions based on unreliable confessions and discouraging the courts from relying on said coerced statements, testimonial evidence must be examined in terms of its reliability and trustworthiness. To avoid an automatic exclusionary, the protections afforded to accused persons under the confession rule must always be balanced against society’s interest in investigating crimes (p. 252). Depending on how testimonial evidence was obtained, conscriptive or non-conscriptive, the Court will assess whether its admission will bring the administration of justice into disrepute.

**1.2 Impact on Privacy Interests.** The inclusion of privacy considerations in the s. 24(2) inquiry is the most drastic change that will emerge from the reformulation of this test. A s. 24(2) analysis requires the Court to look to the interests engaged by the right infringed and examine the extent to which the violation impacted those interests. According to *R. v. Patrick* (2009), an individual’s reasonable expectation of privacy will “vary with the nature of the matter sought to be protected, the circumstances in which and the place where state intrusion occurs, and the purposes of the intrusion” (para. 38). Privacy interests are therefore relevant when discussing encroachments on individual rights and freedoms.

The first line of inquiry requires an evaluation of the extent to which unjustifiable state conduct undermines the interests protected by the right infringed. Recent decisions including *Tessling* (2004) and *Patrick* (2009), along with advancements in forensic DNA analysis suggest a growing consensus that the admissibility of bodily samples should not depend solely on whether the evidence is conscriptive. This approach rejects McLachlin C.J.'s dissent in *R. v. Stillman* (1997). As a result, the Charter concerns raised by the gathering of non-testimonial evidence are better addressed by referencing the interests of "privacy, bodily integrity and human dignity, than by a blanket rule that by analogy to compelled statements, such evidence is always inadmissible" (*R. v. Grant*, 2009, para. 104). Compelled testimonial evidence should be equated with compelled bodily samples.

The nature and degree of the violation of privacy and human dignity will fluctuate with "wide variation between different kinds of bodily evidence" (*R. v. Grant*, 2009, para. 103). Two scales capturing the nature and degree of intrusion will be used to measure the effect of a Charter violation on an individual's rights. In reference to the degree of intrusion, a scale will gauge the impact on protected rights from fleeting and technical to profoundly intrusive. In terms of the nature of the intrusion, at one end of the spectrum lie innocuous practices such as fingerprinting and on the other end invasive body cavity searches.

## ***2. The Seriousness of the State Conduct***

To adequately assess the seriousness of the state, conduct this revised s. 24(2) test demands the Court revisit the definition of good faith. Good faith policing has never been clearly defined, yet it plays a significant role in the police conduct inquiry. This is dangerous as it gives rise to cases where the concept of good faith policing captures a broad scope of conduct (McGuinty, 2018, p. 257). Due to a lack of guidance, courts may erroneously label negligent or



reckless police conduct as good faith policing. This highlights the need to place limitations on the meaning of good faith to prevent the interests of the state from overwhelming the balancing process. Formulating a stringent definition would effectively preclude broad interpretations that give police too much leeway from s. 24(2) applications.

Few definitions of good faith can be found but none are definitive. One of the earliest definitions provided by the Court can be found in *R. v. Therens* (1985) where Le Dain J. states that:

The relative seriousness of the constitutional violation has been 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, wilful, or flagrant. Another relevant consideration is whether the action which constituted the constitutional violation was motivated by urgency or necessity to prevent the loss or destruction of the evidence. (p. 652).

Another definition can be found in literature where Brockman (2015) contends that good faith refers to actions that are “without malice and without intent to breach rights or laws; with a belief that the actions taken were lawful” (p. 340). While these definitions are not fulsome, it does direct the lower courts to place state conduct on a spectrum and to consider exigent circumstances.

In formulating a new definition for good faith, the Court must keep in mind that good faith does not absolve police of wrongdoing, but it can mitigate the seriousness of a violation. Additionally, good faith should only mitigate a Charter breach where the “Crown has shown due diligence by the police in their attempt to comply with Charter standards” (Stuart, 2012, p. 30). Whether or not the police were operating in circumstances of “considerable legal uncertainty” should also be considered (*R. v. Grant*, 2009, para. 140). However, actual ignorance, negligence,

and willful blindness cannot be equated with good faith (*R. v. Grant*, 2009, para. 75; Penney & Yahya, 2021, p. 526). Reiterating Iacobucci J. in *R. v. Elshaw* (1991), the honest and reasonable beliefs of police are “cold comfort” to an accused whose rights have been violated (para. 15). While police conduct may not have been wilful, the accused’s rights have still been infringed, sometimes severely, and without remedy (McGuinty, 2018, p. 296).

In *Heien v. North Carolina* (2014), the U.S. Supreme Court states that police can use the ignorance of law defence so long as the mistake was “objectively reasonable.” (p. 11). If Canada were to adopt this approach it would represent a significant departure from the Court’s good faith exception jurisprudence. Criminal law affords one exception to incurring liability for mistakes of law: officially induced error (Ngov, 2018, pp. 175, 183; *R. v. Jorgensen*, 1995 Officially Induced Error of Law section). Allowing officers to rely on their personal interpretation of the law instead of that of a state official would result in the misapplication of the defence. Canadian courts should therefore avoid mirroring the American approach as it is incongruous with the criminal law mistake of law defence (*Criminal Code*, RSC 1985, c C-46, s 19).

To gauge culpability, police conduct will still be measured on a spectrum from inadvertent to deliberate. The greater the departure from the standards of behaviour, the heavier the onus on the police to justify their actions (Stuart, 2012, p. 30). The goal is not to punish or deter police conduct, but courts have a duty to disassociate themselves from actions that demonstrate a blatant disregard for Charter rights.

### ***3. Societal Interests in Adjudicating a Case on its Merits***

The third stage questions whether the exclusion of evidence would exact too great a toll on the truth-seeking function of the criminal trial.

Favouring the admission of evidence that is probative of a serious crime would subordinate privacy interests to state interests. Justice Abella's dissent in *R. v. Saeed* (2016) not only supports the idea that conscriptive bodily samples demand more rigorous protection under s. 24(2) but urges lower courts to consider the impact of admitting this type of evidence. She states that the reliability and importance of the evidence to the Crown's case are relevant, but "where intrusions on bodily integrity are deliberately inflicted," evidence will be excluded "notwithstanding its relevance and reliability" (para. 156). From the public's perspective, the exclusion of reliable evidence may undermine the truth-seeking function of the justice system and render the trial unfair. It should be noted that the reliability of evidence must be weighed against all other factors of the case. In this revised test, the exclusion of reliable evidence should not negatively impact the reputation of the administration of justice in most cases. Where evidence is reliable and important, the seriousness of the offence can enhance or diminish the case for admission depending on the seriousness of the police conduct and the nature of intrusion on an individual's Charter rights. Societies' interest in adjudicating a case on its merits will influence the decision to admit or exclude evidence when weighed against each line of inquiry.

The invocation of public interest in the third stage of the *Grant* test invites courts to consider the communities' views when performing a s. 24(2) test (Wolfson, 2016, p. 25). While the test connotes public confidence in the administration of justice, the court must be cautious not to afford significant deference to populist opinion in judicial decisions. Giving too much consideration to societal interests may negate the court's ability to function as an independent arbitrator of justice (Jochelson & Kramar, 2014, p. 550).

## Conclusion

By situating the Charter's ever-evolving evidentiary rule in a historical and comparative context, this thesis discussed the fundamental issues that the judiciary has and will likely continue to face in terms of the interpretation and application of s. 24(2) of the *Canadian Charter of Rights and Freedoms*. The majority decision in *R. v. Grant* (2009) broadened the trial judge's discretion to exclude or admit improperly obtained evidence under s. 24(2). By including privacy interests and formulating a stringent definition of good faith policing, a newly articulated test will attempt to constrain judicial discretion. These changes will achieve a better balance between the rights-protection and truth-seeking functions of s. 24(2). Additional research must explore the Supreme Court of Canada's role in adjudicating cases that raise questions about the limitations and scope of police powers under the Charter. With the emergence of more sophisticated and advanced technology in the area of forensic science, post-*Grant* jurisprudence should devote particular attention to the treatment of bodily evidence.

Despite the desire to see guilty persons incarcerated, the role of the Crown is to ensure that a verdict is based on sufficient evidence that best serves the public interest. In the exercise of this power, the Crown possesses a high ethical duty to act independently and objectively without negative or positive animus towards the accused (*Krieger v. Law Society of Alberta*, 2002, para. 3). While at times, the nature of a crime may shock the community, the Court has a duty to uphold the rights of all even those accused of serious crimes. In the words of Justice Iacobucci in *R. v. Burlingham* (1995):

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 or she 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 s. 24(2). (Para. 50)

While there is a heightened interest in seeing a determination made especially in the case of a serious crime, we must not seek a conviction at the expense of due process and fair trial guarantees. A system that is beyond reproach is one that places a premium on individual rights when the penal stakes are high to prevent the erosion of fair trial standards.

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