GENERAL PRINCIPLES OF *CHARTER* EXCLUSION (EXCLUSION OF CONSCRIPTIVE AND NON-CONSCRIPTIVE EVIDENCE)

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I. Introduction

There can be no doubt that the adoption of s. 24(2) of our *Charter*[1] brought about a profound change in the manner in which Canadian courts viewed the admissibility of illegally obtained evidence. The decisions of those courts, and especially of the Supreme Court of Canada, have been the subject of much discussion and debate by academic commentators, the media and, no doubt, all Canadians who take an interest in the administration of criminal justice in this country.

The starting point for any discussion of the principles applicable to the exclusion of evidence in criminal trials must be the Supreme Court of Canada's judgment in *R.* v. *Wray*[2], a decision which predated the *Charter* by some eleven years. The impugned evidence in *Wray* consisted of parts of a confession made by the accused to the police, which was later found to have been involuntary, and an item of what we would now refer to as "derivative evidence". The derivative evidence consisted of a gun found by the police as a result of the accused's involuntary statement. The Crown sought to admit both the gun and those parts of the involuntary confession which were corroborated by other evidence. The accused resisted the admission of this evidence on the ground that its admission would tend to bring the administration of justice into disrepute.

Justice Martland wrote the reasons of the majority. He held that the impugned evidence should be admitted and expressed the view that a judge has no discretion to exclude admissible evidence on the basis that its admission would be calculated to bring the administration of justice into disrepute.

Nevertheless, the majority of the Court acknowledged that a judge has a limited discretion to exclude evidence to ensure a fair trial. The scope of this discretion was, however, exceedingly narrow. Justice Martland held that trial fairness is compromised

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[1]It is now settled that any application for the exclusion of evidence on *Charter* grounds must be brought pursuant to s. 24(2), not s. 24(1). See, for instance, D. Stuart, *Charter Justice in Canadian Criminal Law*, 2d ed., (Toronto: Carswell, 1996) at 454-55.

[2][1971] S.C.R. 272 [hereinafter *Wray*].

(and the evidence may be excluded) only where "the allowance of evidence [is] gravely prejudicial to the accused, [its] admissibility is tenuous and [its] probative force . . . trifling". Otherwise, it was held that "the allowance of admissible evidence relevant to the issue before the Court and of substantial probative value may operate *unfortunately* for the accused, but not *unfairly*".[3]

Three justices dissented, expressing the view that the repute of the administration of justice is properly the concern of judges. This position is perhaps best encapsulated in the reasons of Justice Spence, who held:

> I am most strongly of the opinion that it is the duty of every judge to guard against bringing the administration of justice into disrepute. That is a duty which lies upon him constantly and a duty which he must always keep firmly in mind. The proper discharge of this duty is one which ... is of paramount importance to the continued life of the state.[4]

I think it is safe to state that the views expressed by the minority in *Wray* ultimately carried the day. When the *Charter* was adopted in 1982, it contained s. 24(2) which clearly and unequivocally empowers judges to exclude evidence where the admission of this evidence would bring the administration of justice into disrepute. The legislative history of this provision makes it clear that section 24(2) of the *Charter* was envisaged as a sort of "compromise" between the very narrow rationale for exclusion set out in *Wray* and the almost automatic rule of exclusion in force in the United States.[5]

The question of when evidence will bring the administration of justice into disrepute is a very difficult one to answer. Will the administration of justice be brought into disrepute only where the evidence is obtained so wrongfully as to "shock the conscience" of the community, or will the admission of *any* evidence which was illegally obtained threaten the integrity of our system of justice? Is the answer to be found somewhere in between? These are questions about which reasonable members of the public may, and often do, disagree. Nevertheless, they lie at the very heart of the rules which have been developed in relation to section 24(2) of the *Charter*.

In *R.* v. *Collins*,[6] the Supreme Court of Canada made its first serious attempt to answer these difficult, yet so very important, questions. Justice Lamer (as he then was) identified a catalogue of factors to be weighed in determining whether evidence should be excluded pursuant to s. 24(2) of the *Charter*. These factors include the kind of evidence obtained and whether it was otherwise discoverable, the nature of the right breached, the seriousness of the violation, good faith (or its absence) on the part of the

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[3]*Ibid.* at 293 [emphasis added].

[4]*Ibid.* at 304.

[5]Stuart, *supra* note 1 at 453-54 and 475-77.

[6][1987] 1 S.C.R. 265 [hereinafter *Collins*].

police, the seriousness of the offence and the importance of the evidence to the Crown's case.

Justice Lamer then proceeded to divide these factors into three categories: those relating to the fairness of the trial, those relating to the seriousness of the *Charter* breach and those relating to the effect of excluding the evidence on the repute of the administration of justice. These categories have come to be known as the three "branches" of the *Collins* "test".

With respect to the first branch of the test, the so-called trial fairness branch, Justice Lamer held that the nature of the evidence is a very important factor. He concluded that "real evidence that was obtained in a manner that violated the *Charter* will rarely operate unfairly for that reason alone; the real evidence existed irrespective of the violation of the *Charter* and its use does not render the trial unfair."[7] These words unfortunately led to some confusion in later decisions.

Justice Lamer also held that "the situation is very different where, after a violation of the *Charter*, the accused is conscripted against himself through a confession or other evidence emanating from him."[8] In such cases, an unfair trial will often be the result. This statement clearly shows that the trial fairness branch of the *Collins* test is primarily concerned with "self-incriminating" or "conscriptive" evidence.

In cases where the admission of the evidence would not adversely affect the fairness of the trial, Justice Lamer held that a judge ought to go on to consider the seriousness of the *Charter* breach and the effect of excluding the evidence on the repute of the administration of justice. In doing so, however, the Courts are *not* to consider themselves bound by the results of public opinion polls. On the contrary, Justice Lamer adopted the test suggested by Professor Morissette of McGill University: "would the admission of the evidence bring the administration of justice into disrepute in the eyes of the reasonable man, dispassionate and fully apprised of the circumstances of the case?"[9]

Without a doubt, Justice Lamer's reasons in *Collins* went a long way toward settling the principles applicable to section 24(2) of the *Charter*. Nevertheless, uncertainty remained on several key points.

First, there was some disagreement as to the proper application of the trial fairness branch of the *Collins* test. In the years after *Collins*, a consensus emerged that the admission of *conscriptive* evidence would generally tend to render the trial unfair. Yet,

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[7] *Ibid.* at 284.

[8] *Ibid.*

[9] *Ibid.* at 282.

Justice Lamer stated in *Collins* that "*real*" evidence obtained in violation of the *Charter* will rarely render the trial unfair. Does this mean that so-called real evidence cannot also be conscriptive evidence? If not, what precisely do we mean by the expression conscriptive evidence?

Second, how do we decide if evidence is conscriptive? Will it be conscriptive whenever the accused is forced to participate in its creation or discovery, or is something more required?

Third, what role does the concept of discoverability play in the trial fairness analysis? Will evidence be considered discoverable whenever it could have been discovered without the unlawful conscription of the accused or only where it would have been discovered in the absence of a *Charter* breach?

Fourth, what is the *effect* of finding that certain evidence is conscriptive and would therefore tend to render the trial unfair? Must this evidence of necessity be excluded or may it be saved if the breach was not serious or if the exclusion of the evidence might tend to bring the administration of justice into disrepute?

Finally, how should courts go about determining whether a breach is sufficiently serious to warrant the drastic remedy of exclusion? What is the significance of a finding of good or bad faith on the part of the police? What does "good faith" mean in the context of s. 24(2) of the *Charter*?

In *R.* v. *Stillman*,[10] the Supreme Court of Canada has attempted to both clarify and simplify the principles applicable to the adjudication of applications for the exclusion of evidence on *Charter* grounds. In doing so, it has attempted to answer at least some of the questions posed.

In view of the recency of *Stillman*, as well its relevance to s. 24(2) applications, I intend to make this decision the focus of my discussion of the principles applicable to s. 24(2) of the *Charter*.

II. Trial Fairness and *R.* v. *Stillman*

(a) Facts

The facts of *Stillman* are very troubling, from every perspective. The accused, a young offender, was charged with the brutal murder of a teenage girl in New Brunswick. Semen was found in the victim's vagina and a human bite mark was found on her abdomen. The cause of death was a wound or wounds to the head.

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[10][1997] 1 S.C.R. 607 [hereinafter *Stillman*].

Upon his arrest, the accused retained counsel. His lawyers met him at RCMP headquarters. The police indicated that they wished to take hair samples and teeth impressions and to question the accused. The accused spent two hours with his lawyers. At the end of the meeting, the lawyers provided the police with a letter indicating that the accused refused to provide any bodily samples whatsoever or to give any statements. However, as soon as the lawyers left, the police proceeded to take samples of the accused's scalp hair and forced him to pull some of his pubic hair. Plasticine teeth impressions were also taken.

A constable proceeded to interrogate the accused for approximately one hour. Although the accused did not say anything, he sobbed throughout the interview. The interview came to an end when the accused asked once again to telephone his lawyer.

While waiting for his lawyer to arrive, the accused used the washroom. Upon leaving, he blew his nose and threw the tissue in a waste bin. The tissue was seized and subsequently used for DNA testing.

When the accused's lawyer returned to the headquarters, he objected to the actions taken by the RCMP. Again the lawyer left, and again the RCMP tried to get a statement from the accused. The accused was released from custody five days later when the Crown expressed the view that there was not enough evidence to proceed to trial.

Several months later, after they had received the DNA and dental analysis, the RCMP again arrested the accused, in part to allow them to take better impressions of his teeth. A dentist attended at the RCMP detachment and, in a procedure which lasted more than two hours, took impressions of the accused's teeth without his consent. More hair was taken from the accused, as well as saliva samples and buccal swabs.

Two issues fell to be decided by the Supreme Court of Canada. First, were the tissue or bodily samples validly seized pursuant to the common law power of search incidental to arrest? Since the scope of this common law power is not the topic of this paper, I shall not refer in any detail to this part of the judgment. The majority of the Court held that the seizure of these items was unlawful. Second, should the items seized in violation of the *Charter* nevertheless be admitted pursuant to section 24(2)? It is this part of the reasons which is pertinent for the purposes of this discussion

(b) The Majority Decision

i) Effect of a finding of trial unfairness

The Court first considered the trial fairness branch of the *Collins* test. It will be remembered that one of the outstanding questions after *Collins* was whether evidence the admission of which would render the trial unfair must *always* be excluded, or whether it could nevertheless be admitted if the *Charter* breach was not serious, or

where exclusion may bring the administration of justice into disrepute. The majority of the Court expressed the view that such evidence must *always* be excluded. No free and democratic society can countenance an unfair trial. As the majority held in *Stillman*, "a conviction resulting from an unfair trial is contrary to our concept of justice; to uphold such a conviction would be unthinkable; it would indeed be a *travesty of justice*".[11] Therefore, where the impugned evidence fails the trial fairness branch of the *Collins* test, in other words where the admission of the evidence would render the trial unfair, the evidence *must* be excluded, without reference to the other *Collins* factors.

ii) What kind of evidence will render a trial unfair? – The conscriptive/non-conscriptive distinction

What kind of evidence will render a trial unfair? The majority of the Court held that the answer to this question lies in the distinction between two categories of evidence: conscriptive and non-conscriptive. The admission of non-conscriptive evidence will rarely render the trial unfair. Therefore, if a judge properly characterises evidence as non-conscriptive, he or she should generally move on to consider the other two branches of the *Collins* test.

Conscriptive evidence, however, is an entirely different kettle of fish. If evidence is characterized as conscriptive then, unless it can be said to be discoverable, its admission will generally render the trial unfair. Non-discoverable conscriptive evidence must therefore always be excluded.

But, what is the difference between conscriptive and non-conscriptive evidence? As a starting point, it is imperative to understand where the answer to this question does *not* lie. The answer does not lie in the distinction between testimonial and real evidence. It may be thought by some that real evidence, which refers to anything which is tangible and exists as an independent entity, can never be conscriptive evidence. This view is, with the greatest respect, mistaken. Whether evidence should be characterized as conscriptive or non-conscriptive has nothing whatsoever to do with whether it also happens to be real evidence. As the Court held in *Stillman*, the characterization of evidence as real evidence, *simpliciter*, is irrelevant to the s. 24(2) inquiry. For this reason, it may be better to drop altogether the expression real evidence in the s. 24(2) context. The relevant question is not "is the evidence 'real' evidence", but rather, "is the evidence conscriptive or non-conscriptive".[12]

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[11] *Ibid.* at para. 72 [emphasis added].

[12] See *supra* note 1.

This begs the question: what is the difference between conscriptive and non-conscriptive evidence? The majority of the Court defined conscriptive evidence as follows: "evidence will be conscriptive when an accused, in violation of his *Charter* rights, is compelled to incriminate himself at the behest of the state by means of a statement, the use of the body or the production of bodily samples".[13] All other evidence is non-conscriptive evidence.

It may be helpful to break this definition down to its constituent elements. First, in order to be conscriptive, the evidence must have been *compelled* by the state from the accused. Therefore, where the accused provides the evidence voluntarily, the evidence will not be conscriptive. An accused may simply choose to provide a statement or other evidence. Also, unbeknownst to him, the accused's statement may have been captured by a wiretap or some other recording device, prior to his being detained. This evidence can not be said to be compelled and is therefore not conscriptive.

Second, the compulsion must have resulted from a *Charter* breach. Where, for example, the accused is forced to provide evidence pursuant to a valid warrant, there will be no *Charter* breach. The evidence will therefore not be conscriptive, even though it was compelled from the accused. Likewise, evidence compelled from the accused by a person who is not an agent of the state will not be considered conscriptive.

Third, not all evidence compelled from the accused in violation of the *Charter* will be classified as conscriptive evidence. This label attaches only to three very specific kinds of evidence: statements, the use of the body and bodily samples as evidence. The first of these, statements, is self-explanatory. Where the accused is forced, in violation of the *Charter*, to make a statement, the statement will be conscriptive and, if it is not discoverable, can not be admitted at the trial. This situation usually arises in cases where the accused provides a statement as a result of a breach of his right to counsel.

"The use of the body as evidence" will occur in cases such as *R.* v. *Ross and Leclair*,[14] where the accused were forced, in violation of their *Charter* rights, to participate in a police line up. They were thereby forced to allow their bodies to be used as evidence for identification purposes.

Finally, bodily samples consist of parts of an accused's body, such as hair or blood samples, teeth impressions or buccal swabs, taken from him in violation of the *Charter*.

An alternative approach to conscriptive evidence would be to classify *any* evidence discovered as a result of the forced participation of the accused as conscriptive. Thus, if the police force the accused to produce the contents of his pocket, the items seized

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[13] *Stillman, supra* note 10, at 655.

[14] [1989] 1 S.C.R. 3 [hereinafter *Ross and Leclair*].

would be classified as conscriptive simply because they could not have been seized without the forced participation of the accused. This approach is not the one followed in *Stillman*. On the authority of *Stillman*, the items seized from the accused's pocket would not be classified as conscriptive evidence. Although these items may well have been compelled from the accused in violation of the *Charter*, they do not consist of statements, bodily samples or the use of the body as evidence, and hence are not conscriptive. Of course, whether they would be admitted in evidence would depend upon the other *Collins* factors.

The majority of the Court arrived at this conclusion for two principle reasons. First, the Court took the position that the body is the outward manifestation of a person. A bodily sample certainly tells us something very personal about the accused in a manner similar to a statement. It "emanates from the accused", to use the language in *Collins*. Indeed, bodily samples, in some respects, have a certain testimonial quality to them. Second, the majority of the Court considered it to be of paramount importance to emphasize the sanctity and integrity of the human body. As the majority held in *Stillman*:

> Any invasion of the body is an invasion of the particular person. Indeed, it is the ultimate invasion of personal dignity and privacy ... . The concept of *fairness* requires that searches carried out in the course of police investigations recognize the importance of the body.[15]

Furthermore, the majority of the Court expressly rejected the idea that the sanctity of the body should be relevant only with respect to the "seriousness of the breach" branch of the *Collins* test. Such an approach fails to recognize the fundamental importance of the innate dignity of the individual. That dignity is violated if individuals are prevented from exercising their free will as to the use to be made of their own body by agents of the state. Furthermore, the security of the body is just as worthy of protection from state intrusion aimed at compelled self-incrimination as are statements. Therefore, bodily samples obtained by a significant compelled intrusion upon the body without consent and in violation of the *Charter* will be considered to be conscriptive.

So far then, it is clear that statements and bodily samples compelled from the accused, and the compelled use as evidence of the body, in violation of the *Charter*, will be classified as conscriptive evidence. Is this the only evidence which should be classified as conscriptive? The answer is – not exactly.

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[15] *Stillman, supra* note 11 at 658 [emphasis added].

iii) A subset of conscriptive evidence: derivative evidence

In *Stillman*, the majority of the Court recognized a subset of conscriptive evidence called "derivative" evidence. Derivative evidence is evidence (usually tangible evidence) which is found as a result of conscriptive evidence provided by the accused. In other words, the conscriptive evidence must be a *necessary cause* of the discovery of the derivative evidence.

An example of derivative evidence is provided by the case of *R.* v. *Burlingham*.[16] There the accused gave a full confession, in violation of his right to counsel. This confession was therefore conscriptive evidence. As part of his statement, the accused told the police that the murder weapon could be found at the bottom of a frozen river. The murder weapon, a gun, was ultimately seized from the river. There is no way that the police could have found the gun without the conscripted statement. Because the conscripted statement was the necessary cause of the discovery of the gun, the gun was classified as derivative evidence, which is a logical subset of conscriptive evidence.

Thus, the first step in the trial fairness analysis is to classify the evidence either as conscriptive evidence, which includes derivative evidence, or as non-conscriptive evidence. If the evidence is classified as non-conscriptive, its admission will generally not render the trial unfair and the judge should go on to consider the other *Collins* factors. On the other hand, if the evidence is conscriptive, then, unless it is discoverable, its admission will render the trial unfair. Therefore, if one classifies evidence as conscriptive, one must go on to the second step in the trial fairness analysis: discoverability.

iv) Discoverability

The admission of conscriptive evidence will not always render the trial unfair. Indeed, in recent cases, and again in *Stillman*, it was held that the admission of conscriptive evidence will not render the trial unfair where the impugned evidence would have been discovered in the absence of the unlawful conscription of the accused.

The rationale for this rule is straightforward. The purpose of any *Charter* remedy must be to place the person whose rights were violated, usually the accused, in the position in which he would have found himself had his rights not been breached.[17]

Let us take the example of the gun in *Burlingham*. There is simply no way that the gun would ever have been found if the *Charter* had not been violated. Excluding the

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[16][1995] 2 S.C.R. 206 [hereinafter *Burlingham*].

[17]Professor Kent Roach elaborates upon this rationale in his article entitled "The Evolving Fair Trial Test under Section 24(2) of the Charter" (1996) 1 Can. Crim. L. R. 117.

gun is therefore the only way to undo the breach by putting the accused in the same position as that in which he would have found himself had the breach never taken place.

However, let us change our example somewhat. Let us assume that the gun was hidden, not at the bottom of a frozen river, but in the accused's dresser drawer. Furthermore, let us assume that, while the accused was being interrogated in violation of the *Charter*, other police officers were preparing to search the accused's home. Finally, let us assume that the Crown succeeds in demonstrating, on a balance of probabilities, that the gun would have been found during the ensuing search. In that situation, the gun would have been found even without the unlawful conscription of the accused. If there had been no conscriptive statement, the gun, once found, would no doubt have been admitted as evidence. Therefore, if the gun is excluded, the accused is placed in a *better* position as a result of the conscriptive *Charter* breach than that in which he would have found himself had the breach not occurred. The discoverability principle is designed to ensure that this kind of overcompensation does not take place.

When will evidence be discoverable? Evidence will be discoverable where the Crown proves, on a balance of probabilities, that it would have been discovered. There are two ways in which the Crown may discharge its burden. First, it may establish that there was an alternative non-conscriptive means through which the state would have obtained the evidence. The second situation where discoverability will be made out is where the evidence would have inevitably been discovered. *R.* v. *Black*[18] provides an excellent illustration of the notion of inevitable discovery.

The position of the majority of the Court in *Stillman* may therefore be summarized as follows. For the purposes of the trial fairness branch of the *Collins* test, evidence must be classified as either conscriptive or non-conscriptive. Conscriptive evidence consists of compelled statements and bodily samples and the compelled use of the body as evidence in violation of the *Charter*. It also includes evidence derived from this evidence (usually from a statement). Evidence derived from this evidence (what the Court calls derivative evidence) is evidence, such as the gun in *Burlingham*, which would not have been found in the absence of the conscriptive statement. All other evidence is non-conscriptive.

If evidence is classified as non-conscriptive, its admission will generally not render the trial unfair. The judge should therefore go on to consider the other branches of the *Collins* test, namely the seriousness of the breach and the effect of exclusion on the repute of the administration of justice. On the other hand, if the evidence is conscriptive, the trial judge must go on to consider whether it nevertheless would have been discovered by alternative non-conscriptive means. If the conscriptive evidence was discoverable, its admission will not tend to render the trial unfair and the judge should go on to consider the other *Collins* factors. If the conscriptive evidence was not

[18][1989] 2 S.C.R. 138.

discoverable, its admission will render the trial unfair. It fails the first branch of the *Collins* test and must be excluded without reference to the other *Collins* factors.

The majority of the Court provided the following summary of the principles elucidated in *Stillman*:

1. Classify the evidence as conscriptive or non-conscriptive based upon the manner in which the evidence was obtained. If the evidence is *non*-conscriptive, its admission will not render the trial unfair and the court will proceed to consider the seriousness of the breach and the effect of exclusion on the repute of the administration of justice.

2. If the evidence is conscriptive and the Crown fails to demonstrate on a balance of probabilities that the evidence would have been discovered by alternative non-conscriptive means, then its admission will render the trial unfair. The Court, as a general rule, will exclude the evidence without considering the seriousness of the breach or the effect of exclusion on the repute of the administration of justice. This must be the result since an unfair trial would necessarily bring the administration of justice into disrepute.

3. If the evidence is found to be conscriptive and the Crown demonstrates on a balance of probabilities that it would have been discovered by alternative non-conscriptive means, then its admission will generally not render the trial unfair. However, the seriousness of the Charter breach and the effect of exclusion on the repute of the administration of justice will have to be considered.

Applying this test to the facts before it, the majority of the Court held that all the impugned evidence except the discarded tissue had to be excluded. The bodily samples were compelled from the accused in violation of sections 7 and 8 of the *Charter* and were therefore conscriptive evidence. Furthermore, they were not discoverable, since at the time no warrant procedure was in place pursuant to which they could have been seized. Since this evidence was conscriptive and not discoverable, it would, if admitted, render the trial unfair. Exclusion was therefore the inevitable conclusion.

The tissue, on the other hand, was not compelled. Furthermore, even if it were compelled, it was discoverable. The police could have obtained a warrant to seize it. Admitting the tissue would not render the trial unfair. Furthermore, a consideration of the other *Collins* factors: the seriousness of the breach and the effect of exclusion on the repute of the administration of justice, militated in favour of admission.

While the majority approach in *Stillman* has been the subject of criticism by some academic writers,[19] even critics acknowledge the clarity it has brought to the s.24(2) analysis.

(c) The Dissenting Opinions

The three dissenting judges in *Stillman* would have admitted all the evidence. Justice L'Heureux-Dubé concluded that the seizures were validly carried out pursuant to the common law power of search incident to arrest and, therefore, there was no breach of the *Charter*.

Justice McLachlin took issue with the majority on two main points. First, she expressed the view that the definition of conscriptive evidence adopted by the majority of the Court was overly broad and not supported by the common law. Justice McLachlin would have preferred restricting conscriptive evidence to testimonial evidence, such as a confession. Bodily samples, in her view, ought not be classified as conscriptive but simply as real evidence existing independently of the *Charter* breach.

Second, Justice McLachlin took issue with the majority's conclusion that evidence the admission of which tends to render the trial unfair must always be excluded. She noted that s. 24(2) requires that "all the circumstances" must be considered before evidence is excluded. In her view, this requirement means that all the *Collins* factors must be considered, even if trial fairness is detrimentally effected. She held that there may well be instances where admission of conscriptive evidence might be an "unfair *aspect*" of a trial without necessarily rendering the trial "*fundamentally* unfair".

Applying these considerations to the facts of *Stillman,* Justice McLachlin held that she could see no basis upon which to interfere with the exercise by the trial judge of his discretion and would have admitted the evidence.[20]

The reasons of the majority in *Stillman* focused on the principles applicable to the first branch of the *Collins* test. However, the second branch of the test has also been the subject of close scrutiny by the Court.

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[19]See, for example, D. M. Paciocco, "*Stillman*, Disproportion and the Fair Trial Dichotomy under s. 24(2)" (1997) 2 Can. Crim. L.R. 163; D. Stuart, "*Stillman:* Limiting Search Incident to Arrest, Consent Searches and Refining the Section 24(2) Test" (1997) 5 C.R. (5th) 99.

[20]Justice Gonthier concurred with both Justice L'Heureux-Dubé and Justice McLachlin.

III. Seriousness of the Breach: *R.* v. *Silveira*[21]

In a recent case, the Supreme Court considered the factors applicable to the "seriousness of the breach" branch of the *Collins* test. This case involved an unreasonable search of a dwelling place.

The police entered the accused's dwelling house and conducted a warrantless search. They then remained in the home until other officers arrived with a warrant, at which point they conducted a more thorough search and seized certain evidence. This search was held to have violated s. 8 of the *Charter*. None of the evidence seized was conscriptive in nature.

In assessing the seriousness of the *Charter* breach, the majority of the Court applied the factors elaborated in *R.* v. *Strachan,*[22] namely:

- was the violation inadvertent or committed in good faith or was it wilful, deliberate and flagrant?;
- was the violation serious or merely of a technical nature?;
- was the violation motivated by a situation of urgency or necessity?;
- were there other investigative means available to the police which would not infringe the *Charter*?[23]

The majority of the Court affirmed that any violation of the privacy of a person's home will tend to be extremely serious. However, other factors mitigated the seriousness of the *Charter* violation.

The majority specifically found that there was a reasonable basis for the trial judge's finding that exigent circumstances justified the police entry into the home of the accused. The public nature of the arrest of the accused (which took place prior to the search) would likely have tipped off the occupants of the dwelling house to the imminent arrival of the police. It was therefore imperative to search the house as soon as possible after the arrest. Furthermore, although the police initially had no warrant, there is no doubt that reasonable and probable grounds existed which would have justified the issuance of a warrant. Finally, the manner in which the search was carried out was reasonable.

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[21][1995] 2 S.C.R. 297 [hereinafter *Silveira*].

[22][1988] 2 S.C.R. 980.

[23]*Silveira, supra* note 21 at 367.

On the issue of good faith, the majority held that:

> If there was no specific finding that the police had acted in good faith, there was certainly no indication that there was any evidence of bad faith on the part of the police. Further, the evidence reveals that the police considered that they had the right to enter the house to preserve the evidence and an able and experienced trial judge appeared to agree with that conclusion. The trial judge, like the police, may have been in error in reaching that conclusion for the police actions specifically breached the provisions of s. 10 of the *Narcotic Control Act*. Nonetheless, the circumstances of the public arrests and the need to preserve the evidence were found to constitute exigent circumstances. *In those circumstances, it cannot be said that the breach of the Charter rights by the police was committed in bad faith.*[24]

Finally, the majority of the Court held that, although the police had successfully invoked exigent circumstances, they should be on notice that exigent circumstances will, as a general rule, not excuse them in the future from compliance with the warrant requirements set out in the *Criminal Code*:

> the *Charter* should not be used as a matter of course to excuse conduct which has in the past been found to be unlawful. This case has confirmed that to enter and search a dwelling-house without a warrant constitutes a very serious breach of the *Narcotic Control Act* and the historic inviolability of a dwelling place. *Therefore, in the future, even if such exigent circumstances exist, the evidence would likely be found inadmissible under s. 24(2).* It is difficult to envisage how the admission of the evidence could not bring the administration of justice into disrepute since in subsequent cases, it will be very difficult for the police to claim that they acted in good faith if they entered the dwelling without prior judicial authorization. The police must *now* know that exigent circumstances do not provide an excuse for failing to obtain a warrant.[25]

In my view, it is clear from *Silveira* that an unreasonable search of a dwelling house will generally be considered to be a very serious violation of the *Charter*. While the good faith of the investigating officers may be a factor mitigating the seriousness of the breach, *Silveira* has put those investigating crimes on notice that "exigent circumstances" would henceforth rarely justify the violation of *Charter* rights.

IV. Effect of Exclusion on the Repute of the Administration of Justice

The third branch of the *Collins* test has no application where evidence has properly been found to be conscriptive and not discoverable. Such evidence must be excluded without regard to the other *Collins* factors. The admission of conscriptive and non-discoverable evidence would render the trial unfair. Allowing an unfair trial would without a doubt

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[24] *Ibid.* at 368-69 [emphasis added].

[25] *Ibid.* at 374 [emphasis added]. Justice La Forest dissented. He would have excluded the evidence on seriousness grounds.

bring the administration of justice into disrepute in the eyes of the reasonable person. Therefore, admitting conscriptive and non-discoverable evidence would tend to bring the administration of justice into disrepute. If the evidence fails the first branch of the *Collins* test, it must also fail the third.

However, if the evidence is not conscriptive, or if it is conscriptive and discoverable, one must go on to consider both the second and third sets of *Collins* factors. A consideration of the third set of factors cannot, however, be divorced entirely from a consideration of the second. The more serious the *Charter* breach, the more likely it will be that the admission of the evidence will bring the administration of justice into disrepute. However, if the breach is of a minor or technical nature, it may well be that excluding the evidence would being the administration of justice into greater disrepute than admitting it.

However, it should be recalled that the seriousness of the offence will not always be a factor militating in favour of the admission of the evidence. Indeed, as Justice Iacobucci held in *Burlingham*, "even a person accused of the most heinous crimes, and no matter the likelihood that he or she actually committed those crimes, is entitled to the full protection of the *Charter*."[26]

V. *R.* v. *Feeney*[27]: An Overview

The accused in *Feeney* had been convicted by a jury of the murder of an 85 year old man. The morning after the murder, the investigating officer decided to approach the accused in his "dwelling house" which consisted of a windowless trailer. The officer did not have a warrant.

The officer knocked on the door of the trailer. When he received no reply, he entered with his gun drawn and found the accused sleeping. The officer woke the accused and asked him to get up and move into a better light. The officer noticed blood spattered all over the front of the accused. He arrested the accused and had another officer read the accused his rights. This *Charter* warning was later found to be deficient.

The accused made several inculpatory statements and provided fingerprints and a breath sample, all of which the Crown sought to have admitted in evidence. The Crown also sought to introduce the bloody shirt, a pair of shoes, cigarettes and cash seized by the police in the accused's trailer.

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[26] *Supra* note 16 at 242.

[27] [1997] 2 S.C.R. 13 [hereinafter *Feeney*].

Apart from the breath samples and the inculpatory statements the trial judge dismissed the accused's application for the exclusion of this evidence. The Court of Appeal unanimously dismissed the accused's appeal. The majority of the Supreme Court took a different view of the matter.

Justice Sopinka, with whom La Forest, Cory, Iacobucci and Major JJ. concurred, held that all the impugned evidence must be excluded. The inculpatory statements and the fingerprints were classified as conscriptive evidence, as that expression was defined in *Stillman*. Because this evidence was not discoverable, its admission rendered the trial unfair. This evidence was therefore excluded without reference to the other *Collins* factors.

On the other hand, the bloody shirt, cigarettes, shoes and cash were classified as non-conscriptive, because they did not consist of statements, bodily samples or the use of the body as evidence. Furthermore, because the unlawfully obtained statements were not a *necessary* cause of the discovery of these items of evidence, they could not be classified as derivative evidence. It was therefore held that the admission of this evidence would not render the trial unfair, and the Court went on to consider the other *Collins* factors.

Justice Sopinka held that the violations of the accused's rights were very serious. The investigating officer had testified that he did not believe that he had reasonable and probable grounds to arrest the accused at the moment he entered the trailer. This absence of a subjective belief in reasonable and probable grounds in itself warranted the conclusion that the police were not acting in good faith. As well, it was found that at the relevant time there were no reasonable and probable grounds, in an objective sense.

Justice Sopinka rejected the Crown's argument that the evidence ought to be admitted since it was discoverable. The Crown had pointed out that the police could simply have waited for the accused to come out of the trailer later in the day and observed the bloody shirt from outside. However, it was held that the existence of alternative legal means for obtaining the evidence rendered the *Charter* breach *more* serious, not less so. On this point, Justice Sopinka held that:

> The respondent argued that the evidence of the bloody shirt would have been discovered in any event, stating in its factum (para. 69): "The police could have waited outside the trailer until the appellant eventually came out. At that time they would have observed the blood stains on him unless he had destroyed that evidence." The respondent assumes that the appellant would walk out in broad daylight with blood stains on his shirt. In my view, this suggestion is unrealistic. Moreover, the appellant need not have destroyed the evidence on the shirt in order to avoid displaying it in public, but simply could have stored the shirt in the trailer. *In any event, the availability of alternative constitutional means to discover the shirt does not mitigate the seriousness of the violation even if such means did exist.* As Lamer J. (as he then was) stated in *Collins, supra* at p. 285, "the availability of other investigatory techniques and the fact that the evidence could have been obtained without the violation of the *Charter* will tend to

> render the *Charter* violation more serious." *If other techniques were indeed available, it is demonstrative of bad faith and is particularly serious that the police chose to violate the appellant's rights.*[28]

Finally, Justice Sopinka held that the potential destruction by the accused of the evidence did not constitute an "exigent circumstance" excusing the violation of the accused's rights:

> The respondent also argued that there were exigent circumstances in this case, which, according to *R.* v. *Silveira* ... may be a relevant consideration in a s.24(2) analysis. As discussed above, in my view exigent circumstances did not exist in this case any more than they would exist in any situation following a serious crime. *After any crime is committed, the possibility that evidence might be destroyed is inevitably present. To tend to admit evidence because of the mitigating effect of such allegedly exigent circumstances would invite the admission of all evidence obtained soon after the commission of a crime.* In my view, there were no exigent circumstances in this case that mitigated the seriousness of the *Charter* breach.[29]

In light of the seriousness of the *Charter* breach and the disrepute to the justice system that would have resulted from the admission of the evidence, the majority of the Court excluded the evidence and ordered a new trial.[30]

VI. *Feeney*, *Silveira* and s. 24(2) of the *Charter*

The discussion in the main part of this paper of the "seriousness of the breach" branch of the *Collins* test focused principally upon the reasons of the majority in *Silveira*. It will be recalled that, in *Silveira*, evidence seized pursuant to the unlawful search of a dwelling house was admitted under s. 24(2). The majority found that there was strong and persuasive evidence to support the trial judge's finding that there were exigent circumstances that mitigated the seriousness of the *Charter* breach. Nevertheless, the police were placed on notice that, "after this case it will be rare that the existence of exigent circumstances alone will allow for the admission of evidence obtained in a clear violation of ... s. 8 of the *Charter*."[31]

Silveira and *Feeney* clarify several principles relevant to the interpretation of s. 24(2) of the *Charter*.

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[28] *Ibid.* at para. 70 [emphasis added].

[29] *Ibid.* at para. 73 [emphasis added].

[30] Lamer C.J. and L'Heureux-Dubé, Gonthier and McLachlin JJ. would have admitted the evidence. In their view, the violations were not serious and the exclusion of the evidence would bring the administration of justice into greater disrepute than would its admission.

[31] *Silveira, supra* note 21 at 370.

First, when read together, these cases make it clear that an unreasonable search of a dwelling house will generally be considered to be a very serious violation of the *Charter*. As the majority held in *Silveira*:

> It is hard to imagine a more serious infringement of an individual's right to privacy. The home is the one place where persons can expect to talk freely, to dress as they wish and, within the bounds of the law, to live as they wish. The unauthorized presence of agents of the state in a home is the ultimate invasion of privacy. It is the denial of one of the fundamental rights of individuals living in a free and democratic society. To condone it without reservation would be to conjure up visions of the midnight entry into homes by agents of the state to arrest the occupants on nothing but the vaguest suspicion that they may be enemies of the state. This is why for centuries it has been recognized that a man's home is his castle.[32]

Second, the two judgments discuss the meaning of the expression "good faith" in the context of s. 24(2) of the *Charter*. While the good faith of the investigating officers may be a factor mitigating the seriousness of the breach, it will be almost impossible to demonstrate good faith where the officers did not even have a *subjective* belief in the reasonableness of the search or arrest.

Furthermore, even where police officers believe that they are acting lawfully, they cannot be said to be in good faith where that belief is mistaken and where they ought to have known that their conduct was improper. Thus, in *R.* v. *Kokesch*, it was held that:

> The police must be taken to be aware of this Court's judgments in *Eccles* and *Colet*, and the circumscription of police powers that those judgments represent.
>
> Either the police knew they were trespassing, or they ought to have known. Whichever is the case, they cannot be said to have proceeded in "good faith", as that term is understood in s. 24(2) jurisprudence.[33]

Justice Sopinka cited this passage with approval in *Feeney*. He held that the police could not be said to have acted in good faith because "in this case, as in *Kokesch*, the police knew they were trespassing or ought to have known."[34]

Finally, in *Feeney*, the Court once again considered the notion of "exigent circumstances". Although Justice Sopinka did not pronounce upon whether exigent circumstances could ever excuse the unlawful search of a dwelling house, he held that, in any event, "exigent circumstances" must mean more than the situation of urgency which follows any violent crime. He observed that:

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[32] *Ibid.* at 367.

[33] [1990] 3 S.C.R. 3 at 32 [hereinafter *Kokesch*].

[34] *Supra* note 27 at para. 189.

> After any crime is committed, the possibility that evidence might be destroyed is inevitably present. To tend to admit evidence because of the mitigating effect of such allegedly exigent circumstances would invite the admission of all evidence obtained soon after the commission of a crime.[35]

This cautious approach to the notion of "exigent circumstances" is consistent with *Silveira*. In *Feeney*, the real possibility of the destruction of evidence did not constitute an "exigent circumstance" and was found not to mitigate the seriousness of the *Charter* breach.

VII. Conclusion

The Court attempted in *Silveira* and, more recently, in *Stillman,* to clarify some of the more difficult issues arising out of its post-*Collins* jurisprudence. Issues such as the definition of conscriptive evidence, and how it differs from non-conscriptive evidence, the nature of derivative evidence, the role of discoverability and the effect of a finding of trial unfairness on the admissibility of evidence have, it is hoped, been clarified, at least to some degree.

The Court was told in oral argument that many aspects of the *Collins* test, at least as it had come to be interpreted, were unduly complex both from the point of view of the practitioner and the judge. There can be no doubt that one very important aim of *Stillman* was to provide a clear path for all to follow.

The importance of the sanctity of the body was stressed. It was emphasized that any removal of a bodily substance must be carried out in accordance with lawful statutory provisions and the principles of fundamental justice.

The Criminal Code now provides that the police may in certain circumstances secure a warrant to seize bodily samples. It was observed that:

> Although the issue was not raised it would seem that the recent provisions of the *Code* permitting DNA testing might well meet all constitutional requirements. The procedure is judicially supervised, it must be based upon reasonable and probable grounds and the authorizing judge must be satisfied that it is minimally intrusive. It cannot be forgotten that the testing can establish innocence as readily as guilt as the Guy-Paul Morin case so vividly demonstrates. It seems to me that the requirement of justification is a reasonable safeguard which is necessary to control police powers to intrude upon the body. This is the approach that I would favour.[36]

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[35] *Ibid.* at para. 194.

[36] *Stillman, supra* note 10 at 660.

In *Silveira*, the primordial importance of privacy within the home was emphasized. Any breach of s. 8 which occurs in a dwelling house will generally be considered to be very serious indeed.