The Purposes of the Exclusionary Remedy

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The exclusion of unconstitutionally obtained evidence from criminal trials is a controversial constitutional remedy. As discussed in chapter one, Canadian courts have traditionally resisted using exclusion of evidence as a remedy under the common law[1] and the *Canadian Bill of Rights*.[2] Section 24(2) of the *Canadian Charter of Rights and Freedoms* now contemplates exclusion of evidence as a legitimate constitutional remedy by providing that if "a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by the Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute".[3] This provision has been subject to much judicial interpretation and academic commentary. Exclusion of evidence is the most discussed and developed constitutional remedy.[4]

I. THE EVOLUTION AND PURPOSES OF EXCLUSION OF EVIDENCE

The controversial nature of exclusion of evidence is related to disagreement about its purposes as a constitutional remedy. In the United States, three different justifications have been used at different times. As will be discussed, they all have some relevance under section 24(2) of the Charter.

A. Exclusion of Evidence to Correct a Violation

One rationale for excluding unconstitutionally obtained evidence is that such a remedy is necessary to compensate a suspect for the violation of his or her constitutional rights and to ensure that the effects of unconstitutional behaviour in the investigation of crime are nullified. The focus is on the protection of rights. This rationale was originally used in the United States to exclude evidence obtained by federal law enforcement officials through unreasonable searches and seizures. In a landmark 1914 case, *U.S.* v. *Weeks*, Justice Day stated that:

> *The effect of the 4th Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the*

people, their persons, houses, papers and effects against all unreasonable searches and seizures under the guise of law.[5]

The Court dismissed arguments that exclusion of evidence was too drastic a remedy because it deprived courts of important evidence of crimes on the grounds that the exclusionary remedy was but a reflection of the constitutional right.[6]

Exclusion of evidence was a remedy that flowed from the violation of a constitutional right. Such a justification reflected a legal culture that celebrated corrective justice and the close connection between rights and remedies.[7] It also reflected a commitment to the rule of law. Both the police and the courts were bound by legal rules in the same manner as individuals.[8] From this perspective, to admit unconstitutionally obtained evidence would perpetuate the original violation.

Judges concentrated on repairing the original violation and were not concerned about whether the remedy would deter police misconduct in the future. The flagrancy of the violation was also not an essential factor; the fact that the evidence was obtained through a violation of a constitutional right was sufficient to justify the remedy.[9] Proving that the evidence was obtained because of the constitutional violation and could not have been obtained from an independent source, did however, soon become a crucial issue.[10] Under corrective principles, remedies are only justified, if they respond to harms that were caused by the violation.

The idea that exclusion of unconstitutionally obtained evidence is an act of corrective justice required to nullify a violation of a constitutional right is showing its age in the United States. Although it still enjoys support from some commentators,[11] and under some State constitutions,[12] it has become a dissenting position in the federal courts. For example, in *United States* v. *Leon*, Justice Brennan dissented from the development of a good faith reliance on a warrant exception to the exclusionary rule partly on the basis that the Fourth Amendment "comprises a personal right to exclude all evidence secured by means of unreasonable searches and

seizures".[13] Nevertheless, he devoted most of his dissent to arguing that a good faith exception would compromise the instrumental purpose of deterring constitutional violations.[14]

B. Exclusion of Evidence to Regulate Police Conduct

Unlike corrective rationales which look backward to nullifying a past wrong, regulatory rationales look forward to providing incentives to influence future conduct. The focus is not on compensating a particular accused or nullifying the effects of a particular constitutional violation, but rather on deterring constitutional violations in general. The United States Supreme Court first relied on this rationale in 1960 when it stated that the exclusionary rule is calculated to prevent, not to repair. "Its purpose is to deter - to compel respect for the constitutional guaranty in the only effectively available way - by removing the incentive to disregard it".[15] This rationale was subsequently used to justify the exclusion of evidence obtained by state officers through Fourth Amendment violations[16] and statements obtained in violation of the *Miranda* rules governing custodial interrogation.[17] The deterrence rationale has been used to justify a rigid approach to exclusion regardless of the relative seriousness of the constitutional violation or the crime charged, but it has also justified a refusal to exclude evidence in contexts where it is believed that the police will not be influenced by judicial rulings.[18]

Just as the corrective rationale for exclusion was influenced by the legal and political culture in which it was produced, so too was the deterrence rationale. It was articulated at a time when Americans were starting to recognize police misconduct in the South and in the large cities, when they were confident about the ability of law to influence human behaviour. For example, at about the same time as the deterrence rationale for exclusion of evidence was adopted, American tort law was changing from its corrective origins to a new emphasis on the regulation and deterrence of harmful behaviour.[19]

At one level, the introduction of a deterrence rationale did not change the American exclusionary rule much because both deterrence and corrective rationales were used to justify

exclusion of unconstitutionally obtained evidence as a, more or less, automatic remedy for constitutional violations that produced evidence. Nevertheless, there were significant differences between the two rationales. Exclusion was the automatic remedy under the earlier corrective rationale because the remedy was required by the nature of the right violated and the rule of law. On the other hand, an automatic exclusionary rule was necessary under *Mapp* and *Miranda* as a means of providing the clearest of signals and incentives to the police to comply with constitutional safeguards. A more restrained regulatory approach might only exclude evidence if the police had unreasonably, or perhaps even wilfully, violated constitutional rights.

The exclusionary remedy remains controversial in the United States largely because of shortcomings of both the corrective and deterrence rationales. A corrective focus on the nullification of particular constitutional violations provides the most robust remedies to those who possess or divulge evidence of crimes. It does not benefit those who suffer constitutional violations when no evidence is discovered or introduced as evidence.[20] Moreover, corrective justice ignores the social interests that may be harmed by exclusion of evidence because of its bi-polar focus on the rectification of past wrongs that the state has committed to the accused. The public or the victims of crime cannot be considered. By requiring a causal connection between the violation and the discovery of the evidence, corrective justice also relies on speculation about whether evidence would have been obtained but for the constitutional violation.

The deterrence rationale for exclusion of evidence is also problematic. It assumes that the police are aware of judicial rulings and that exclusion of evidence provides sufficient incentives for them to modify their behaviour. Like corrective justice, the deterrence rationale does not sufficiently account for the fact that exclusionary claims will only be available to a subset of those whose constitutional rights have been violated by the police. If a person is not charged with an offence, pleads guilty to a lesser charge or, if there is enough evidence that the prosecution does not need to introduce evidence obtained through a constitutional violation, then exclusion of evidence is simply not an option.[21] The deterrence rationale thus relies on influencing police behaviour in all cases through the treatment of a narrow group of cases. Finally, the deterrence

rationale has been criticized for not judging the proportionality between illegalities committed by the police and the suspect. This explains the famous comment that "there has been no blinking the consequences. The criminal is to go free because the constable has blundered".[22] Both corrective and regulatory approaches to the exclusion of unconstitutionally obtained evidence can be criticized for ignoring social interests harmed by the exclusion of relevant evidence in criminal trials.

C. Exclusion of Evidence to Balance Competing Interests

Alternatives to the corrective and deterrence approaches to exclusion of evidence involve some form of balancing the seriousness of the constitutional violation against the social interests in the admission of evidence. The United States has only briefly experimented with such balancing approaches. The leading proponent of this approach was Justice Frankfurter,[23] who stated that unconstitutionally obtained evidence should be excluded when required by due process, but warned:

> *The real clue to the problem confronting the judiciary* [...] *is not to ask where the line is once and for all to be drawn but to recognize that it is for the Court to draw it by the gradual and empiric process of 'inclusion and exclusion*.'[24]

He was unwilling to rule in advance whether all evidence unconstitutionally obtained by state law enforcement officials should be excluded, but was prepared in *Rochin,* to exclude evidence obtained when California officials forcibly pumped a detainee's stomach to obtain evidence. Appealing to community standards and judicial integrity, Justice Frankfurter concluded:

> *to sanction the brutal conduct* [...] *would be to afford brutality the cloak of law. Nothing would be more calculated to discredit law and thereby to brutalize the temper of society*.[25]

The balance of interests in this case favoured exclusion of evidence because the police conduct "shocks the conscience".[26]

This balancing test soon encountered difficulties as cases with less emotive facts were considered. In *Irvine* v. *California*,[27] the majority of the United States Supreme Court refused to exclude evidence obtained through unconstitutional electronic surveillance. Justice Frankfurter dissented on the grounds that the state's conduct met the shock the conscience standard set out in *Rochin*.[28] In the end, criticisms of balancing tests as "subjective", "accordion-like", "ad-hoc", and "unpredictable" won the day[29] and the United States Supreme Court soon adopted the deterrence rationale for exclusion and applied it without attempting to judge the flagrancy of each constitutional violation.

Balancing of interest tests have been used in other countries without constitutional bills of rights, most notably Scotland and Australia.[30] For example, a leading case from Scotland states:

> [...] *from the standpoint of principle it seems to me that the law must strive to reconcile two highly important interests which are liable to come into conflict a) the interest of the citizen to be protected from illegal or irregular invasions of his liberties by the authorities, and b) the interest of the State to secure that evidence bearing upon the commission of crime and necessary to enable justice to be done shall not be withheld from Court of law on any merely formal or technical ground*.[31]

The competing crime control and fairness interests to be balanced have been described in similar terms by Australian judges.[32] Other than general statements articulating the competing interests, however, the common law approach has not produced useful guidelines to decide hard cases.[33] There has been a concern that "the exercise of judicial discretion may become fettered by rules, seemingly apt enough when first conceived, but inappropriate to all the varied circumstances with which courts will be confronted in the future".[34] The trial judge is thus allowed considerable freedom to decide whether exclusion of evidence is warranted in particular cases.

This introduction has outlined three different rationales for the exclusion of unconstitutionally obtained evidence. As will be discussed, the approach taken by Canadian courts under section 24(2) of the Charter is not easily captured by any one of these approaches. It can be seen as a Canadian compromise which embraces elements of all three and adds some distinctive concerns.

II. AN OUTLINE OF SECTION 24(2) JURISPRUDENCE

A. *Therens* v. *The Queen*

The first case decided by the Supreme Court of Canada under section 24(2) of the Charter demonstrated the difficulties posed by the multiple and sometimes conflicting purposes that can be assigned to the exclusionary remedy. The case involved an episode that occurred on April 24, 1982, shortly after the Charter came into force. A constable of the Moose Jaw Police arrived at the scene of a single car accident and, after some investigation, requested the driver to accompany him to the station to supply samples of his breath pursuant to the breathalyser procedures of the Criminal Code. The accused co-operated and supplied a sample that was over the legal limit. At no time was the accused advised of his section 10(b) right to retain and instruct counsel without delay upon arrest or detention.

The trial judge held that the accused had been detained and denied his right to counsel and that exclusion of the breathalyser certificate would be the appropriate and just remedy under section 24(1) of the Charter.[35] This decision was upheld by the Saskatchewan Court of Appeal with 4 of 5 judges holding that evidence could be excluded under section 24(1) as an appropriate and just remedy for an individual who suffered a constitutional violation.[36] Excluding evidence as an appropriate and just remedy under section 24(1) of the Charter is well-suited to a corrective approach to providing remedies.[37] As Lambert J.A. has argued:

> [...] *the Charter confers individual rights on individuals. That is its purpose. If the denial of those rights works an injustice to an individual, but in such a way that the public interest in the general administration of justice is unaffected, surely the Charter rights would be meaningless, and the purpose of the Charter would be frustrated, unless the evidence was excluded.*[38]

Even if the admission of evidence obtained through a good faith or inadvertent Charter violation would not bring the administration of justice into disrepute, it could be justified as an appropriate and just remedy to repair a violation suffered by an individual.

Unlike the trial judge and the Court of Appeal, the Supreme Court of Canada decided the admissibility of the evidence in *Therens* under section 24(2) of the Charter. In a brief judgment, Justice Estey concluded:

> *Here the police authority has flagrantly violated a Charter right without any statutory authority for so doing. Such an overt violation as occurred here, must, in my view, result in the rejection of the evidence thereby obtained* [...] *To do otherwise than reject this evidence on the facts and circumstances in this appeal would be to invite police officers to disregard Charter rights of the citizen and to do so with an assurance of impunity. If section 10(b) of the Charter of Rights can be offended without any statutory authority for the police conduct here in question and without the loss of admissibility of evidence obtained by such a breach then section 10(b) would be stripped of any meaning and would have no place in the catalogue of 'legal rights' found in the Charter.*[39]

This passage contains several rationales for the exclusion of the breathalyser certificate.[40]

The characterization of the violation as "flagrant" and "overt" and the statement that to admit the evidence would invite police officers "to disregard Charter rights [...] [with] impunity" suggests a regulatory rationale for exclusion. The concern is with the flagrancy of the violation and the incentives that judicial decisions have on police behaviour. Like the American cases, Estey J. seems prepared to take a fairly rigid approach to exclusion because he was not presented with any facts suggesting that the police had deliberately, or in bad faith, violated the Charter.

Other aspects of the decision, however, suggest a corrective rationale for exclusion.[41] Estey J.'s statement that admission of evidence would strip section 10(b) of its meaning as a legal right suggested that the Court believed that exclusion was required by the nature of the right violated. In addition, both Estey J. and Lamer J. stressed that the breathalyser evidence excluded was the direct result of the violation of the right to counsel.[42]

In the end, Estey J.'s decision was too ambiguous to provide firm guidance of where the Court was heading in its interpretation of section 24(2). In some respects, Le Dain J.'s dissent provided a more helpful foundation for the interpretation of section 24(2). He stated that evidence could not be excluded under section 24(1) because of the "explicit and deliberately adopted limitation in section 24(2) on the power to exclude evidence because of an infringement or a denial of a guaranteed right or freedom".[43] This conclusion was later affirmed in *Collins* by the majority of the Court.[44]

Le Dain J. also set out a broad test of what evidence is "obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter". He held that "there must be some connection or relationship between the infringement or denial of the right or freedom in question and the obtaining of the evidence the exclusion of which is sought" but that they "do not connote or require a relationship of causation".[45] He elaborated:

> *It is not necessary to establish that the evidence would not have been obtained but for the violation of the Charter. Such a view gives adequate recognition to the intrinsic harm that is caused by a violation of a Charter right or freedom, apart from its bearing on the obtaining of evidence.*[46]

If evidence is excluded to protect the administration of justice from disrepute and not to nullify the effects of a Charter violation on an individual, then it makes sense to consider evidence for exclusion that was not necessarily produced or discovered because of the violation. The "intrinsic harm" of a Charter violation relates not so much to the effects of the violation on a particular accused, but rather to the public interest in constitutional behaviour.[47] A wide net of

excludable evidence can be cast, but evidence will only be thrown away if its admission will bring the administration of justice into disrepute. As will be discussed below, Justice Le Dain's broad definition of what evidence was obtained in a manner that violated the Charter has found support in subsequent decisions of the Court.[48]

Le Dain J. also rejected the "community shock" test developed by Lamer J. in the pre-Charter case of *Rothman* v. *The Queen*.[49] In that case, Lamer J. had stated that the courts had a discretion to exclude evidence that was obtained by tricks and other police conduct that would "shock the community". In *Therens*, Justice Le Dain stated that some evidence that would bring the administration of justice into disrepute under section 24(2) might not necessarily shock the Canadian community and the Court "should not substitute for the words of section 24(2) another expression of the standard, drawn from a different jurisprudential context".[50] Section 24(2) applications raise questions of law and "[a] court is the best judge of what would bring the administration of justice into disrepute",[51] not a jury or a public opinion poll. In subsequent cases, the Court has generally followed Justice Le Dain's suggestion that section 24(2) be interpreted as a matter of constitutional law.

The commitment to interpret section 24(2) as part of the Constitution meant not only that the standard for exclusion of evidence would be more lenient than under the common law "community shock" test,[52] but also that the test would reflect a purposive and contextual approach to constitutional interpretation. To this end, Le Dain J. articulated two competing purposes that he believed section 24(2) embraced. One was maintaining "respect for and confidence in the administration of justice, as that may be affected by the violation of constitutional rights and freedoms," while the other was the value of admitting evidence "for the ascertainment of truth in the judicial process, particularly in the administration of the criminal law".[53] He then drew a contextual distinction between balancing the relative seriousness of the constitutional violation and of the criminal charge in situations where there had been a violation of the right to counsel and other rights. He stated:

> [...] *the right to counsel is of such fundamental importance that its denial in a criminal law context must* prima facie *discredit the administration of justice. That effect is not diminished but, if anything, increased by the relative seriousness of the possible criminal law liability.*[54]

Le Dain J. did not, of course, contemplate an automatic rule of exclusion for evidence obtained through a violation of the right to counsel. He dissented from excluding the breathalyser certificate in *Therens* on the basis that the police officer "was entitled to assume in good faith" that, as under the *Canadian Bill of Rights*,[55] the right to counsel did not apply to someone in the accused's position. Nevertheless, the contextual distinction between evidence obtained through a violation of the right to counsel and evidence obtained through other Charter violations can be found in subsequent decisions of the Court, albeit not in the same form.[56] Justice Le Dain's dissent in *Therens* provided some of the foundations for the Court's decision in *Collins*, which did succeed in providing a lasting framework for section 24(2) jurisprudence.

B. *Collins* v. *The Queen*

The landmark decision establishing the test for exclusion of evidence under section 24(2) of the Charter is *Collins* v. *the Queen*.[57] The application and development of this test will be considered in detail in latter parts of the chapter, but it is important to have a general overview of this influential test.

Lamer J. stated that the focus under section 24(2) should be on whether the admission of evidence could bring the administration of justice into further disrepute, given that a constitutional violation will already, by definition, have been proved. Further, disrepute was classified into two general types: one that "will result from the admission of evidence that would deprive the accused of a fair hearing"; the second "from judicial condonation of unacceptable conduct by the investigatory and prosecutorial agencies".[58] Like Justice Le Dain in *Therens*, Justice Lamer suggested that the relevance and balance of factors would vary with the context.

> *If the admission of the evidence in some way affects the fairness of the trial, then the admission of the evidence would tend to bring the administration of justice into disrepute and, subject to a consideration of the other factors, the evidence generally should be excluded.*[59]

Thus, it would be easier to exclude evidence if its admission would affect the fairness of a the trial as opposed to simply risking judicial condonation of a serious constitutional violation.

1. Exclusion to Prevent Unfair Trials

Lamer J. stated that "[t]he use of self-incriminating evidence obtained following a denial of the right to counsel will generally go to the very fairness of the trial and should generally be excluded".[60] He offered a more purposive and expansive explanation than Le Dain J. had in *Therens* about why such evidence should generally be excluded.[61] Evidence obtained after a violation of the right to counsel will generally be obtained through a process of self-incrimination where "the accused is conscripted against himself through a confession or other evidence emanating from him".[62] Unlike real evidence that "existed irrespective of the violation of the Charter", self-emanating or conscripted evidence did not exist prior to the violation but rather was produced through a process tainted by unconstitutionality. The admission of such evidence at a subsequent trial "strikes at one of the fundamental tenets of a fair trial, the right against self-incrimination".[63] Because the very fairness of a subsequent trial was at stake, the seriousness of the offence charged should not justify a refusal to exclude the evidence.[64]

In many respects, the fair trial test is a corrective approach to exclusion of evidence. The remedy is closely connected with the rights against self-incrimination and to a fair trial and it follows more or less automatically from the violation of these rights. Not much, if any, attention is paid to competing social interests in the admission of the evidence. It is also important that the evidence is produced by the particular violation of the Charter. Lamer J. recognized that causation analysis would play a role in the administration of the fair trial test by stating that evidence that "existed irrespective of the violation"[65] would not render the trial unfair and that "[i]t may also be

relevant, in certain circumstances, that the evidence would have been obtained in any event without the violation of the Charter".[66]

2. Exclusion to Prevent Judicial Condonation of Unacceptable Conduct

Under this test, the focus is on preventing judicial condonation of unacceptable conduct rather than protecting the accused's rights. Unlike the fair trial test, exclusion does not follow from the nature of the right violated or from the type of evidence obtained. Rather, it depends on an assessment of the seriousness of the violation as balanced against the harmful effects of excluding the evidence. This test combines elements of regulatory and balancing approaches to exclusion of evidence.

Lamer J. quoted with approval Le Dain J.'s statement in *Therens* that the seriousness of the violation should be determined by assessing whether it "was committed in good faith, or was inadvertent or of a merely technical nature, or whether it was deliberate, wilful or flagrant".[67] It was also relevant if the police had acted in urgent circumstances or in order to prevent the loss or destruction of evidence. Causation analysis or speculation about whether the evidence could have been obtained without a violation of the Charter was not relevant because the Court was concerned with "the actual conduct of the authorities and the evidence must not be admitted on the basis that they could have proceeded otherwise and obtained the evidence properly".[68]

Although this part of the *Collins* test focused on the seriousness of the Charter violation and required an assessment of police behaviour that resulted in a Charter violation, Lamer J. made it clear that exclusion under section 24(2) was not "to discipline the police"[69] or to provide a remedy for police misconduct. Rather, evidence would be excluded on the basis that the Charter violation was so serious that the administration of justice would be brought into further disrepute if the evidence was accepted in the criminal trial. Unlike American courts, the Supreme Court did not try to justify exclusion as necessary to deter constitutional violations in the future. At the same time, however, the condonation test clearly required an assessment of both police behaviour and

the future effects on the administration of justice of judicial condonation of serious constitutional violations.

3. The Effects of Exclusion

Justice Lamer articulated a third group of factors to be considered in deciding to exclude evidence under section 24(2). In determining "whether the system's repute will be better served by the admission or the exclusion of the evidence," Lamer J. indicated that the Court should consider "any disrepute that may result from the exclusion of the evidence."[70] This would require a consideration of the importance of the evidence and the seriousness of the charge, subject to the important qualification that the seriousness of the offence does not justify admitting evidence that would render the trial unfair.[71]

Community standards are relevant in determining whether the exclusion of evidence could bring the administration of justice into disrepute but they are judged on the basis of "the long-term consequences of regular admission or exclusion"[72] and from the perspective of the "reasonable man, dispassionate and fully apprised of the circumstances".[73] Justice Lamer noted the dangers of allowing disrepute to be determined on the immediate and emotional responses of "uninformed members of the public" and affirmed that "[t]he Charter is designed to protect the accused from the majority, so the enforcement of the Charter must not be left to that majority".[74]

This group of factors represents only a qualified commitment to balancing the interests affected by the exclusion of evidence. Justice Lamer's judgment did not suggest that crime control considerations such as the seriousness of the offence or the importance of the evidence would often outweigh the need to avoid judicial condonation of unacceptable conduct. His example of a case in which the third group of factors would be determinative was one in which the evidence was "essential to substantiate the charge" and the breach of the Charter was "trivial".[75] On the facts as presented in *Collins*, Lamer J. would have excluded evidence of heroin and acquitted the accused of "a relatively serious charge"[76] on the basis that the courts could not "accept that police

officers take flying tackles at people and seize them by the throat when they do not have reasonable and probable grounds to believe that those people are either dangerous or handlers of drugs."[77] He admitted that the admission of the drugs would not affect the fairness of the trial and its exclusion would bring the administration of justice into disrepute but concluded it was more important to avoid judicial condonation of a serious Charter violation.

4. Implications of the *Collins* Tests

A danger may exist that the three parts of the *Collins* test will be applied too rigidly. After all, Lamer J. articulated them as a "matter of personal preference" and not as a quasi-legislative code.[78] As a matter of practice, however, the fair trial and judicial condonation arms of *Collins* have generally been applied as distinct tests. Likewise, as a matter of theory, it is difficult to understate the difference between protecting the fairness of trials and avoiding judicial condonation of unacceptable behaviour. The fair trial test focuses on matters most likely to affect the accused, such as the type of evidence and the nature of the violation, while the condonation test addresses the purposes or motives with which the state acted in obtaining the evidence. In general, the fair trial test conceives of exclusion as a corrective remedy that flows from the nature of the violation and protects an accused from its effects while the condonation tests conceives of exclusion as a regulatory device to respond to serious violations.

The contrasting purposes of the two tests can be illustrated by some examples of how the same factors have a different relevance under each test.

A conclusion that the impugned evidence could have been discovered without a Charter violation aggravates the seriousness of the violation.[79] The failure of the police to obtain evidence through available constitutional means tends "to indicate a blatant disregard for the Charter"[80] and make the case for exclusion to avoid judicial condonation of unacceptable behaviour stronger. The regulatory purposes of the judicial condonation test mean that the courts can exclude evidence

even if that evidence exists irrespective of the Charter violation and could have been discovered without the violation.

In contrast, a conclusion "that the evidence would have been obtained in any event without the violation"[81] can lead to the admission of unconstitutionally obtained evidence under the fair trial test.[82] The purpose of this test is to not judge police conduct but rather to protect the accused's right to a fair trial. Therefore, the connection between the violation of the right and the evidence to be excluded can be an important factor. The admission of self-emanating or conscripted evidence renders a trial unfair in part because the evidence "did not exist prior to the violation"[83] or could not have been discovered without the violation.[84] In other words, but for the violation, the incriminating evidence would not have existed or been discovered. Thus, admitting the evidence would allow the state to take advantage of what was produced by its unconstitutional conduct. True to its corrective purposes, the fair trial test depends on causation analysis.

Another difference between the fair trial and judicial condonation tests is their relation to the third part of *Collins*. Lamer J. warned that, if anything, "the more serious the offence, the more damaging to the system's repute would be an unfair trial",[85] and thus evidence that would affect the fairness of the subsequent trial should not be admitted because the offence charged is serious. This part of the fair trial test re-affirms due process values that the end of investigating serious crimes does not justify unconstitutional means.[86] On the other hand, "evidence is more likely to be excluded if the offence is less serious"[87] in applying the judicial condonation test. This recognizes the competing crime control interests against the exclusion of evidence. There is a greater tolerance of unconstitutional means when what is at stake is evidence of crime that existed prior to, and could be discovered apart from, a constitutional violation.

Evidence obtained through a process of self-incrimination will generally be excluded in order to ensure that the accused has a fair trial. The fair trial branch of *Collins* tends more toward an absolute rule of exclusion because courts are instructed not to concentrate on the motives behind the Charter violation or to use the seriousness of the offence charged as an excuse for

admitting the evidence. On the other hand, this test may implicitly recognize crime control values by only excluding evidence that was brought into existence by the Charter violation. In many cases, other tangible evidence of a crime, evidence that existed before and irrespective of the Charter violation, may be available[88] and would generally not be excluded under the fair trial test.[89] Such evidence may be excluded, but only if its admission will amount to judicial condonation of unacceptable conduct balanced against any disrepute caused by the exclusion of important evidence in serious cases.

The judicial condonation arm of *Collins* requires courts to assess the seriousness of the Charter violation. Although *Collins* indicates clearly that evidence should not be excluded to discipline the police, it invites an assessment of police behaviour during the entire investigation. As discussed above, if there were other constitutional means to obtain the evidence, this would be a reason to conclude that the police behaviour was more unacceptable because they acted in blatant disregard of the Charter. This approach is tougher on police misconduct than the American rule because in the United States, a conclusion that real evidence could have been discovered without a violation justifies its admission.[90] The Canadian rule is also stricter because no causal relation is required between evidence that can be excluded and a serious Charter violation.[91] A counterweight to this more expansive regulatory approach is that, in Canada, courts can balance the seriousness of the violation against the seriousness of the offence charged and the importance of the evidence sought to be excluded. These crime control factors are considered so that the judge can decide whether in the particular circumstances of the case, the administration of justice will be brought into greater disrepute by the exclusion or admission of the evidence.[92]

In general, the Supreme Court in its *Collins* test has not committed itself unequivocally to corrective, regulatory or balancing of interests approaches to the exclusion of evidence. Rather they have embraced elements of all of these models to develop a contextual and purposive approach to determining when exclusion of evidence is required under section 24(2). Evidence that affects the fairness of a trial is generally excluded in order to correct violations that result in unfair self-incrimination. Evidence that does not affect the fairness of the trial is only excluded

if its admission amounts to judicial condonation of a serious Charter violation as balanced against the state's interest in its admission.

FOOTNOTES

1. *Wray* v. *The Queen* (1970), 4 C.C.C. (2d) 1 (S.C.C.); *Rothman* v. *The Queen* (1981), 59 C.C.C. (2d) 30 (S.C.C.).

2. *Hogan* v. *The Queen* (1975), 18 C.C.C. (2d) 65 (S.C.C.).

3. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), c.11, s. 24(2).

4. Since 1985, the Supreme Court alone has decided over 40 cases under section 24(2). *Canadian Charter of Rights and Freedoms Annotated* (Aurora: Canada Law Book, 1993) at c. 24(2). For commentary on section 24(2) see Y.M. Morissette, "The Exclusion of Evidence under the *Canadian Charter of Rights and Freedoms*: What To Do and What Not To Do" (1984) 29 McGill L.J. 521; D. McDonald, *Legal Rights in the Canadian Charter of Rights and Freedoms*, 2d ed., (Toronto: Carswell, 1989) at c. 28; D. Paciocco, "The Judicial Repeal of section 24(2) and the Development of the Canadian Exclusionary Rule" (1989-90) 32 Crim. L.Q. 326; K. Jobson, "The Canadian Charter of Rights and Freedoms: Section 24(2)" in W. Charles, T. Cromwell & K. Jobson, *Evidence and the Charter of Rights and Freedoms* (Toronto: Butterworths, 1989) at c. 3; D. Stuart, *Charter Justice in Canadian Criminal Law* (Toronto: Carswell, 1991) at c. 11; G. Mitchell, *The Supreme Court on Excluding Evidence Under the Charter* (Charlottetown: Clarke Printing Service, 1992); J. Sopinka, S. Lederman & A. Bryant, *The Law of Evidence in Canada* (Toronto: Butterworths, 1992) at c. 9.

5. *U.S.* v. *Weeks*, 232 U.S. 341 at 344 (1914).

6. "If the searches and seizures are unlawful as invading personal rights secured by the Constitution, those rights would be infringed yet further if the evidence was allowed to be used." *Dodge* v. *U.S.*, 272 U.S. 530 at 532 (1921). Note that in this case, the Court did approve the forfeiture of a boat illegally seized while transporting liquor during the Prohibition era.

7. W. Blackstone stated "where there is a legal right, there is also a legal remedy", 3 *Commentaries* *23 quoted with approval in *Marbury* v. *Madison*, 5 U.S.(1 Cranch) 137 at 163 (1803). A.V. Dicey affirmed this legal maxim and commented on the "inseparable connection between the means of enforcing the right and the right to be enforced". A.V. Dicey, *An Introduction to the Study of the Law of the Constitution*, 10th ed., (London: MacMillan, 1959).

8. "The tendency of those who execute the criminal laws of the country to obtain convictions by means of unlawful seizures ... should find no sanction in the judgments of the courts, which are charged at all times with the support of the Constitution, and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights". *U.S.* v. *Weeks, supra* note 5 at 344.

9. In *Gouled* v. *U.S.*, 255 U.S. 298 at 304 (1920), the United States Supreme Court emphasized that unconstitutionally obtained evidence should be excluded regardless of the seriousness of the violation because constitutional rights were as harmed as much by "stealthy encroachment upon or 'gradual deprecation'... by imperceptible practice of courts or by well-intentioned but mistakenly over-zealous executive officers".

10. *Silverthorne Lumber Co.* v. *U.S.*, 251 U.S. 385 (1920); *Nardone* v. *U.S*,. 308 U.S. 338 (1939) (evidence derived from constitutional violation should be excluded unless it could be obtained from an independent source).

11. Y. Kamisar, "Does the Exclusionary Rule Rest on a Principled Basis Rather than an Empirical Proposition" (1983) 16 Creighton L. Rev. 565; J.S. Schrock & R.C. Welsh, "Up from Calandra: The Exclusionary Rule as a Constitutional Requirement" (1974) 59 Minn. L. Rev. 251; W. Schroeder, "Restoring the Status Quo Ante: The Fourth Amendment Exclusionary Rule as a Compensating Device" (1983) 51 Geo. Wash. L. Rev. 633. In the British context see also A. Ashworth, "Excluding Evidence as Protecting Rights" [1977] Crim. L. Rev. 723.

12. *People* v. *Bigelow*, 488 N.E.2d 451 at 458 (N.Y. 1985) (good faith exception to exclusionary rule rejected because "if the People are permitted to use the seized evidence, the exclusionary rule's purpose is completely frustrated") See also *State* v. *Novembrino* 491 A.2d. 37 (N.J. 1985); *Commonwealth* v. *Edmunds* 586 A.2d 887 (Pa. 1991).

13. *U.S.* v. *Leon*, 468 U.S. 897 at 935 (1984).

14. *Ibid*. at 948-960.

15. *Elkins* v. *United States*, 364 U.S. 206 at 217 (1960).

16. *Mapp* v. *Ohio*, 367 U.S. 643 (1961).

17. *Miranda* v. *Arizona*, 384 U.S. 436 (1966).

18. For example, *Mapp* and *Miranda* were not applied retroactively to convictions obtained before the announcement of those decisions on the grounds that the rules in those cases were designed to prevent constitutional violations, not to ensure fair trials or to exclude unreliable evidence. *Linkletter* v. *Walker*, 381 U.S. 618 at 636-639 (1965); *Johnson* v. *New Jersey*, 384 U.S. 719 at 730 (1965).

    The United States Supreme Court has also relied on the deterrence rationale to refuse to apply the exclusionary rule in federal *habeas corpus* proceedings [*Stone* v. *Powell*, 428 U.S. 465 (1976)], civil proceedings [*U.S.* v. *Janis*, 428 U.S. 433 (1976)], grand jury proceedings [*U.S.* v. *Calandra*, 414 U.S. 338 (1974)] and deportation hearings [*INS* v. *Lopez Mendoza*, 468 U.S. 1032 (1984)]. More recently, the deterrence rationale has

been used to justify the admission of unconstitutionally obtained evidence obtained by good faith reliance on search warrants [*Leon, supra* note 13] and on legislation [*Illinois* v. *Krull*, 480 U.S. 340 (1987)].

19. The California Supreme Court led the way on both fronts. In *People* v. *Cahan* 282 P.2d. 905 at 912-913 (1955), Justice Traynor concluded that the exclusion of unconstitutionally obtained evidence was the most effective way to deter constitutional violations. "Experience has demonstrated [...] that neither administrative, criminal nor civil remedies are effective in suppressing lawless searches and seizures. The innocent suffer with the guilty, and we cannot close our eyes to the effect the rule we adopt will have on the rights of those not before the court". A decade earlier, he wrote an influential judgment propounding a theory of absolute liability in products liability cases, in part, in order to give companies incentives to make their products safer. *Escola* v. *Coca Cola Bottling Co. of Fresno*, 150 P.2d. 436 at 440 (1944).

20. These victims of unconstitutional behaviour are left with, at best, a damage remedy if unconstitutional searches or interrogations did not discover incriminating evidence. See J. Kaplan, "The Limits of the Exclusionary Rule" (1974) 26 Stan. L. Rev. 1027.

21. See J. Skolnick, *Justice Without Trial: Law Enforcement in Democrate Society* (New York: J. Wiley, 1966) at 211-229.

22. *People* v. *Defore*, 150 N.E. 585 at 587 (1926), Cardozo J.

23. Before Frankfurter, Justice Cardozo approached the exclusion of evidence as a balance of interests. He stated: "The question is whether the protection for the individual would not be gained at a disproportionate loss of protection for society. On the one side is the social need that crime shall be repressed. On the other hand, the social need that law shall not be flouted by the insolence of office. There are dangers in any choice. *People* v. *Defore*, 150 N.E. 585 at 589 (1926).

24. *Wolf* v. *Colorado*, 338 U.S. 25 at 27 (1949).

25. *Rochin* v. *California*, 342 U.S. 165 at 173-174 (1951).

26. *Ibid*. at 172.

27. *Irvine* v. *California*, 347 U.S. 128 (1954).

28. *Ibid*. at 142.

29. See for example *Rochin, supra* note 25 at 177 per Black J. Justice Clark stated that the *Rochin* test "makes for such uncertainty and unpredictability that it would be impossible to foretell - other than by guesswork - just how brazen the invasion of the intimate

privacies of one's home must be in order to shock itself into the protective arms of the Constitution [...] We may thus vindicate the abstract principle of due process, but we do not shape the conduct of local police one whit [...]". *Irvine, supra* note 27 at 138, Clark J.

30. The English courts have generally restricted their discretion to exclude improperly obtained evidence. *R.* v. *Sang*, [1980] A.C. 402 (H.L.). Some Irish judges approach exclusion of evidence from the perspective of enforcing their constitution. See *People* v. *O'Brien*, [1965] I.R. 142, Walsh J.; *People* v. *O'Loughlin*, [1979] I.R. 85.

31. *Lawrie* v. *Muir* (1950), S.L.T. 37 at 39-40 (H.C.).

32. "On the one hand there is the public need to bring to conviction those who commit criminal offenses. On the other hand there is the public interest in the protection of the individual from unlawful and unfair treatment. Convictions obtained by the aid of unlawful or unfair acts may be obtained at too high a price. Hence the judicial discretion". *R.* v. *Ireland* (1970), 126 C.L.R. 321 at 335 (Aust. H.C.).

33. The most useful description of these cases is found in D. McDonald, *supra* note 4 at 663-670.

34. *Bunning* v. *Cross* (1978), 19 A.L.R. 641 at 660 (Aust. H.C.), Stephen & Aikin JJ.

35. *R.* v. *Therens* (1982), 70 C.C.C. (2d) 468 at 474 (Sask. Prov. Ct.) ("the public interest is after all best served when the rights of the individual are defended and protected".)

36. *R.* v. *Therens* (1983), 5 C.C.C. (3d) 409 at 427 (Sask C.A.). (holding that section 24(1) allows discretionary decision to exclude evidence whereas section 24(2) mandates exclusion when the admission of the evidence would bring the administration of justice into disrepute.)

37. See K. Roach, "Section 24(1) of the Charter: Strategy and Structure" (1987-88) 29 Crim. L.Q. 222 at 251-253.

38. *R.* v. *Gladstone* (1985), 22 C.C.C. (3d) 151 at 161-162 (B.C.C.A.).

39. *R.* v. *Therens* (1985), 18 D.L.R. (4th) 655 at 662-663, Beetz, Chouinard and Wilson JJ. concurring, Dickson C.J.C. and Lamer J. concurring in the reasons but also issuing separate opinions.

40. Justice Estey's decision was criticized for its conclusory form. See M. MacCrimmon, "Developments in the Law of Evidence: The 1984-5 Term" (1986) 8 Sup. Ct. L. Rev. 249 at 252.

41. See generally K. Roach "Constitutionalizing Disrepute: Exclusion of Evidence after *Therens"* (1986) 44 U.T. Fac. L. Rev. 209.

42. Estey J. stated that the case involved "direct evidence or evidence thereby obtained directly and I leave to another day any consideration of evidence thereby indirectly obtained". *Supra* note 39 at 663. See also 664-665, Lamer J.

43. *Ibid*. at 683.

44. *R.* v. *Collins* (1987), 56 C.R. (3d) 193 at 204 (S.C.C.).

45. *Supra* note 39 at 683-684.

46. *Ibid.* at 684.

47. The approaches to this issue taken by Estey and Lamer JJ. are more individualistic in requiring that the evidence to be excluded was either directly related to the Charter violation or related in a purposive sense to the right violated. *Ibid*. at 663, Estey J.; at 664-665, Lamer J.

48. In *R.* v. *Strachan* (1989), 46 C.C.C. (3d) 479 at 501 (S.C.C.) Justice Lamer stated that he was "satisfied that the approach proposed by LeDain J. in *Therens* is, from a practical point of view, the better one". Similarly, Dickson C.J.C. stated that a causal connection between the violation and the evidence sought to be excluded was not necessary and "[a] better approach [...] would be to consider all evidence gathered following a violation of a *Charter* right [...]". *Ibid*. at 498.

49. *Rothman, supra* note 1 at 74-75.

50. *Supra* note 39 at 686.

51. *Ibid*. at 687.

52. In *Collins, supra* note 44 at 213, Lamer J. rejected the "community shock" test for the majority of the Court stating that it contemplated a higher threshold for the exclusion of evidence and that section 24(2) contemplated a lower threshold because 1) "under section 24(2) there will have been a violation of the most important law in the land" and 2) the french version of section 24(2) was translated as requiring the exclusion of evidence if its admission "*could* bring the administration of justice into disrepute".

53. *Supra* note 39 at 686.

54. *Ibid*. at 687.

55. *Chromiak* v. *The Queen* (1980), 49 C.C.C. (2d) 257 (S.C.C.).

56. See generally *R.* v. *Collins, supra* note 44. As will be discussed *infra*, this distinction has not emerged as an absolute rule or one derived solely from whether section 10(b) was violated. See *R.* v. *Ross* (1989), 46 C.C.C. (3d) 129 at 139 (S.C.C.); *Thompson Newspapers Ltd.* v. *Canada* (1990), 54 C.C.C. (3d) 417 at 511-514; *R.* v. *Mellenthin* (1993), 76 C.C.C. (3d) 481 at 488-491 (S.C.C.) discussed *infra.*

57. *Collins, supra* note 44.

58. *Ibid.* at 208.

59. *Ibid*. at 211. Note, however, that although Le Dain J. expressed "general agreement" with Lamer J.'s approach to section 24(2), he expressed concern with the notion that the evidence that affected the fairness of the trial "should generally lead to the exclusion of the evidence". *Ibid*. at 215.

60. *Ibid*. at 211.

61. As will be discussed *infra*, Justice Lamer also did not limit his more rigorous fair trial test to evidence obtained after a violation of the right to counsel as Justice LeDain had in *Therens.*

62. *Ibid*. at 211.

63. *Ibid*.

64. Lamer J.: "if the admission of the evidence would result in an unfair trial, the seriousness of the offence could not render that evidence admissible. If any relevance is to be given to the seriousness of the offence in the context of the fairness of the trial, it operates in the opposite sense: the more serious the offence, the more damaging to the system's repute would be an unfair trial". *Ibid.* at 212.

65. *Ibid* at 211.

66. *Ibid* at 212. See *R.* v. *Black* (1989), 50 C.C.C. (3d) 1 (S.C.C.); *R.* v. *Wise* (1992), 70 C.C.C. (3d) 193 (S.C.C.) discussed *infra.*

67. *Supra* note 44 at 212.

68. *Ibid*.

69. *Ibid.* at 204.

70. *Ibid*. at 212.

71. *Ibid*.

72. *Ibid*. at 208.

73. This person was "usually the average person in the community, but only when that community's current mood is reasonable". *Ibid.* at 209.

74. *Ibid*. at 209.

75. *Ibid.* at 212.

76. Possession of heroin for the purposes of trafficking. *Ibid*. at 214.

77. *Ibid*. at 214. Assuming these to be the facts, Lamer J. would have excluded the evidence. The case was actually sent back to the trial judge to determine whether the police had reasonable and probable grounds for their actions.

78. McIntyre J. in dissent suggested that section 24(2) applications should be decided in a "less formulated approach" than outlined by Lamer J. and should rely on the application of a reasonable person test to develop "rules and principles on a case-by-case basis". *Ibid*. at 197.

79. In elaborating the judicial condonation test, Lamer J. stated: "[...] the availability of other investigatory techniques and the fact that the evidence could have been obtained without the violation of the Charter tend to render the Charter more serious." *Ibid.* at 212.

80. *Ibid*.

81. *Ibid*.

82. See *Black, supra* note 66 at 20, discussed *infra*.

83. *Supra* note 44 at 211.

84. See *Thompson, supra* note 56 at 513-514, LaForest J.; *R.* v. *Mellenthin* (1993), 76 C.C.C. (3d) 481 at 490 (S.C.C.) discussed *infra.*

85. *Supra* note 44 at 212.

86. *Hogan, supra* note 2 at 81, Laskin J. in dissent.

87. *Supra*note 44 at 212.

88. Many of the objections against the American exclusionary rule focus on its use to exclude real evidence. One American critic has stated that unlike real evidence "[i]nvoluntary confessions and other evidence of that kind raise entirely different questions. Innocent men may give false confessions if sufficient pressure is put upon

them by the police. The murder weapon, the envelope of narcotics, the gambling slips, however, speak for themselves". Wright, "Must the Criminal Go Free if the Constable Blunders" (1982) 50 Texas L. Rev. 736 at 737.

89. An important exception, to be discussed below, is real evidence derived from an unconstitutionally obtained statement or obtained through an unconstitutional process of self-incrimination. See *Thompson, supra* note 56; *Mellenthin, supra* note 84.

90. *Segura* v. *United States,* 445 U.S. 463 (1984); *Murphy* v. *United States,* 487 U.S. 533 (1988) (admission of evidence obtained by a legal warrant after an initial violation on the grounds that the evidence was obtained from an independent source); *Nix* v. *Williams,* 467 U.S. 431 (1984) (admission of a dead body on the basis that it would inevitably have been discovered).

91. *Supra* note 48.

92. As discussed *supra,* this third group of factor has not been well developed by the Supreme Court.