SECTION 24(2): THE PAST, PRESENT, AND FUTURE OF EVIDENCE EXCLUSION

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An Honours Project submitted
in partial fulfillment
of the Degree requirements for the degree of

Bachelor of Arts – Criminal Justice (Honours)
Mount Royal University

Date Submitted: April 14, 2025

MOUNT ROYAL UNIVERSITY

CALGARY, AB. CANADA

MRU Territorial Land Acknowledgement

Mount Royal University is situated on an ancient and storied land steeped in ceremony and history that, until recently, was occupied exclusively by people indigenous to this place. With gratitude and reciprocity, Mount Royal acknowledges the relationships to the land and all beings, and the songs, stories and teachings of the Siksika Nation, the Piikani Nation, the Kainai Nation, the Îethka Stoney Nakoda Nation (consisting of the Chiniki, Bearspaw, and Goodstoney Nations), the people of the Tsuut'ina Nation, and the Métis.

Abstract

This study aimed to map the evolution of section 24(2) tests and their judicial criticisms. The evolving understanding of the *Canadian Charter's* s. 24(2) was developed through three landmark cases: *R. v. Collins* (1987)*, R. v. Stillman* (1997), and *R. v. Grant* (2009). The test primarily remained a three-step test since the creation of the *Collins* test in 1987; however, the focus of the three steps was expanded upon in *R. v. Stillman* (1997) to include both conscriptive and non-conscriptive evidence and the introduction of two grounds upon which trial fairness can be presumed non-infringed by *Charter* violations. This framework was almost entirely overhauled and reformed in *R. v. Grant* (2009), but the three-stage formulation and the consideration of the balance of probabilities remained. However, it most notably placed trial fairness as the overarching systematic goal. Each case presented encompasses the case facts and the resulting s. 24(2) test was concluded by an investigation into their respective judicial criticisms. A discussion of the future of section 24(2) concludes the paper with a look at a newly formulated test steaming from the subsequent jurisprudence.

Acknowledgements

First and foremost, I would like to thank the kindest soul who has forever impacted my life and who has instilled in me a profound love for the *Charter* and all it entails, Professor Doug King. Not only have you continued to provide me with assistance in all my educational adventures, but your classes and knowledge will also be with me forever in all my future endeavours. Thank you for guiding me during this process, and continuing to support and encourage me, even when I decided to switch topics last minute. Without your support and knowledge, this thesis would not have come to fruition. Thank you for all you do, not just for me but every student who walks into your classroom; you are truly a beacon of light who has inspired countless students to pursue their dreams.

To my parents, Randy and Kim. Your support, encouragement, love, and guidance have never failed to amaze me. You are the reason I am not afraid to chase my wildest ambitions, for I know you will be my loudest cheerleader. Without you, none of this would have been possible, and I couldn't imagine navigating this world. There are no words to express the gratitude I hold for all you have done for me. Every step I take, and every hurdle I overcome, I am reminded of the strength and resilience you've instilled in me. You've poured yourselves into me, and for that, I am eternally grateful. I see you in everything I am, and I love you both more than words can say.

Amy, Holden, and Shelby: I cannot express how much you guys mean to me. Your unwavering love, infectious laughs, and endless hugs have given me the strength to overcome the hardest days. Thank you for reminding me to have fun amongst all the stress, and listening to my never-ending rambles about school. I am immensely lucky to have the three of you in my corner,

you guys are my inspiration and voice of sanity in the chaos. I am forever grateful for you, and I love you guys, forever and always.

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Section 24(2): Section 24(2): The Past, Present, and Future of Evidence Exclusion

Throughout the *Charter* era, numerous tests created by the Supreme Court of Canada (SCC) have set binding precedents for lower courts to follow in applying various sections; section 24(2) is no exception. Laying the foundation for this inquest with a brief introduction into section 24(2) of the *Canadian Charter of Rights and Freedoms*, this paper will explore the evolution of section 24(2) tests. Beginning with *R. v. Collins* (1987), a brief introduction of the case will be followed by the framework laid out by the SCC for the determination of evidence admissibility, highlighting the three main phases of inquiry. Next, the focus will shift toward the case of *R. v. Stillman* (1997), providing relevant case information and the subsequent amendment implemented to the s. 24(2) test. Lastly, a comprehensive look into the most recent landmark case, *R. v. Grant* (2009), will envelope the key case details and the new revised framework, followed by a discussion of the arising criticisms, enabling a better understanding of the frameworks' respective controversies and pitfalls.

Outlining Section 24(2) of the *Charter of Rights and Freedoms*

Section 24(2) of the *Canadian Charter of Rights and Freedoms* reads as follows:

> 24. (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* (UK), 1982, c11).

This provision highlights the importance of maintaining a good reputation in administering justice and upholding individual protections against self-incrimination while

balancing the individual's rights and protections against law enforcement aims (Charterpedia, 2023). S. 24(2) concludes that all inculpatory evidence – evidence obtained by way of infringing on an individual's rights or freedoms prescribed in the *Charter* – will be excluded from the proceedings of a trial if it is established that the admission of such evidence would bring the administration of justice into disrepute (Charterpedia, 2023). It is imperative, as stated in the language of s. 24(2) that all relevant circumstances must be considered in order to assess the admissibility of evidence (Naudé, 2021). The importance of s. 24(2) cannot be understated, for an applicant's success in excluding inculpatory evidence is noted as "one of the most determinative events in the outcome of a criminal trial" (Eberdt, 2011, p. 65).

Research Question

This research collects data on the evolution of tests concerning section 24(2) of the *Canadian Charter of Rights and Freedoms* and analyzes judicial critiques regarding the tests' effectiveness in application and overall judicial support and opposition to the varying tests. Looking directly at the landmark cases *R. v. Collins* (1987)*, R. v. Stillman* (1997), and *R. v. Grant* (2009), this paper maps how the test evolved over time and uses supplementary cases with references to the landmark cases to draw conclusions on overall judicial opinion. Through this analysis, recommendations will be made to improve the current s.24(2) test, allowing for more significant impact and reflection in the future. Recommendations will be made based on the prevailing critiques and the test's effectiveness in reaching the design goal; fair and equal justice.

Research Design

This research utilizes an integrative literature review research design, with the aim of producing recommendations for change and amendments to improve the truth-seeking and judicial functions of s.24(2) tests. An integrative literature review pulls together the current

research and knowledge surrounding a topic and utilizes it to critically analyze, synthesize, and build critiques for the creation of new perspectives (Snyder, 2019). This is most appropriate for this study due to the inherent time restraints for conducting research, the ethical and logistical considerations of involving participants, and the goals of producing recommendations. However, this design also leads to potential conflicts and limitations within my research, for the lack of phenomenological research looking at first-hand experiences could lead the research away from the impacts on those who have navigated the system and towards the perspectives of those intertwined within the system, judges. Looking at the three key cases, *R. v. Collins* (1987)*, R. v. Stillman* (1997), and *R. v. Grant* (2009), and secondary source literature, this study will allow for a complete understanding of the history and current standing of s.24(2).

Data Collection Methods and Sources

This thesis collects data from the main landmark cases *R. v. Collins* (1987)*, R. v. Stillman* (1997), and *R. v. Grant* (2009)*,* alongside secondary sources produced within the last fifteen years. Narrowing the search to the last fifteen years (2010-2025) allows for an understanding of the cases and implications surrounding section 24(2) without regard for outdated information. The use of secondary data and Supreme Court of Canada (SCC) cases are most appropriate for they allow for a thorough analysis within the time constraints of this paper and remove the complex ethical obligations. Data identified as relevant through a preliminary reading (within the scope of the last fifteen years) will be downloaded to a file and then organized regarding the primary theme. The files will be saved locally on my computer hard drive, and the varying search terms used will also be recorded. Raw data will be found utilizing the Mount Royal University Library database, Google Scholar, and CanLII using a variation of the key search

words, “s.24(2),” “Canada,” “exclusion of evidence,” “R. v. Grant,” “R. v. Stillman,” and “R. v. Collins.”

The inclusion criteria for academic sources for preliminary reading are as follows;

1) The articles must be centred around the topic of section 24(2).
2) Articles are in English.
3) Articles are published between 2010-2025.

For inclusion in the judicial critiques section, the requirements are;

A. Cases look to the issues presented in the varying tests (*Collins’* Test, *Stillman’s* Test, and *Grant’s* Test)
B. Issues are raised by judges
C. Published after 1987 (as *R. v. Collins* originated in 1987).

For non-academic peer-reviewed articles, Google searches to provide relevant background information based on grey literature will be utilized using the same search words. However, a rigorous analysis of the author's credibility and potential conflicts of interest will be conducted before inclusion. It is essential to include grey literature, for many lawyers and academics provide useful insight into the cases and their representative tests. Case studies will be sourced primarily from the Supreme Court of Canada's official website, focusing on landmark cases that have shaped the legal perspectives of section 24(2). The cases selected will focus on the issue of s.24(2) to enhance the understanding of how the tests are exercised through real-world examples. Moreover, these cases will further the objective of evaluating effectiveness through analyzing judicial rulings and justifications.

Limitations to literature review research are always present, as the sources compile various methodological designs and objectives, and the justices may have varying unknown

objectives and motives to their opinions. Additionally, there is a potential for bias to form and undermine this thesis due to the predominate reliability of peer-reviewed academic journals, but as the University of Texas Libraries (2024) denotes, these biases can be mitigated by the inclusion of various other sources, which is another benefit of including grey literature and case studies in this thesis.

R. v. Collins, 1987

Case Facts

The appellant, Ms. Ruby Collins, was sitting at the Cedars Pub bar when she was intercepted by two police officers from the Royal Canadian Mounted Police (R.C.M.P.) Drug Squad, who had been surveilling her throughout the day and had arrested her husband, Richard Collins, earlier in the afternoon due to possession of heroin (*R. v. Collins,* 1987). They approached her on suspicion of possession, utilized the "throat-hold" to prevent her from swallowing any evidence, pulled her off the chair onto the ground, and demanded she release the object in her hand (*R. v. Collins,* 1987). Collins complied, dropping the object onto the ground beside her, which was seized by the officers and turned out to be a green balloon filled with heroin (*R. v. Collins,* 1987). Ruby Collins was charged with possession of heroin for the purpose of trafficking, and before the case entered the court, a *voir dire* hearing was held on the grounds that the evidence was obtained in violation of Ms. Collins s. 8 rights – to be free from unreasonable search and seizure – and thus the evidence should be excluded under s. 24(2) (*R. v. Collins,* 1987). The determination was made within the *voir dire* hearing that officers did not have reasonable grounds to search the appellant under s. 10 of the *Narcotics Control Act,* but concluded, based on the judgement of *Rothman v. The Queen* (1981), that Collins failed to satisfy exclusion under s. 24(2), and thus, the evidence was admitted into trial, and she was

found guilty (*R. v. Collins,* 1987). The case was then taken to the British Columbia Court of Appeal, which unanimously dismissed the appeal, following similar logic to that of the trial judge, which was supplemented by a review of American case law (*R. v. Collins,* 1987). Based on this dismissal, Ruby Collins then appealed the case to the Supreme Court of Canada, which granted the appeal in a five-to-one decision, concluding that the evidence was an infringement on section eight and falls to exclusion under s. 24(2), and ordered a new trial (*R. v. Collins,* 1987).

The Collins Test

During the deliberations by the SCC of Collins' appeal, two main legal questions were raised: 1) was the search reasonable under s. 8 of the *Charter*, and 2) would the admission of the evidence into trial bring the administration of justice into disrepute (*R. v. Collins,* 1987). In deliberating these two questions, the justices formulated a framework for applying to inquiries regarding section 24(2) of the *Charter.* The three factors that outline the framework include factors that render a trial unfair, the seriousness of the constitutional breach by state actors, and whether the exclusion/inclusion of evidence brings the administration of justice into repute (*R. v. Collins,* 1987).

Factors that Render a Trial Unfair

The first step was introduced to determine whether the nature of the evidence rendered a trial unfair. During this determination, justices must decide whether the evidence was real and separate from the *Charter* infringement, or rather, it emerged from an accused (Jochelson & Kramar, 2014). The majority highlighted that real evidence is not granted self-incrimination protections and is not to be considered under s.24(2) for it pre-existed – and is irrespective of – the *Charter* violation (Naudé, 2021; *R. v. Collins,* 1987). The justice furthered this notion by stating, "[if] the real evidence existed irrespective of the violation of the *Charter*, [..] its use does

not render the trial unfair," however if the violation of the *Charter* occurs prior to the accused conscripting against himself through testimonial evidence, "such evidence would render the trial unfair, for it did not exist prior to the violation and it strikes at one of the fundamental tenets of a fair trial, the right against self-incrimination" (*R. v. Collins,* 1987, at para. 37). If the courts determined the nature of the evidence did not render the trial unfair, the evidence would progress to step two for consideration of the seriousness of the violation.

The Seriousness of the Charter Breach

This stage of the test concerns the overall seriousness of the *Charter* breach by the state on the accused *Charter* rights and freedoms. Simply put, the relative seriousness of the constitutional violation must be viewed through the lens it was committed: was it "in good faith, or was inadvertent or of a merely technical nature, or whether it was deliberate, wilful or flagrant." (*R. v. Collins*, 1987, at para. 38). Another relevant factor denoted by the courts is whether any extenuating circumstances were present; was the violation a result of the states perceived urgency and necessity to prevent evidence destruction from occurring (Naudé, 2021, p. 612). The court also highlighted that in cases where the evidence could have been obtained legally through less infringing means, the blatant disregard for the *Charter* must be considered as a factor supporting the exclusion of evidence (Naudé, 2021; *R. v. Collins*, 1987). Nonetheless, the court argued that in cases where the police act in "good faith," the exclusion of evidence is not required based on subsequent misconduct, as the effect of s. 24(2) is not to discipline police officers but to maintain the repute of the justice system, as seen in the following step (*R. v. Collins*, 1987).

Placing the Administration of Justice in Repute

The last factor the justices in *Collins* (1987) laid out in the framework is whether the inclusion or exclusion of evidence gathered through unconstitutional means would put the integrity and administration of the justice system in repute. This factor, as highlighted by Justice Lamer, requires justices to view disputes through the lens of the social policy concerns that underlie s. 24(2), considering the community's views (*R. v. Collins*, 1987). Furthermore, the standard given to assess disrepute is the "reasonable person" standard, in which questions would an ordinary and reasonable person, knowing the full circumstances and facts of the case, determine the exclusion (or inclusion) of evidence acceptable and upholding of the administration of justice (*R. v. Collins,* 1987). Lastly, the court must consider whether the inclusion of evidence collected through unconstitutional means condones the illegal actions of the state and whether or not to distance themselves from such behaviour to uphold the administration and repute of the justice system (*R. v. Collins,* 1987).

Judicial Criticism and Debate of the Collins Test

Since integrating the *Collins* test for section 24(2) of the *Charter,* many justices have had varying degrees of critiques regarding its effectiveness and applicability. Beginning with critiques provided by Justice McIntyre in the dissent of *R. v. Collins* (1987), he presents that the test could have negative implications for self-incriminating evidence and confessions, stating that the relevancy of trial fairness could "generally lead to the exclusion of evidence" (at para. 53). These remarks have been echoed by numerous other Justices fearful of the inaccurate application of the weight of each branch in the consideration of exclusion. The Honourable Mr. Justice Sherstobitoff, in writing the decision for *R. v. Shepherd* (2007), highlighted these concerns, stating that the *Collins* test was not clear regarding the scope of self-incriminating evidence and to which extent the weight of the three branches should be considered. He questions "whether a

finding that trial fairness would be affected by [the] admission of the evidence was or should be conclusive of the question of admissibility or whether, conversely, a court should go on to consider and balance the other two factors" (*R. v. Shepherd,* 2007, at para. 75). Here, Justice Sherstobitoff is pointing to the contradictory nature of the tests' formulation within *Collins* (1987) in which Justice Lamer first states that evidence that affects trial fairness will lean towards bringing administration into disrepute and "subject to the consideration of the other factors" (*R. v. Collins,* 1987, at para. 36), the evidence should generally be excluded. Then, two paragraphs later, Justice Lamer writes that since self-incriminatory evidence will generally affect the trial fairness, it should generally be excluded (here there remains no mention of the other two factors for consideration) (*R. v. Collins,* 1987, at para. 37). Furthermore, highlighting the confusion in the weight of the branches, in *R. v. Grant* (2009) Chief Justice McLachlin (as she was known then) and Justice Charron noted that after finding reasons for exclusion under the first branch, questions arose regarding what extent the following two branches were to be examined and applied. These remarks followed Justice McLachlin's strong dissent in *R. v. Stillman* (1997), in which she stated that failing to consider all branches "is the antithesis of the balancing envisioned by the framers of s. 24(2). If one factor or set of factors determines admissibility, there can be no balancing. Nor can there be consideration of 'all the circumstances' as s. 24(2) requires" (*R. v. Stillman,* 1997, p. 732). However, in the descent of *R. v. Stillman* (1997), Justice McIntyre wrote that the test set out in *Collins* mandated consideration of all factors and circumstances specific to the case and did not permit the inquiry to stop after examining the first branch. Evidently, there is a need for a more comprehensive test that ensures the application of the test. 24(2) remained consistently applied and understood; if there is such confusion among the highest court, such confusion would certainly permeate lower courts.

Further criticisms arose over the formulation of the *Collins* test; Justice McIntyre cautions that the test is overly formulated, while C.J. McLachlin highlights that the three branches were a "matter of personal preference" (citing Justice Lamer in *R. v. Collins,* 1987, at para. 36). However, these preferences were formalized as the official s. 24(2) test. Moreover, Justice McIntyre cautions that adopting the theoretical concept of community views is inadequate to address the exclusion of evidence (*R. v. Collins,* 1987). Instead, he suggests that the adaptation of the reasonable man standard, which has been proven to serve well within the administration of justice, would be a better fit as it develops general rules of social attitudes and principles on a case-by-case basis and "will produce an acceptable standard for the application of s. 24(2) of the *Charter"* (*R. v. Collins,* 1987, at para. 49).

R. v. Stillman, 1997

Case Facts

William Stillman, age seventeen, and Pamela Bischoff, age fourteen, were out with friends in the evening hours of April 12, 1991, where they participated in drinking and taking lysergic acid diethylamide (LSD) before they separated from the group (*R. v. Stillman,*1997). Mr. Stillman arrived home approximately three hours after they separated from the group. He had a cut above his eye, was cold, wet, covered in mud and grass, and was visibly shaken, reporting to his parents that he was in a fight with a group of five Indigenous peoples (*R. v. Stillman,* 1997). However, six days later, the body of Ms. Bischoff was found in the Oromocto River, approximately three to five hundred meters from where the group was hanging out. Two individuals witnessed Mr. Stillman this evening by the bridge, one witnessing him with Ms. Bischoff on top of the bridge and the other encountering him alone on the road leading to the bridge with wet and muddy pants from the knees down (*R. v. Stillman,* 1997). An autopsy

revealed Ms. Bishoff's manner of death resulted from multiple wounds to the head and found semen and bite marks on the victim (*R. v. Stillman,* 1997).

On April 19, 1991, Mr. Stillman was arrested for her murder. When arriving at the police station, he was met by his counsel, who advised him not to give any statements. He further informed the officers that Mr. Stillman did not consent to provide any bodily samples (*R. v. Stillman,* 1997). Without regard to this information, the Royal Canadian Mounted Police (RCMP) took numerous bodily samples under the threat of force and twice attempted to obtain a confession through an interview without the presence of his lawyers or parents (*R. v. Stillman,* 1997). Additionally, the police seized a tissue used by the accused for DNA sampling. However, there was not enough evidence to secure a charge, so Mr. Stillman was released until several months later when the DNA and odontology results came back. The RCMP subsequently arrested Stillman again, taking new dental impressions, hair strands, saliva samples, and buccal swabs, all without consent (*R. v. Stillman,* 1997).

At trial, a *voir dire* hearing was held to determine if the evidence collected should be admissible. The trial judge determined that despite the dental impression, hair strands, saliva samples, and buccal swabs being collected in violation of the accused *Charter* rights, the evidence should be admitted based on the framework of *R. v. Collins* (*R. v. Stillman,* 1997). Furthermore, the judge stated that the collected tissue did not violate Stillman's rights (*R. v. Stillman,* 1997). Stillman was convicted of first-degree murder by a jury trial, which was a decision upheld by the Court of Appeal of New Brunswick (*R. v. Stillman,* 1997). Stillman raised the appeal to the Supreme Court of Canada, which upheld the appeal, ordering a new trial with the exclusion of the hair samples, dental impressions, and buccal swabs and the inclusion of the tissue evidence (*R. v. Stillman,* 1997).

The Stillman Test

With issues arising from the *Collins* test, the SCC took this case as an opportunity to improve upon the existing framework and implement greater clarity and breadth of the application of the steps outlined in *R. v. Collins* (1987). The basic foundation remained the same: three steps to evaluate the exclusion of evidence under s. 24(2) of the *Charter,* involving consideration of the factors affecting the right to a fair trial, the seriousness of the violation, and the repute of the administration of justice (*R. v. Stillman,* 1997). However, greater depth and application were given to the factors that render a trial unfair in restating the *Collins* test.

Factors that Render a Trial Unfair – Stillman Revision

Similarly to the *Collins* test, the justices acknowledge that consideration of trial fairness is of utmost importance (*R. v. Stillman,* 1997). The *Stillman* decision set precedent as the first decision to conclude that the privilege against self-incrimination extends beyond testimonial evidence and includes real evidence, such as saliva or blood samples (Naudé, 2021). The justices asserted that the DNA evidence obtained by the officers is inherently unjust and erodes Mr. Stillman's presumption of innocence and his rights against self-incrimination. (*R. v. Stillman,* 1997; Naudé, 2021). The primary focus for the SCC majority in this step is determining non-conscriptive evidence (which is unlikely to hinder trial fairness) and conscriptive evidence (*R. v. Stillman,* 1997). Conscriptive evidence is "self-incrimination evidence in the form of statements or bodily substances conscripted from the accused in violation of the *Charter* and evidence derived from unlawful conscripted statements" (Naudé, 2021, p. 610). The justices note that any admission of conscriptive evidence will render an unfair trial. However, they provided two grounds: if proven on a balance of probabilities, the evidence will not render the trial unfair due to the discovery of evidence absent of *Charter* violations (*R. v. Stillman,* 1997).

1) If the evidence would have been obtained by another independent source. Was it possible, on the balance of probabilities, that law enforcement would have been able to attain the evidence without the conscriptive means?

2) Was there an inevitability that the evidence would have been discovered?

If either of these two grounds is determined to be true, on the balance of probabilities, the evidence is not assumed to hinder a fair trial under this first step and must progress to the following two steps (Naudé, 2021; *R. v. Stillman*, 1997).

Judicial Criticism and Debates of the Stillman Test

Following the *Stillman* decision, numerous judicial criticisms arose regarding the classification of evidence, the determination of disrepute, and the quasi-automatic exclusionary rule emitting from conscriptive evidence under the *Stillman* test. Beginning with the classification of evidence, Justice L'Heureux-Dubé denotes that the classification of conscriptive evidence and non-conscriptive real evidence presented by the *Stillman* framework is an "unfortunate development" (*R. v. Stillman,* 1997, at para 184), that, according to Chief Justice McLachlin and Justice Charron, has led to the nature of evidence being key to the determination of exclusion under s. 24(2), which is not consistent with the language or principles therein. Furthermore, Justice L'Heureux-Dubé states that the approach under *Collins* is a more appropriate test and the efforts put forth in *Stillman* have failed to clarify and alleviate the confusion surrounding s. 24(2)'s application (*R. v. Stillman,* 1997, at para. 184). These remarks are echoed by Justice McLachlin (as she then was) in her dissent in *R. v. Stillman* (1997), in which she highlights the demanding task of justices to determine whether the evidence admission/exclusion would bring the administration of justice into disrepute. This task has become increasingly complex and has been addressed in the Supreme Court numerous times.

Justice Lebel further comments that "it may be impossible to divorce the different stages of the analysis" *(R. v. Orbanski; R. v. Elias,* 2005, at para. 99), leading to the balance of each branch being inherently hindered upon the others, and the evaluation of trial fairness contaminated by the seriousness of the infringement and its impact.

Lastly, criticisms grew around the quasi-automatic exclusionary rule emanating from Stillman. As noted previously, section 24(2) of the *Canadian Charter of Rights and Freedoms* is intended to protect individuals from unconstitutionally obtained evidence from entering trial proceedings and upholds individual rights and freedoms (Chaprterpedia, 2024). However, under Stillman, conscriptive evidence was determined to (almost always) negatively impact trial fairness and, thus, "as a general rule, be found to render the trial unfair" (*R. v. Stillman*, 1997, at para. 98). Justice Ducharme highlighted how this rule permeated lower courts in *R. v. Padavattan* (2007), in which trial judges have excluded breath samples due to their classification as conscripted evidence and on the basis of the quasi-automatic exclusionary rule; without consideration of the two other branches laid out in *Collins.* Moreover, Justice Lebel cautioned that despite the view that an automatic exclusionary rule would provide clarity and effective management of section 24(2) applications, adopting such an approach would be detrimental to justice and would not provide true to the fundamental purposes of s. 24(2) (*R. v. Orbanski; R. v. Elias*, 2005).

R. v. Grant, 2009

Case Facts

This case commenced during a routine lunchtime patrol of an area situated around four schools with a history of assaults, robberies, and drug offences occurring at the lunch hour, involving two officers in plainclothes (Constables Worrell and Forde) and one officer in uniform

(Constable Gomes) (*R. v. Grant,* 2009). During the patrol, officers Worrell and Forde drove past Mr. Grant, a young black male, who held an "unusually intense" eye contact with the officers while simultaneously fidgeting in his pockets (*R. v. Grant,* 2009, at para. 5). This seemed suspicious based on the reason for their patrol, so the officers decided to get Constable Gnomes to investigate Mr. Grant's purpose on the block and his intentions; later in the conversation, Constables Worrell and Forde (who remained in their unmarked car initially) joined for backup (*R. v. Grant,* 2009). Mr. Grant was reportedly acting nervously, constantly readjusting his pockets and avoiding eye contact by looking "all over the place," which prompted further questioning, in which Mr. Grant revealed he had a small bag of marijuana and a firearm on his person (*R. v. Grant,* 2009, at para. 7).

At trial, Mr. Grant stated his *Charter* ss. 8, 9, and 10(b) rights were violated. However, the judge ruled that no such infringements occurred and, as a result, included the firearm into evidence, subsequently leading to his conviction on five firearm offences (*R. v. Grant,* 2009). Mr. Grant appealed to the Ontario Court of Appeal, which dismissed the appeal despite finding a violation of s. 9., on the basis that the admission of the gun into evidence did not render the trial unfair under s. 24(2) according to his application of the *Stillman-Collins* frameworks (*R. v. Grant,* 2009). Mr. Grant appealed this decision to the Supreme Court of Canada, which required the SCC to revisit the test for evidence exclusion under s. 24(2), in which they ultimately reformulated and enhanced the previous test into a new three-step test (*R. v. Grant,* 2009).

The Grant Test

The SCC ruled that a new test must be developed for the *Stillman-Collins* test, which proved too complex in application and caused significant disparity and unsatisfactory results. The new framework under the *Grant* test sets trial fairness as an "overarching systematic goal

[rather] than [..] a distinct stage of the s.24(2) analysis" (*R. v. Grant*, 2009, at para 65), as it was determined that the trial fairness criteria underlined in the *Collins* test was often applied either too liberally or conservatively resulting in greater misinterpretation by judicial bodies. The SCC had two primary questions to consider in the case: Was the evidence (the seized gun) obtained through a violation of Mr. Grant's rights, and if so, should the evidence be admissible to court under s.24(2) of the *Charter* (Naudé, 2021: *R. v. Grant,* 2009). They determined that the evidence was obtained unconstitutionally; however, in their determination of admissibility, they set out the new framework to apply. 24(2), which evoked a purposive analysis of the language of provision (*R. v. Grant,* 2009). Additionally, the justices ventured to define detention, specifically, psychological detention, to advance the judicial understanding of when an individual becomes legally detained, for section 9 protects individual physical and mental liberty from unjust state intrusion (*R. v. Grant,* 2009). In the introduction, they highlight that detention:

> Refers to a suspension of the individual's liberty interest by a significant physical or psychological restraint. Psychological detention is established either where the individual has a legal obligation to comply with the restrictive request or demand, or a reasonable person would conclude by reason of the state conduct that he or she had no choice but to comply. (*R. v. Grant,* 2009)

Within the purposive analysis, the justices focused on the phrase "to maintain the repute of the administration of justice" as directing justices to look to the long-term and prospective repute of the justice system when determining admissibility through an objective standard (Naudé, 2021). The court created a new test to ensure the application of s. 24(2) was consistent with the language within. The three main considerations for inquiry under the *Grant* test include "the seriousness of the *Charter*-infringing state conduct [...], the impact of the breach on the

Charter-protected interests of the accused [...], and society's interests in an adjudication on the merits" (*R. v. Grant,* 2009, at para 71).

The Seriousness of the Charter-Infringing State Conduct

The first inquiry relevant to the application of s. 24(2) is whether the admission of evidence gained through unconstitutional means would imply to the public that the courts condone unlawful actions by failing to separate themselves from the illegal recourse (*R. v. Grant,* 2009; Naudé, 2021). In doing so, there is a requirement for the courts to look at the severity and deliberateness of the conduct, and whether the law enforcement acted in good faith, the nature of the violation (was it inadvertent and minor or wilful and reckless), and whether a pattern of *Charter* right abuses have occurred by the enforcement officer or if it was an isolated incident (Jochelson & Kramar, 2014; *R. v. Grant,* 2009). However, the court highlights that this inquiry aims not to punish police for unconstitutional actions and "ignorance of the *Charter* must not be rewarded or encouraged" (*R. v. Grant,* 2009, at para 75).

The requirements of the second branch in the *Stillman-Collins test* are observed here by the courts, as there is an inherent requirement to evaluate the seriousness of the conduct that led to the violation (Naudé, 2021). However, in the cases of extenuating circumstances, such as the unconstitutional collection of evidence with the aim of destruction prevention, the seriousness of the violation is to be adjusted and judged accordingly (Naudé, 2021; Jochelson & Kramar, 2014; *R. v. Grant,* 2009).

The Impact on the Charter-Protected Interests of the Accused

This step requires the courts to look at the extent to which the interests protected by the accused's rights were violated, scaling from mere fleeting and technical impact to profoundly intrusive impact (*R. v. Grant*, 2009; Naudé, 2021; Jochelson et al., 2015). The greater the impact,

the greater the risk to the administration of justice, for the public may assume the *Charter* rights avail fewer protections against state interests (*R. v. Grant,* 2009). The SCC majority highlights that it is imperative to look at the interests engaged by the right in order to determine the impact the infringement had (*R. v. Grant,* 2009; Naudé, 2021).

Society's Interests in an Adjudication on the Merits

The final stage of inquiry requires the courts to assess whether the inclusion or exclusion of the evidence enhances the "truth-seeking" function of the criminal trial proceedings and to address the evidence's reliability (*R. v. Grant,* 2009; Naudé, 2021). The justices stated that if the *Charter* infringement undermines the evidence's reliability, the evidence should be excluded, rendering the other relevant factors under the *Grant* test (*R. v. Grant,* 2009). Moreover, the Supreme Court of Canada expressed that the wording of s.24(2) denotes that all circumstances must be considered, not simply the reliability of evidence, for reliable evidence obtained through illegal action is inconsistent with the accused's *Charter* rights (Naudé, 2021).

The balance of truth-seeking and justice integrity is critical to considering evidence exclusion, for the unconstitutionally obtained evidence may aid in the discovery of truth and the adjudication of the case on its merits (*R. v. Grant*, 2009). Another essential consideration denoted by the majority in *R. v. Grant* (2009) is the weight of the probative value and its significance to the prosecution's case, for "evidence of questionable reliability is more likely to bring the administration of justice into disrepute where it forms the entirety of the case against the accused" (*R. v. Grant,* 2009, at para 83).

Finally, it is essential to recognize that rulings based on s. 24(2) are not straightforward and do not necessitate a unanimous "yes" or "no" from the justices. Rather, it prompts a strategic balance, comparing the different aspects of exclusion and inclusion under the three inquiries to

assess which side carries more weight (*R. v. Grant,* 2009). Even if two of the three inquiries weigh moderately to exclusion, the evidence may be admitted if the third weighs heavily to inclusion (and inclusion does not bring the administration of justice into disrepute).

Judicial Criticism and Debates of the Grant Test

After the overhaul of the section 24(2) test presented in *Grant,* numerous judicial discussions and criticisms have concerned whether the new tests provide an accurate account of the intentions of the *Charter* and the language within. Beginning with the criticisms of Paciocco et al. (2020) in their text, *The Evidence of Law,* they question the contradictory nature of the *Grant* test and highlight how this increases the difficulty of administering the test. Section 24(2) is found within the enforcement provisions of the *Charter of Rights and Freedoms.* Its underlying purpose is to deter the police from unconstitutional actions by the increased emphasis on the blameworthiness of the officer's conduct (Paciocco et al., 2020). This section also enables the courts to provide remedies for *Charter* violations, emphasizing causation while de-emphasizing trial procedural impact (Paciocco et al., 2020). However, section 24(2)'s central tenant is trial fairness and whether the admission or exclusion of evidence would render the trial unfair, essential placing the focus not on the deterrence of police conduct but rather on the "way evidence operates at trial" (Paciocco et al., 2020, p. 468). Lastly, the authors denote that by triggering s. 24(2) the overarching goal of the *Grant* test is to determine whether the evidence exclusion or inclusion would bring the administration of justice into disrepute, which empowers judges to separate the court from unconstitutional state conduct and uphold the public confidence within the justice system (*Grant,* 2009; Paciocco et al., 2020). Looking to the repute of justice shifts the focus to the seriousness and significance of the *Charter* violation rather than the blameworthiness of the police conduct (Paciocco et al., 2020). These remarks from Paciocco et

al. (2020) are further advanced by Justice Deschamps' concurrence under *Grant* (2009), in which he states, "the majority's emphasis on state conduct [is] puzzling in view of the purpose of s. 24(2). Although the majority acknowledges that the purpose of the s. 24(2) rule is neither to punish the police officers nor to compensate the accused; the importance they attach to this factor places the judge on a slippery slope" (at para 210).

Despite the majority's efforts to clarify and simplify the s. 24(2) test under *Grant* (2009), criticism arose surrounding the various interpretations of the application for the *Grant* test, including Justice Deschamps writing in concurrence in *R. v. Harrison* (2009). Justice Deschamps stated his disagreement with the newly formulated s. 24(2) test under *Grant* due to the inherent difficulty in balancing the competing values and upholding the reputation of justice, criticizing that this is no easy task for any judge (*R. v. Harrison*, 2009). Misinterpretations of the balancing required by *Grant* have been seen by the trial court's inaccurate application of the test, evident in the case of *R. v. Reilly* (2021), where the trial judge improperly conducted the overall balancing by only considering the first two branches of the *Grant* test. The trial judge also failed to consider all the relevant *Charter* breaches under the first branch of inquiry, leading to a faulted conclusion as "trial judges cannot choose which relevant *Charter*-infringing state conduct to consider" (*R. v. Reilly,* 2021, at para 3). Moreover, in *R. v. McGuffie* (2016), the trial judge was criticized for numerous failures in the application of the *Grant* test for s. 24(2), including "his assessment of the seriousness of the charges, and nothing else, that led the trial judge to admit the evidence, despite his finding of significant police misconduct" (at para 72). Chief Justice McLachlin who wrote for the majority in *Grant* (2009), clarified in *R. v. Harrison* (2009) that by allowing the seriousness of the offence to overwhelm the s. 24(2) analysis, individuals accused of serious crimes would be stripped of their individual freedoms afforded to all Canadians, and

this would inadvertently create a system of justice in which the "ends justify the means" (*R. v. Harrison*, 2009, at para 40). Moreover, in the dissent of *R. v. Harrison* (2009), Justice Deschamps expressed his disagreement with the new test proposed by the majority for the case of *R. v. Harrison* (2009), which provides an example of the inherent difficulties of balancing the three branches and their contradictory nature. These remarks are also echoed by Woollcombe (2010), who noted that although the Grant test is void of the "rigid rules that often operated to produce incongruent results," the flexibility within the Grant test "is not without fairly fulsome guidelines relating to each of the three lines of inquiry. These guidelines will significantly narrow the scope of judicial discretion and should assist judges in identifying each of the relevant factors to consider in any par-ticular case" (p. 501). These examples show clear evidence that the current test has not clarified the issue of accurately navigating a section 24(2) application and the weight attached to each branch.

Lastly, Justice Doherty, writing for the majority in *R. v. McGuffie* (2016), highlighted how the first two branches of the *Grant* test seemingly work in tandem, oftentimes tipping the balance towards exclusion, especially in cases where there is serious state misconduct leading to a more significant impact on *Charter* protected rights. Therefore, "if the first and second inquiries make a strong case for exclusion, the third inquiry will seldom, if ever, tip the balance in favour of admissibility" (*R. v. McGuffie*, 2016, at para 63; Mitchell, 2025, p. 46). These claims are backed by the research conducted by McGuinty (2018) in which he studied one-hundred s.24(2) cases and found that the *Charter* infringing state conduct "has arguably become the determinative factor in the overall decision of whether to exclude evidence" (p. 295). However, Chief Justice McLachlin and Justice Charron stated explicitly within *Grant* (2009) that the *Grant* test is designed to create a "decision tree" that provides greater flexibility of discretion compared

to the *Stillman* test and that it is the job of the justices to weigh the various branches for there are no overarching rules set to regulate how the balance is reached (at para 86).

A New Path Forward

It is clear that no one test will operate perfectly in all circumstances, for all justices, in all jurisdictions. Due to the inherent complexities of s. 24(2) applications, the justices should be equipped with a test that allows flexibility to grant discretionary powers but also allows for a clear understanding of how to navigate s. 24(2) claims. This thesis proposes that the *Stillman/Collins* test presented greater leniency for exclusion, which protected individual *Charter* rights and freedoms to the highest degree while maintaining the reputation of justice. Although major criticisms of *Stillman/Collins* arose from academics and justices surrounding the quasi-automatic exclusionary rule (*R. v. Panavattan,* 2007), it is proposed that a combination of the *Stillman* test and the *Grant* test would provide sufficient strides toward justice for future cases. The revised test would have three branches:

1) Evaluation of trial fairness;

2) seriousness of the *Charter*-infringing conduct;

3) society's interest in an adjudication on the merits.

The proposed test would maintain the repute of justice as an overarching theme, as seen in *Grant* (2009), and maintain that each branch is weighed individually along a continuum from highly favouring admissibility to highly favouring exclusion. No one factor can be determinative without balancing the others, as the *Charter* prescribes.

Evaluation of Trial Fairness

Enhanced from the *Stillman* test, an evaluation of trial fairness would be the first step to consider. However, this branch would stray from *Stillman's* focus on evidence classification and

reassign focus to a vulnerability assessment with a consideration of the principle against self-incrimination. Within this stage, judges would consider the accused's vulnerability, including age, mental health, ethnic/cultural background, intelligence (general IQ), personal history, and others. These factors would help guide the courts to consider "all [the] circumstances" as required under section 24(2) of the *Charter,* as well as provide context to the vulnerability of individuals navigating the justice system (Charterpedia, 2023). Within *R. v. Bartle* (1994), Chief Justice Lamer (as he was then) stated that the opportunity to be informed of one's rights and acquire legal advice is essential because "when an individual is detained [...], he or she is put in a position of disadvantage relative to the state. Not only has this person suffered a deprivation of liberty, but also this person may be at risk of incriminating him- or herself" (p. 191). This vulnerability identified by Lemar, C.J., is essential to the consideration of trial fairness. Furthermore, building in a vulnerability assessment would look at how the accused has been impacted by the *Charter*-infringing conduct and to what extent the courts uphold the rights of the accused, similarly to the second consideration under *Grant* (2009). When assessing evidence, *Stillman* (1997) placed undue emphasis on evidence classification – conscriptive, non-conscriptive, discoverable, and non-discoverable – which effectively limited the determination of admissibility to only the conscriptive character and incorrectly diminished the distinction between testimonial and real evidence (Jochelson & Kramar, 2014; Naudé, 2021; Avey & Moen, 2022). This development in *Stillman* also created a seeming quasi-automatic exclusionary rule for non-discoverable conscriptive evidence, which fatally dismantled the balancing required by the test (*R. v. Orbanski; R. v. Elias,* 2005). To mend this issue, a consideration of evidence should be present but only to the extent that it affects the severity of this branch, not overbearing the overall analysis of s. 24(2).

The Seriousness of the Charter Breach

The seriousness of the *Charter* breach has been an important consideration in s. 24(2) tests since its introduction in *Collins* (1987); however, its current emphasis on "good faith" policing needs to be recalibrated, for it has never been clearly defined and is often mischaracterized, leading to erroneous conclusions (McGuinty, 2018). Since s. 24(2) determinations are heavily influenced by police conduct during the violation, there is a need to shift the focus away from solely police conduct. As McGuinty (2018) highlighted:

> The police conduct inquiry seems to have put the entire *Grant* analysis into a straightjacket. Relying too heavily on the first factor may lead some courts to fail to recognize that even minor or good faith policing breaches can still amount to a serious breach on the rights of an accused. (p. 291)

Shifting the focus away from police conduct and toward how the evidence was obtained allows for greater emphasis on the nature of the infringement, whether legal avenues were readily available to obtain the evidence, and to what extent the *Charter* breaches were avoidable. In cases of extreme police misconduct and arising patterns of systematic problems, this cannot be ignored. However, it must not trump the entirety of the analysis.

Society's Interests in an Adjudication on the Merits

The last branch is adopted directly from *Grant* and its predecessors, *Collins* and *Stillman.* This factor examines whether the evidence's exclusion or admission would enhance the justice system's truth-seeking function regarding the evidence's reliability, probative value weight, and significance to the prosecution's case (*R. v. Grant*, 2009). Exploring how evidence operates at trial and the societal perceptions of "justice" through the reasonable person standard provides

justices with the opportunity to address whether admission or exclusion would better support public confidence in the system.

Again, it is paramount that these branches are each weighted individually along a continuum from highly in favour of admissibility to highly in favour of exclusion. At the conclusion – considering each branch and all the circumstances of the case – if the balance is tipped towards admission, only then is it justifiable to admit unconstitutionally obtained evidence into trial and deny the accused the remedy of exclusion.

Rejecting the "Fresh Start" Notion

In consideration of the future of s. 24(2), this proposed new test would reject the concept of a "fresh start" arising under *R. v. Beaver* (2022). This notion of providing officers with a means to deconstruct the nexus between evidence gathered and the *Charter*-infringing conduct cannot be maintained as it would critically undermine the s. 24(2) test, though minimizing the seriousness of the state conduct and creating an "unwelcome result which would automatically immunize prior *Charter* breaches" (Beaver, 2021, p. 16; Cameron, 2023). Although the notion of a "fresh start" was not considered during the decision in *R. v. Grant* (2009), this newly arising notion was upheld by the SCC in the case of *R. v. Beaver* (2021), which the majority decision, written by Justice Jemal, upheld that a fresh start causes the s. 24(2) claim to go unsubstantiated due to the severed connection between the *Charter*-infringing conduct and the evidence. The SCC sets a precedent for all of Canada's courts, allowing the notion of a "fresh start" to advance in the face of s. 24(2) is dangerous and inherently hinders the purpose of s. 24(2) to provide a remedy in cases where an individual's *Charter* rights are violated by the state (Rudnicki, 2024). The case of *R. v. Beaver* (2021) also highlights the need for police powers to be enforced only within the means of the laws; the officers detained the two accused individuals under legislation

that does not exist and then justified it under a law that does not provide means for arrest. The officers who detained the suspects failed to ensure they understood the gravity of the circumstances they faced, which is unacceptable; most people do not know the laws being applied to them and cannot inherently question the police authority or the constitutionality of the conduct (*R. v. Beaver,* 2021, at para 220). We must hold our enforcement officers to the highest standards.

Conclusion and Discussion

Maintaining individual rights as prescribed within the *Charter of Rights and Freedoms* is paramount to upholding justice and maintaining public confidence within the justice system. The evolving s. 24(2) tests underline the role of the Supreme Court of Canada to ensure all cases are equitably considered and to promote the functions of the *Charter* as the founders intended. Within the evolution of the test, it is clear that no one test will provide flawless guidance for all cases, but through addressing judicial concerns and modifying the test society strides greatly towards the pursuit of justice.

Since the decision of *Grant* in 2009, hundreds of cases have evoked s. 24(2) allows for further discussion, analysis, and data collection, which can be implemented to better understand the way s. 24(2) functions in trials. This research provides a launching point for further analysis and discussion over how s. 24(2) should be adapted and amended to meet the current demands of justice. Further research will need to be conducted primarily in the light of artificial intelligence integration and technological advancements that have the potential to complicate and contaminate individuals' rights at the hands of the state. The SCC will likely draft a new section 24(2) test in upcoming years due to the elapsed time since its last enhancements and emerging

research surrounding the *Grant* test's application. It is critical that tests continue to evolve to meet the needs of the courts and ensure justice is upheld.

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