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# Charter Standards for Investigative Powers: Have the Courts Got the Balance Right?

Don Stuart\*

## I. INTRODUCTION

The entrenchment of *Canadian Charter of Rights and Freedoms*<sup>1</sup> rights for accused in 1982 with effective remedies for breach has indeed had a revolutionary effect on the criminal justice system. Our criminal justice system is no longer just about whether guilt has been proved. Courts also insist on maintaining fundamental Charter standards of fairness respecting policing, prosecution, trials, sentencing and release from custody. The judicial assertion of entrenched Charter standards since 1982 has constituted the only real check against the lure of law-and-order politics by politicians of all stripes and the consequent unremittingly legislative trend to toughen the criminal law. There are no votes in being soft on crime. Politicians fall over each other to be tough even though criminologists have made it very clear that toughening penalties in the United States and elsewhere has had no effect on reducing crime.<sup>2</sup> The Charter has helped ensure that we have a balanced criminal justice system of which Canadians should be proud. It protects minority rights against the tyranny of the majority. This include rights of those accused of crime, which tend to be unpopular until the moment you get charged.

This paper seeks to state the basic minimum Charter standards put in place for police powers to stop, detain and question and then to consider whether the courts have arrived at the proper balance between

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\* Faculty of Law, Queen's University. Many of the views expressed in this article first appeared in comments in the *Criminal Reports* and in my *Charter Justice in Canadian Criminal Law* (4th ed., 2005), both Carswell/Thomson publications.

<sup>1</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act* (U.K.), 1982, c. 11 [hereinafter "the Charter"].

<sup>2</sup> Tony Doob & Cheryl Webster, "Sentence Severity and Crime: Accepting the Null Hypothesis" in Michael Tonry, ed., *Crime and Justice: A Review of Research*, vol. 31 (Chicago: University of Chicago Press, 2003), at 143-95.

affording police effective enforcement powers while protecting the civil rights of all Canadians. Have the standards been set too low or too high? This will require consideration of minimum standards under sections 7, 8, 9 and 10, the voluntary confession rule and of the usual remedy of exclusion of evidence under section 24(2). In each case I will seek to set out the current standards and then assess strengths and weaknesses. I will be guided by what Dickson C.J.C. once said in a visit to Queen's University. He indicated that academics were excellent critics but not as good at constructive suggestions for future development of the law.

## II. POWER TO SEARCH

### 1. General Section 8 Standards

Section 8 protects against unreasonable search or seizure. Where there is a reasonable expectation of privacy, the Charter requires that the search be authorized by law, based on credibly based probabilities not mere suspicion, pre-authorized by warrant where feasible and with the warrant issued on oath by one capable of acting judicially, and that the search be conducted in a reasonable manner.

These standards were mostly put in place as early as 1984 through the visionary, purposeful approach undertaken to the Charter generally, and section 8 in particular, by Dickson C.J.C. for the Supreme Court in *Hunter v. Southam*.<sup>3</sup>

### 2. Weakening Trigger of Reasonable Expectation of Privacy

In *Hunter v. Southam*,<sup>4</sup> the Court stressed that section 8 protects people, not places, and that the privacy interests to be protected are wider than trespass. It was recognized that a reasonable expectation of privacy would sometimes give way to the interests of law enforcement and security of the State. Reasonable expectation of privacy thus became the trigger for section 8 protection. Where there is no reasonable expectation of privacy, there is no section 8 Charter protection at all.

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<sup>3</sup> *Canada (Combinex Investigation Act, Director of Investigation and Research) v. Southam Inc.*, [1984] S.C.J. No. 36, [1984] 2 S.C.R. 145 (S.C.C.) [hereinafter "*Hunter v. Southam*"]. See, too, *R. v. Collins*, [1987] S.C.J. No. 15, [1987] 1 S.C.R. 265 (S.C.C.).

<sup>4</sup> [1984] S.C.J. No. 36, [1984] 2 S.C.R. 145 (S.C.C.).

At first, the Supreme Court stuck to its guns. In *Wong*,<sup>5</sup> the police used a hidden camera to conduct surveillance of a hotel room rented by the accused to conduct illegal gambling. Justice La Forest decided for the majority that there had been a reasonable expectation of privacy and that the warrantless search breached section 8. He emphasized that the question of reasonable expectation of privacy had to be asked in a neutral way and that the illegality of the conduct was irrelevant:

[I]t would be an error to suppose that the question that must be asked in these circumstances is whether persons who engage in illegal activity behind the locked door of a hotel room have a reasonable expectation of privacy. Rather, the question must be framed in broad and neutral terms so as to become whether in a society such as ours persons who retire to a hotel room and close the door behind them have a reasonable expectation of privacy.<sup>6</sup>

Subsequent Supreme Court interpretations of reasonable expectation of privacy have substantially, and without persuasive justification, much reduced the ambit of section 8 protection.

The rot really set in with *Edwards*.<sup>7</sup> The majority relied on the very brief two-page reasons of a U.S. federal court in *Gomez*,<sup>8</sup> a minor case involving the stop and search of a stolen vehicle, to hold that there should be a totality of circumstances approach in which the following were factors that could be considered:

- (1) presence at the time of the search;
- (2) possession or control of the property or place searched;
- (3) ownership of the property or place;
- (4) historical use of the property and place;
- (5) the ability to regulate access, including the right to admit or exclude others from the place;
- (6) the existence of a subjective expectation of privacy; and
- (7) the objective reasonableness of the expectation.<sup>9</sup>

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<sup>5</sup> *R. v. Wong*, [1990] S.C.J. No. 118, [1990] 3 S.C.R. 36 (S.C.C.).

<sup>6</sup> *R. v. Wong*, [1990] S.C.J. No. 118, [1990] 3 S.C.R. 36, at 50 (S.C.C.).

<sup>7</sup> *R. v. Edwards*, [1996] S.C.J. No. 11, [1996] 1 S.C.R. 128 (S.C.C.).

<sup>8</sup> *U.S. v. Gomez*, 16 F.3d 254 (8th Cir. 1994).

<sup>9</sup> *U.S. v. Gomez*, 16 F.3d 254, at 256 (8th Cir. 1994).

This placed the emphasis on property interests contrary to *Hunter v. Southam*.<sup>10</sup> Edwards was held by the majority, over the vehement dissent of La Forest J., to have had no reasonable expectation of privacy respecting a police search of his girlfriend's apartment although he occasionally stayed over and had keys. *Edwards*<sup>11</sup> led to the majority ruling in *Belnavis*<sup>12</sup> that a passenger in a vehicle normally has no reasonable expectation of privacy to even advance a section 8 claim.

Then the Court decided that the full *Hunter v. Southam*<sup>13</sup> standards could not be applied to regulatory offences. This assumes that there is a satisfactory distinction between what is regulatory and what is criminal, and also leaves uncertain the extent to which the *Hunter* standards can be reduced. Fortunately the Supreme Court in *Jarvis* (2002),<sup>14</sup> a case of income tax evasion contrary to the *Income Tax Act*,<sup>15</sup> brought some clarity and a partial return to *Hunter*. The Court held that an inquiry by a tax auditor "crossed the Rubicon" when the predominant purpose became that of a prosecution. From that point, the full *Hunter* protections are to be applied.<sup>16</sup>

In the case of school searches, the Supreme Court compromised. In *M. (M.R.)*,<sup>17</sup> school children were held to have a reduced expectation of privacy such that standards for school searches could be reduced to reasonable suspicion and reasonable manner and there was to be no warrant requirement.

A further significant threat to the ambit of section 8 protection came with the decision of the Court in *Tessling* (2005).<sup>18</sup> Justice Binnie, speaking for a unanimous Court of seven justices,<sup>19</sup> decided that the use of Forward Looking Infra-Red ("FLIR") technology from an airplane to detect heat emanations from a private home did not violate section 8 as the accused had no reasonable expectation of privacy in such information. According to Binnie J., few things are more important to our way of life as the

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<sup>10</sup> [1984] S.C.J. No. 36, [1984] 2 S.C.R. 145 (S.C.C.).

<sup>11</sup> *R. v. Edwards*, [1996] S.C.J. No. 11, [1996] 1 S.C.R. 128 (S.C.C.).

<sup>12</sup> *R. v. Belnavis*, [1997] S.C.J. No. 81, [1997] 3 S.C.R. 341 (S.C.C.).

<sup>13</sup> [1984] S.C.J. No. 36, [1984] 2 S.C.R. 145 (S.C.C.).

<sup>14</sup> *R. v. Jarvis*, [2002] S.C.J. No. 76, 6 C.R. (6th) 23 (S.C.C.).

<sup>15</sup> R.S.C. 1985, c. 1 (5th Supp.).

<sup>16</sup> See, further, Davis Stratas, "'Crossing the Rubicon': The Supreme Court and Regulatory Investigations" (2003) 6 C.R. (6th) 74.

<sup>17</sup> *R. v. M. (M.R.)*, [1998] S.C.J. No. 83, [1998] 3 S.C.R. 393 (S.C.C.).

<sup>18</sup> *R. v. Tessling*, [2004] S.C.J. No. 63, 23 C.R. (6th) 207 (S.C.C.).

<sup>19</sup> McLachlin C.J.C., Major, Bastarache, LeBel, Deschamps, and Fish JJ. concurred. Justices Iacobucci and Arbour, who had both recently resigned from the Court, took no part in the judgment.

amount of power allowed the police to invade the homes, privacy and even the bodily integrity of members of Canadian society without judicial authorization. At the same time, social and economic life creates competing demands. The community wants privacy but it also insists on protection. Safety, security and the suppression of crime are legitimate countervailing concerns. Thus section 8 of the Charter accepted, held Binnie J., the validity of reasonable searches and seizures. It is only if the police activity invades a reasonable expectation of privacy that the activity is a search. The Court saw section 8 as protecting a number of privacy interests, including personal, territorial and informational interests. Privacy, however, was a “protean concept”, and the difficult issue was where the “reasonableness” line should be drawn. Whereas Abella J.A., then of the Ontario Court of Appeal in the Court below, treated the FLIR imaging as equivalent to a search of the home, and thus “worthy of the state’s highest respect”,<sup>20</sup> it was more accurately characterized as an external surveillance of the home to obtain information that may or may not be capable of giving rise to an inference about what was actually going on inside, depending on what other information is available to the police. The reasonableness line had to be determined by looking at the information generated by existing FLIR technology, and then evaluating its impact on a reasonable privacy interest. Surface emanations detected by present FLIR technology are, on their own, meaningless. The technology was seen to be presently non-intrusive in its operation and mundane in the data it was capable of producing. Although the information about the distribution of the heat was not visible to the naked eye, the FLIR heat profile did not touch on a biographical core of personal information, nor did it tend to reveal intimate details of lifestyle. Its disclosure scarcely affected dignity, integrity and autonomy.

The Supreme Court has clearly resolved that police use of existing FLIR technology does not offend section 8 of the Charter. The Court distances Canada from the decision of Scalia J. for the United States Supreme Court in *Kyllo v. U.S.* (2000)<sup>21</sup> that FLIR imaging of the outside of houses is unconstitutional. Our highest Court does expressly enter two caveats:

- (1) FLIR information alone is insufficient ground to obtain a search warrant; and

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<sup>20</sup> *R. v. Tessling*, [2003] O.J. No. 186, at para. 33 (Ont. C.A.).

<sup>21</sup> 533 U.S. 27 (2000).

- (2) If, as the Court expects, FLIR technology gets better, the constitutional issue will have to be reconsidered.

What of aerial surveillance using binoculars? Such a search for a marijuana grow operation on suspicion has been held by the New Brunswick Court of Appeal to violate section 8.<sup>22</sup> Is that different because that method is more intrusive? The Court in *Tessling*<sup>23</sup> recognizes its earlier ruling in *Kokesch* (1990)<sup>24</sup> where the Court decided it was a serious breach of section 8 for a police officer to walk up a driveway without a warrant to check from the outside as to a possible grow operation. *Tessling* rests uneasily with *Kokesch*. It is difficult to understand how flying over a house with FLIR technology is constitutional whereas walking up the driveway and feeling the wall for heat is not.

Overall the ruling in *Tessling*<sup>25</sup> appears to tilt section 8 principles markedly in favour of the interests of law enforcement rather than protecting privacy. The Court says there was no search because there was no reasonable expectation of privacy. It is one thing to decide there was no reasonable expectation of privacy and therefore no section 8 protection engaged. To go further and deny that there was a search would be hard to justify to a house owner watching a police helicopter flying overhead with FLIR technology, however crude.

The Court's focus on the reasonableness of the search allows it to bypass the fundamental warrant requirement put in place by *Hunter v. Southam*<sup>26</sup> and asserted by Abella J.A. in the Court below.

Justice Binnie speaks of "perhaps a long spiritual journey" from famous pronouncements protecting one's home from the power of the King to the accused's attempt to shelter a marijuana grow operation.<sup>27</sup> This remark undercuts the key pronouncement in *Wong*<sup>28</sup> as to the importance of asking the question in a neutral way. Here the question should not have been whether grow operators have a reasonable expectation of privacy, but whether occupants of houses have a

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<sup>22</sup> *R. v. Kelly*, [1999] N.B.J. No. 98, 22 C.R. (5th) 248 (N.B.C.A.).

<sup>23</sup> *R. v. Tessling*, [2004] S.C.J. No. 63, [2004] 3 S.C.R. 432 (S.C.C.).

<sup>24</sup> *R. v. Kokesch*, [1990] S.C.J. No. 117, [1990] 3 S.C.R. 3 (S.C.C.).

<sup>25</sup> *R. v. Tessling*, [2004] S.C.J. No. 63, [2004] 3 S.C.R. 432 (S.C.C.).

<sup>26</sup> [1984] S.C.J. No. 36, [1984] 2 S.C.R. 145 (S.C.C.).

<sup>27</sup> *R. v. Tessling*, [2004] S.C.J. No. 63, [2004] 3 S.C.R. 432, at para. 15 (S.C.C.).

<sup>28</sup> *R. v. Wong*, [1990] S.C.J. No. 118, [1990] 3 S.C.R. 36 (S.C.C.).

reasonable expectation of privacy from police inspection conducted by aircraft using technology devices.<sup>29</sup>

Disturbingly, many lower courts have seized on *Tessling*<sup>30</sup> to hold that there is no reasonable expectation of privacy against police use of dog sniffers. The Ontario Court of Appeal<sup>31</sup> did reject the analogy between police use of rudimentary FLIR technology and dog sniffers in holding that a random dog sniff search of an entire school violated section 8. However, the Courts of Appeal of Alberta<sup>32</sup> and Newfoundland<sup>33</sup> applied *Tessling* to hold that youth getting off public buses in those provinces subjected to police dog sniffers have no reasonable expectation of privacy and cannot raise section 8 protections. Those random searches are part of the RCMP's Operation Pipeline, which was imported from the United States and is controversial for its deliberate use of racial profiling.<sup>34</sup> The Canadian version was first justified as a preventive tool against terrorism but it is clearly now an excuse to go after youth with marijuana on buses.

The dog sniff issue is on reserve in the Supreme Court. Hopefully the Supreme Court will decide that section 8 must be applied to police use of dog sniffers and, in the course of that ruling, it will adjust its approach in *Tessling*.<sup>35</sup> There is a mountain of case law on the issue of whether a smell of marijuana can constitute reasonable grounds for a search to comply with section 8. It would be odd were the courts to hold that all the police need to avoid the reasonable ground, warrant, reasonable manner and other requirements in drug searches is to bring along a dog.

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<sup>29</sup> For further critical comments on *Tessling*, see Renee Pomerance, "Shedding Light on the Nature of Heat: Defining Privacy in the Wake of *R. v. Tessling*" (2005) 23 C.R. (6th) 229; Steve Coughlan & Marc Gorbet, "Nothing Plus Nothing Equals . . . Something? A Proposal for FLIR Warrants on Reasonable Suspicion" (2005) 23 C.R. (6th) 239; and James Stringham, "Reasonable Expectations Revisited: A Return to the Search for a Normative Core for Section 8?" (2005) 23 C.R. (6th) 245. For a more supportive view, see Arthur J. Cockfield, "Protecting the Social Value of Privacy in the Context of State Investigations Using New Technologies" (2007) 40 U.B.C. L. Rev. 41.

<sup>30</sup> *R. v. Tessling*, [2004] S.C.J. No. 63, [2004] 3 S.C.R. 432 (S.C.C.).

<sup>31</sup> *R. v. M. (A.)*, [2006] O.J. No. 1663, 37 C.R. (6th) 372 (Ont. C.A.).

<sup>32</sup> *R. v. Brown*, [2006] A.J. No. 755, 39 C.R. (6th) 282 (Alta C.A.).

<sup>33</sup> *R. v. Taylor*, [2006] N.J. No. 218, 40 C.R. (6th) 21 (N.L.C.A.).

<sup>34</sup> See David Tanovich, *The Colour of Justice: Policing Race in Canada* (Toronto: Irwin Law, 2006), at 91-94.

<sup>35</sup> *R. v. Tessling*, [2004] S.C.J. No. 63, [2004] 3 S.C.R. 432 (S.C.C.). See, too, Steve Coughlan, "Privacy Goes to the Dogs" (2006) 40 C.R. (6th) 31; Jonathan Shapiro, "Narcotics Dogs and the Search for Illegality: American Law in Canadian Courts" (2007) 43 C.R. (6th) 299; Ian Kerr & Jena McGill, "Emanations, Snoop Dogs and Reasonable Expectation of Privacy" (2007) 52 Crim. L.Q. 392; and Sherri Davis-Barron, "The Lawful Use of Drug Detector Dogs" (2007) 52 Crim L.Q. 345.



Any balancing of interests should be done under those requirements and not pre-empted by a narrow interpretation of the triggering device.<sup>36</sup>

There are grounds for distinction of places such as airports where it is widely accepted that there is a much diminished expectation of privacy. Even in that context, Courts of Appeal<sup>37</sup> have thus far found that searches of luggage engage section 8 scrutiny, although the trend is not to exclude for breaches given the reduced expectation of privacy.

Searches of luggage in bus stations is a situation where more privacy can reasonably be expected. The Supreme Court decision in *Buhay*<sup>38</sup> is authority for the view that there is a reasonable expectation of privacy in lockers at a bus station even where the owners of the station have a key. *Buhay* was expressly relied on by the Alberta Court of Appeal in *Dinh*<sup>39</sup> in its holding that a dog sniff search without reasonable grounds of a locker in a bus depot was a serious violation of section 8 which should result in exclusion. However the majority of the Alberta Court of Appeal later decided *Dinh* had to be reversed given *Tessling*.<sup>40</sup>

Another area in which the dangers of *Tessling*<sup>41</sup> are evident is the issue of police use of digital recorder ammeters (DRA meters). This device can be attached to the electric supply going into a residence and measures amount going in and the timing of use. In *Le*,<sup>42</sup> Fradsham J. of the Alberta Provincial Court decided that the warrantless installation of a DRA meter violated section 8. It was used to produce presumptive patterns of marijuana grow operations and produced invariably reliable information. It might reveal intimate details of lifestyle and personal choices and was quite unlike the rudimentary heat emanations outside a house revealed by crude FLIR technology. This carefully considered judgment was followed by a Saskatchewan Court of Queen's Bench judge who was, however, reversed by the Saskatchewan Court of Appeal.<sup>43</sup> To that Court of Appeal the fact that the evidence was more probative than in *Tessling* made no difference. This evidence revealed very little about core biographical details, lifestyle or private decisions.

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<sup>36</sup> See, too, Steve Coughlan, "Privacy Goes to the Dogs" (2006) 40 C.R. (6th) 31.

<sup>37</sup> *R. v. Lewis*, [1998] O.J. No. 376, 13 C.R. (5th) 34 (Ont. C.A.) and *R. v. Truong*, [2002] B.C.J. No. 1067, 168 C.C.C. (3d) 132 (B.C.C.A.).

<sup>38</sup> *R. v. Buhay*, [2003] S.C.J. No. 30, [2003] 1 S.C.R. 631 (S.C.C.).

<sup>39</sup> *R. v. Lam*, [2003] A.J. No. 811, 11 C.R. (6th) 58 (Alta. C.A.).

<sup>40</sup> *R. v. Brown*, [2006] A.J. No. 755, 39 C.R. (6th) 282 (Alta. C.A.).

<sup>41</sup> *R. v. Tessling*, [2004] S.C.J. No. 63, [2004] 3 S.C.R. 432 (S.C.C.).

<sup>42</sup> *R. v. Le*, [2005] A.J. No. 338, 30 C.R. (6th) 124 (Alta. Q.B.).

<sup>43</sup> *R. v. Cheung*, [2007] S.J. No. 187, 219 C.C.C. (3d) 414 (Sask. C.A.), revg [2005] S.J. No. 474, 199 C.C.C. (3d) 260 (Sask. Q.B.).

Professor Stephen Coughlan perceptively points out there will be much less section 8 protection if courts continue to categorize matters as informational privacy rather than the traditionally highly protected categories of personal and territorial privacy:

Essentially any piece of evidence can be recast as a piece of information: the amount of heat in one's home ... undetectable odour from inside a piece of luggage ...; the percentage of alcohol in one's system and therefore whether one is impaired, and so on. When there are three categories of privacy, one is much less protected than the other two, and almost anything can be placed into that category, privacy protection is significantly impaired.<sup>44</sup>

Section 8 protection has been substantially diminished by the Court's pro-State interpretations of reasonable expectation of privacy. There ought to be a reconsideration and a return to the wide protection of privacy interests afforded in *Hunter v. Southam*.<sup>45</sup>

### 3. Acceptance of Ancillary Powers Doctrine

Chief Justice Dickson was at pains in *Hunter v. Southam*<sup>46</sup> to declare that the Courts were "the guardians of the Constitution"<sup>47</sup> and that the Charter "is intended to constrain governmental action inconsistent with those rights and freedoms; it is not in itself an authorization for governmental action"<sup>48</sup>.

*Collins*<sup>49</sup> confirmed that an illegal search was necessarily a violation of section 8. Yet various majorities of the Supreme Court have, ever since the majority *Dedman* decision<sup>50</sup> that RIDE stop programs could be authorized by the courts without enabling legislation, done an end run around that by using the so-called ancillary powers doctrine derived from the English decision in *Waterfield*<sup>51</sup> to create a number of new police powers.

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<sup>44</sup> Annotation to *R. v. LaChappelle*, [2007] O.J. No. 3613 (Ont. C.A.).

<sup>45</sup> [1984] S.C.J. No. 36, [1984] 2 S.C.R. 145 (S.C.C.).

<sup>46</sup> [1984] S.C.J. No. 36, [1984] 2 S.C.R. 145 (S.C.C.).

<sup>47</sup> *Hunter v. Southam*, [1984] S.C.J. No. 36, [1984] 2 S.C.R. 145, at 169 (S.C.C.).

<sup>48</sup> *Hunter v. Southam*, [1984] S.C.J. No. 36, [1984] 2 S.C.R. 145, at 156 (S.C.C.).

<sup>49</sup> *R. v. Collins*, [1987] S.C.J. No. 15, [1987] 1 S.C.R. 265 (S.C.C.).

<sup>50</sup> *R. v. Dedman*, [1985] S.C.J. No. 45, [1985] 2 S.C.R. 2 (S.C.C.). Dickson C.J.C. registered a strong dissent, expressing concerns about the rule of law and the supremacy of Parliament.

<sup>51</sup> *R. v. Waterfield*, [1963] 3 All E.R. 659, [1964] 1 Q.B. 164 (Ct. Crim. App.).

The latest statement of the ancillary powers doctrine was by Abella J. for a 6-3 majority of the Supreme Court in *Clayton*.<sup>52</sup> She adopted the following statement of Doherty J.A. in the Court below:<sup>53</sup>

Where the prosecution relies on the ancillary power doctrine to justify police conduct that interferes with individual liberties, a two-pronged case specific inquiry must be made. First, the prosecution must demonstrate that the police were acting in the exercise of a lawful duty when they engaged in the conduct in issue. Second, and in addition to showing that the police were acting in the course of their duty, the prosecution must demonstrate that the impugned conduct amounted to a justifiable use of police powers associated with that duty.<sup>54</sup>

The key issue is almost always that of the second test of justifiability which, according to *Dedman*<sup>55</sup> is that of “reasonably necessary” given the liberty interest involved.

Many writers<sup>56</sup> argue that the problem with the ancillary powers doctrine is that it is a fact-specific *ex post facto* inquiry that is vague and speculative and contrary to the rule of law. It should be left to Parliament to allow for full democratic processes to come up with clear, prospective and comprehensive rules that will serve to confine and structure the exercise of police discretion.<sup>57</sup>

<sup>52</sup> *R. v. Clayton*, [2007] S.C.J. No. 32, 2007 SCC 32 (S.C.C.).

<sup>53</sup> *R. v. Clayton*, [2005] O.J. No. 1078, 27 C.R. (6th) 197 (Ont. C.A.).

<sup>54</sup> *R. v. Clayton*, [2007] S.C.J. No. 32, 2007 SCC 32, at para. 22 (S.C.C.).

<sup>55</sup> *R. v. Dedman*, [1985] S.C.J. No. 45, [1985] 2 S.C.R. 2 (S.C.C.).

<sup>56</sup> See most recently Stephen Coughlan, “Common Law Police Powers and the Rule of Law: Annotation to *R. v. Clayton*” (2007) 47 C.R. (6th) 266 and James Stribopoulos, “The Limits of Judicially Created Police Powers: Investigative Detention after *Mann*” (2007) 52 *Crim. L.Q.* 299. Respecting investigative detention, see also Eric Gottardi, “*R. v. Mann*: Regulating State Intrusions in the Context of Investigative Detentions” (2004) 21 C.R. (6th) 27; Tim Quigley, “*Mann*, It’s a Disappointing Decision” (2004) 21 C.R. (6th) 41; David Tanovich, “The Colourless World of *Mann*” (2004) 21 C.R. (6th) 47; Benjamin Berger, “Race and Erasure in *R. v. Mann*” (2004) 21 C.R. (6th) 58; Lesley McCoy, “Some Answers from the Supreme Court on Investigative Detention . . . And Some More Questions” (2004) 49 *Crim. L.Q.* 268; Alec Fiszauf, “Articulating Cause — Investigative Detention and Its Implications” (2007) 52 *Crim. L.Q.* 327; and Christina Skibinsky, “Regulating *Mann* in Canada” (2006) 69 *Sask. L. Rev.* 197. See earlier Stephen Coughlan, “Search Based on Articulate Cause: Proceed with Caution or Full Stop?” (2003) 2 C.R. (6th) 49; James Stribopoulos, “A Failed Experiment? Investigative Detention: Ten Years Later” (2003) 41 *Alta. L. Rev.* 335; Tim Quigley, “Brief Investigatory Detentions: A Critique of *R. v. Simpson*” (2004) 41 *Alta. L. Rev.* 935; Patrick Healey, “Investigative Detention in Canada” (2005) *Crim. L.R.* 98; and James Stribopoulos, “In Search of Dialogue: The Supreme Court, Police Powers and the Charter” (2005) 31 *Queen’s L.J.* 1.

<sup>57</sup> James Stribopoulos, “The Limits of Judicially Created Police Powers: Investigative Detention after *Mann*” (2007) 52 *Crim. L.Q.* 299, at 326.

Both citizens and the police officer need to know what State powers are in advance. Yes, but what of Parliament's inaction on the many clarifying police powers recommendations of the Law Reform Commission of Canada in the 1980s? And what of Parliament's record of the past 15 years of almost always favouring arguments of law-and-order expediency and listening to like-minded lobby groups — in this context those of police and prosecutors? The Parliamentary record ought also to be subjected to rigorous critical scrutiny. There is now a significant body of case law since the Charter to suggest that our independent judges in applying the ancillary powers doctrine do a better job than Parliament in their role as “guardians of the constitution” in balancing minority rights of accused against the interests of law enforcement and public safety.<sup>58</sup> This reality has caused me to change flags on this issue.

Consider the issue of strip searches. In its blockbuster ruling in *Golden* (2001),<sup>59</sup> Iacobucci and Arbour JJ.<sup>60</sup> for a 5-4 majority of the Supreme Court dramatically declared several new Charter standards for strip searches incidental to lawful arrest. They declared a number of new minimum standards for strip searches conducted incident to lawful arrest:

- They cannot be carried out simply as a matter of routine policy.
- They cannot be carried out abusively or for the purpose of humiliating or punishing the arrestee.
- Police must have reasonable and probable grounds to justify a strip search.
- They must be conducted in a reasonable manner.
- They should be conducted at the police station except where there is a demonstrated necessity and urgency to search for weapons or objects that could be used to threaten the safety of the accused, the arresting officers or other individuals.

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<sup>58</sup> The debate is now water under a fast-flowing bridge. Justice Binnie in *R. v. Clayton*, [2007] S.C.J. No. 32, 2007 SCC 32 (S.C.C.), says “[w]hether *Waterfield* was or was not a sound basis for the majority view in *Dedman* may still be a matter of historical and academic interest, but I take the law established by the majority in *Dedman* as my point of departure” (at para. 77).

<sup>59</sup> *R. v. Golden*, [2001] S.C.J. No. 81, 47 C.R. (5th) 1 (S.C.C.). This review of *Golden* was first published in the *Criminal Reports* and in revised form in Don Stuart, “Zigzags on Right of Accused: Brittle Majorities Manipulate Weasel Words of Dialogue, Deference and Charter Values” (2003) 20 S.C.L.R. (2d) 267, at 268-74.

<sup>60</sup> Justices Major, Binnie and LeBel concurred.

The majority nevertheless suggested<sup>61</sup> that legislative intervention could be an important addition to the guidance the Court was setting out. Clear legislative prescription as to when and how strip searches should be conducted would be of assistance to the police and to the courts. In the meantime, the following questions, which drew upon the common law principles as well as the statutory requirements set out in English legislation, would provide a framework for the police in deciding how best to conduct a strip search incident to arrest in compliance with the Charter:

- (1) Can the strip search be conducted at the police station and, if not, why not?
- (2) Will the strip search be conducted in a manner that ensures the health and safety of all involved?
- (3) Will the strip search be authorized by a police officer acting in a supervisory capacity?
- (4) Has it been ensured that the police officer(s) carrying out the strip search are of the same gender as the individual being searched?
- (5) Will the number of police officers involved in the search be no more than is reasonably necessary in the circumstances?
- (6) What is the minimum of force necessary to conduct the strip search?
- (7) Will the strip search be carried out in a private area such that no one other than the individuals engaged in the search can observe the search?
- (8) Will the strip search be conducted as quickly as possible and in a way that ensures that the person is not completely undressed at any one time?
- (9) Will the strip search involve only a visual inspection of the arrestee's genital and anal areas without any physical contact?
- (10) If the visual inspection reveals the presence of a weapon or evidence in a body cavity (not including the mouth), will the detainee be given the option of removing the object himself or of having the object removed by a trained medical professional?

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<sup>61</sup> *R. v. Golden*, [2001] S.C.J. No. 81, 47 C.R. (5th) 1, at para. 103 (S.C.C.).

(11) Will a proper record be kept of the reasons for and the manner in which the strip search was conducted?<sup>62</sup>

Justice Bastarache authored the dissenting opinion of four justices.<sup>63</sup> He expressed profound disagreement with these new standards. The majority were wrong to require police to prove that they had reasonable and probable grounds to justify a strip search. The existing common law rule that police demonstrate an objectively valid reason for the arrest rather than for the search was consistent with section 8 of the Charter, provided that the strip search was for a valid objective and not conducted in an abusive fashion. According to Bastarache J., the discovery of evidence should not be postponed to a time where the search can take place at a police station. The fear that evidence may be destroyed or lost before arriving at the police station was genuine. Police officers are not always close to a station; they operate in remote areas and are often alone. In the view of the minority, the proposed rule that all strip searches proceed at a police station absent exigent circumstances should be left to Parliament. Furthermore, by stating that exigent circumstances will only exist where there is a demonstrated necessity and urgency to search for weapons or objects that could be used to threaten safety, the majority had abolished the right to search for evidence upon arrest. In doing so, they had drawn an unprecedented and unworkable distinction between the objective of discovering and preserving evidence and the objective of searching for weapons.

According to Bastarache J., the majority were “excessive to adopt foreign legislation”.<sup>64</sup> Disagreement was also expressed with the majority’s view of the need for authorization by a senior officer, and the emphasis on the unilateral decision of officers, the danger to health and safety and the failure of the police to give the accused the opportunity to remove his own clothing.

There is certainly room for debate<sup>65</sup> as to whether the majority went too far in setting out Charter standards for strip searches. Some of the Court’s pronouncements, such as the need for authorization by a superior officer, may be impractical in remote areas, as Bastarache J. suggests. However Bastarache J. shows little respect for the Court’s role as

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<sup>62</sup> *R. v. Golden*, [2001] S.C.J. No. 81, 47 C.R. (5th) 1, at para. 101 (S.C.C.).

<sup>63</sup> Chief Justice McLachlin and Gonthier J. concurred. Justice L’Heureux-Dubé delivered a short concurring opinion.

<sup>64</sup> *R. v. Golden*, [2001] S.C.J. No. 81, 47 C.R. (5th) 1, at para. 8 (S.C.C.).

<sup>65</sup> See further Eric V. Gottardi, “The Golden Rules: Raising the Bar Regarding Strip Searches Incident to Arrest” (2002) 47 C.R. (5th) 48.

“[guardian] of the Constitution”<sup>66</sup> in suggesting that standards for strip searches be left for Parliament. This takes deference to a new level which does little to validate entrenched Charter rights. Strip searches are highly intrusive and had become very much part of the landscape of the Canadian criminal justice system. Parliament had chosen not to intervene despite recommendation from the Law Reform Commission as early as 1985.<sup>67</sup> This is typical of the ever-increasing law-and-order slant of politicians of all stripes who see few votes in being soft on crime and amending the law to favour accused. It was high time for the Supreme Court to assert section 8 standards. It is not clear why it was improper for the majority to have developed its standards by looking to other jurisdictions, whether this law was found in court decisions or legislative enactment.

Another example where the courts have shown a balanced approach that may well have been too pro-accused for Parliament is in the judicial use of the ancillary powers doctrine to create investigative detention and, now, roadblock stop powers. In declaring these powers, which are assessed in the next section, the majority of the Court has very carefully limited incidental search powers to situations of officer safety rather than searching for evidence.

So, too, in *Godoy*,<sup>68</sup> while authorizing emergency powers to enter to investigate disconnected 911 calls, the Court refused to authorize relaxation of section 8 search standards.

### III. POWER TO DETAIN

#### 1. General Section 9 and Section 10(a) Standards

Under section 9, any arrest, detention or imprisonment must not be arbitrary. Arbitrary means without criteria for discretion,<sup>69</sup> capricious, without lawful authority<sup>70</sup> and without justification.<sup>71</sup> Where a person is

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<sup>66</sup> *Hunter v. Southam*, [1984] S.C.J. No. 36, [1984] 2 S.C.R. 145, at 169 (S.C.C.).

<sup>67</sup> Law Reform Commission of Canada, *Report on Obtaining Forensic Evidence: Investigative Procedures in Respect of the Person* (Ottawa: Law Reform Commission of Canada, 1985).

<sup>68</sup> *R. v. Godoy*, [1998] S.C.J. No. 85, [1999] 1 S.C.R. 311 (S.C.C.).

<sup>69</sup> *R. v. Hufsky*, [1988] S.C.J. No. 30, [1988] 1 S.C.R. 621 (S.C.C.); *R. v. Ladouceur*, [1990] S.C.J. No. 53, [1990] 1 S.C.R. 1257 (S.C.C.).

<sup>70</sup> *R. v. Clayton*, [2007] S.C.J. No. 32, 2007 SCC 32 (S.C.C.).

<sup>71</sup> *R. v. Clayton*, [2007] S.C.J. No. 32, 2007 SCC 32 (S.C.C.).

arrested or detained, section 10(a) requires that the person be informed without delay of the reason for the arrest.

## 2. Psychological Detention

What is the meaning of “detention” for section 9 and section 10(b) purposes? Justice Iacobucci in *Mann* (2004)<sup>72</sup> remarked<sup>73</sup> that police cannot be said to “detain”, within the meaning of sections 9 and 10 of the Charter, every suspect they stop for purposes of identification, or even interview. The Court noted that a person stopped will in all cases be “detained” in the sense of “delayed” or “kept waiting”. Justice Iacobucci observed that the constitutional rights recognized by sections 9 and 10 of the Charter were not engaged by delays that involve no significant physical or psychological restraint.

This test of degree is too uncertain and also misses the civil liberty concerns about general stop powers. The Supreme Court could not have intended that the careful limits they were placing on investigative detention could be completely bypassed by the current police practice in Toronto of approaching young persons, getting their names, doing a CPIC search and then launching into aggressive questions aimed at incrimination. Surely, contrary to some recent rulings,<sup>74</sup> suspects are detained when police start to ask a person for identification to facilitate a criminal records search and/or search backpacks, whether the person is in a vehicle, on public transit or in the street.

The Supreme Court earlier extended beyond physical detention to psychological detention, which it defines as where the person confronted by the police reasonably believes there is no choice but to comply.<sup>75</sup> The

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<sup>72</sup> *R. v. Mann*, [2004] S.C.J. No. 49, 21 C.R. (6th) 1 (S.C.C.).

<sup>73</sup> *R. v. Mann*, [2004] S.C.J. No. 49, 21 C.R. (6th) 1, at para. 19 (S.C.C.).

<sup>74</sup> See too *R. v. Rajaratnam*, [2006] A.J. No. 1373, 43 C.R. (6th) 280 (Alta. C.A.) and *R. v. Lewis*, [2007] N.S.J. No. 18, 217 C.C.C. (3d) 82 (N.S.C.A.). Compare, however, findings of detention in *R. v. Grant*, [2006] O.J. No. 2179, 38 C.R. (6th) 58 (Ont. C.A.); *R. v. Suberu*, [2007] O.J. No. 317, 45 C.R. (6th) 47 (Ont. C.A.) (investigative detention triggers s. 10(b) protection). For further discussion, see footnote 106 and *R. v. Harris*, [2007] O.J. No. 3185, 49 C.R. (6th) 220 (Ont. C.A.) (majority holding no power to compel identification other than for traffic offences leading to s. 8 breach). See also the persuasive analysis of Lane J. in *R. v. Powell*, [2000] O.J. No. 2229, 35 C.R. (5th) 89 (Ont. C.J.) (pedestrian stopped for identification and records check arbitrarily detained), expressly overruled in *R. v. B. (L.)*, [2007] O.J. No. 3290, 86 O.R. (3d) 730 (Ont. C.A.), of LaForme J. (as he then was) in *R. v. Ferdinand*, [2004] O.J. No. 3209, 21 C.R. (6th) 65 (Ont. S.C.J.) and of Jones J. in *R. v. D. (J.)*, [2007] O.J. No. 1365, 45 C.R. (6th) 292 (Ont. C.J.), discussed further on page 45.

<sup>75</sup> *R. v. Thomsen*, [1988] S.C.J. No. 31, [1988] 1 S.C.R. 640 (S.C.C.).



Court needs to return to the issue of what constitutes detention to trigger section 10(b) rights. Contrary to the recent view of the Ontario Court of Appeal in *B. (L.)*<sup>76</sup> a host of other courts have applied the concept of psychological detention developed in the context of vehicle stops equally to stops of pedestrians. The problem with a sole focus on physical or psychological detention is that this leaves without Charter protection one naively unaware that the only real choice is to comply. That test also encourages police to avoid sections 9 and 10 rights by delaying arrest and resorting to such strategies as being polite and falsely telling the detainee he or she is free to leave.

This concern would be addressed by an alternative test that detention also occurs whenever the police suspect the person and attempt to obtain incriminating evidence. This was the test carefully justified by a majority of the Newfoundland Court of Appeal in *R. v. Hawkins*<sup>77</sup> but it was rejected by the Supreme Court with the briefest of reasons on the appeal as of right.<sup>78</sup> A focus on the stage of investigation is part of the often relied upon multi-factor approach of the Ontario Court of Appeal in *Moran*.<sup>79</sup> The Court could rely on the test of a “functional equivalent of interrogation” it developed in *R. v. Broyles*<sup>80</sup> as one of the triggers for the pre-trial right to silence.

### 3. Vehicle Stops

In *Hufsky*<sup>81</sup> and *Ladouceur*<sup>82</sup> the Supreme Court held that a stop under a general provincial highway traffic stop power, which set out no criteria for the exercise of discretion, was arbitrary and contrary to section 9. However the majority found that the stop power was a demonstrably justified reasonable limit under section 1 given the difficulty of enforcing impaired driving and other traffic laws, especially on rural roads. Justice Sopinka dissented in the case of roving stops on the basis that this was the last straw: police would be able to stop “any vehicle at

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<sup>76</sup> *R. v. B. (L.)*, [2007] O.J. No. 3290, 86 O.R. (3d) 730 (Ont. C.A.).

<sup>77</sup> [1992] N.J. No. 147, 14 C.R. (4th) 286 (Nfld. C.A.).

<sup>78</sup> *R. v. Hawkins*, [1993] S.C.J. No. 50, [1993] 2 S.C.R. 157 (S.C.C.). But see, however, *R. v. Grant*, [1991] S.C.J. No. 78, 7 C.R. (4th) 388 (S.C.C.), where the Court quickly found a detention on the basis of police suspicion.

<sup>79</sup> *R. v. Moran*, [1987] O.J. No. 794, 36 C.C.C. (3d) 225 (Ont. C.A.), as recently re-emphasized by MacDonnell J. in *R. v. K. (G.)*, [2007] O.J. No. 4308 (Ont. C.J.).

<sup>80</sup> [1991] S.C.J. No. 95, [1991] 3 S.C.R. 595 (S.C.C.).

<sup>81</sup> *R. v. Hufsky*, [1988] S.C.J. No. 30, [1988] 1 S.C.R. 621 (S.C.C.).

<sup>82</sup> *R. v. Ladouceur*, [1990] S.C.J. No. 53, [1990] 1 S.C.R. 1257 (S.C.C.).

any time, in any place, without having any reason to do so”.<sup>83</sup> Courts have in partial response to *Sopinka J.* since made it clear that the stop must be for vehicle-related reasons and that any search must meet section 8 tests.<sup>84</sup>

I have come to believe that this pro-state position is the right balance. There is a qualitative distinction between vehicle and pedestrian stops. Walking the streets is an important civil liberty. But driving a vehicle, given the potential for harm, is a licensed privilege. Police must indeed be afforded a wide stop power to be able to check for impairment and unlicensed driving.<sup>85</sup>

In *Orbanski, Elias* (2005),<sup>86</sup> Charron J., for a 7-2 majority<sup>87</sup> of the Supreme Court, held that police following a lawful vehicle stop have implied and constitutional powers to question motorists about their sobriety and to ask them to perform sobriety tests. These powers were held to fall within the scope of reasonable police authority conferred by necessary implication from operational requirements of combined provincial and federal statutes. Those operational requirements were also held to impliedly prescribe limits on section 10(b) right to counsel. The majority held that these limits were demonstrably justified under section 1, given the dangers of drunk driving. The majority followed *Milne* (1996)<sup>88</sup> in limiting the results of these investigative techniques to the threshold determination of reasonable grounds that the driver is impaired. It was not permissible for the Crown to introduce the results of compelled direct participation in roadside tests and police questioning about alcohol consumption to incriminate at a subsequent trial. The Court adds that *Milne* makes it clear that this does not prevent the officer from otherwise testifying as to his observations as to signs of impairment to prove impairment.<sup>89</sup>

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<sup>83</sup> *R. v. Ladouceur*, [1990] S.C.J. No. 53, [1990] 1 S.C.R. 1257, at 1264 (S.C.C.).

<sup>84</sup> See, for example, *R. v. Mellenthin*, [1992] S.C.J. No. 100, [1992] 3 S.C.R. 615 (S.C.C.); *R. v. Simpson*, [1993] O.J. No. 308, 20 C.R. (4th) 1 (Ont. C.A.), and *R. v. MacLennan*, [1995] N.S.J. No. 77, 97 C.C.C. (3d) 69 (N.S.C.A.).

<sup>85</sup> In contrast David Tanovich, *The Colour of Justice: Policing Race in Canada* (Toronto: Irwin Law, 2006), at 143-44 suggests that given the prevalence of racial profiling the Supreme Court should reverse itself and require that vehicle stops be for probable cause.

<sup>86</sup> *R. v. Orbanski; R. v. Elias*, [2005] S.C.J. No. 37, 29 C.R. (6th) 205 (S.C.C.).

<sup>87</sup> McLachlin C.J.C., Major, Bastarache, Binnie, Deschamps and Abella JJ. concurred.

<sup>88</sup> *R. v. Milne*, [1996] O.J. No. 1728, 107 C.C.C. (3d) 118 (Ont. C.A.).

<sup>89</sup> *R. v. Orbanski; R. v. Elias*, [2005] S.C.J. No. 37, 29 C.R. (6th) 205, at para. 58 (S.C.C.).

Justice LeBel<sup>90</sup> issued a strong and compelling<sup>91</sup> dissent. Although recognizing that impaired driving is a serious danger, the dissenting justices were of the view that:

It is not appropriate to adopt a strained legal interpretation to sidestep inconvenient *Charter* rights for the greater good. Curtailing *Charter* protections through and the inventive use of the law-making powers of the courts is even less acceptable. Doing so turns the country's legal system upside down. Ironically enough, while *Charter* rights relating to the criminal justice system were developed by the common law, the common law would now be used to trump and restrict them.<sup>92</sup>

The majority's argument was seen to be circular. The operational requirements of a legislative provision could not stand apart from the statute as a distinct source of powers and obligations. The power to ask questions or to request sobriety tests was found nowhere in the statutes and could not be found by implication or by a broad interpretation. Enabling the courts to limit rights through the development of common law police powers simply on the basis of the needs of the police pre-empted a serious review of limits on constitutional rights. Although it was conceded that drivers are under no obligation to perform the tests or to answer the questions, the majority had not required that they be reminded of their constitutional rights. There appeared to be some concern that they might otherwise choose to exercise the approaches to sobriety tests.<sup>93</sup> The Court, concluded the minority, should be cautious in creating such powers, especially given that legislation was pending in Manitoba and federally.

It is indeed hard to see why the majority did not wait for the comprehensive new legislation with its standardized approach to sobriety tests. Nevertheless, the powers authorized by the majority seem reasonable and not excessive given the problem of detecting impaired driving. Here, too, the Court achieved the right balance.

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<sup>90</sup> Justice Fish concurred.

<sup>91</sup> See, too, Tim Quigley, "Annotation: *R. v. Orbanski*" (2005) 29 C.R. (6th) 205.

<sup>92</sup> *R. v. Orbanski*; *R. v. Elias*, [2005] S.C.J. No. 37, 29 C.R. (6th) 205, at para. 70 (S.C.C.).

<sup>93</sup> *R. v. Orbanski*; *R. v. Elias*, [2005] S.C.J. No. 37, 29 C.R. (6th) 205, at para. 82 (S.C.C.).

#### 4. Investigative Detention: *R. v. Mann*

In *Mann*,<sup>94</sup> a majority of the Supreme Court applied the *Waterfield*<sup>95</sup> approach to ancillary powers and adopted much of the earlier approach of Doherty J.A. in his trail-blazing judgment in *Simpson*.<sup>96</sup> The Ontario Court of Appeal had created a power of investigative detention based on articulable cause defined as “a constellation of objectively discernible facts which give the detaining officer reasonable cause to suspect that the detainee is criminally implicated in the activity under investigation”.<sup>97</sup>

Justice Doherty carefully noted that a police “hunch” based entirely on intuition gained by experience would not be enough even if it proved accurate. Such subjectively based assessments “can too easily mask discriminatory conduct based on such irrelevant factors as the detainee’s sex, colour, age, ethnic origin or sexual orientation”.<sup>98</sup>

The Supreme Court majority announced a preference for the phrase “reasonable grounds to detain” rather than the U.S. phrase of “articulable cause” adopted by Doherty J.A.<sup>99</sup> It also set out to declare “concrete guidelines” for investigative detention rather than leaving the matter, as had *Simpson*,<sup>100</sup> to be resolved on a case-by-case basis. After lengthy analysis, the Court established the following four requirements:

- (1) “Police officers may detain an individual for investigative purposes if there are reasonable grounds to suspect in all the circumstances that the individual is connected to a particular crime and that such a detention is necessary”.<sup>101</sup>
- (2) “[W]here a police officer has reasonable grounds to believe that his or her safety or that of others is at risk, the officer may engage in a protective pat-down search of the detained individual.”
- (3) “Both the detention and the pat-down search must be conducted in a reasonable manner.”

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<sup>94</sup> *R. v. Mann*, [2004] S.C.J. No. 49, 21 C.R. (6th) 1 (S.C.C.).

<sup>95</sup> *R. v. Waterfield*, [1963] 3 All E.R. 659, [1964] 1 Q.B. 164 (C.A.).

<sup>96</sup> *R. v. Simpson*, [1993] O.J. No. 308, 20 C.R. (4th) 1 (Ont. C.A.).

<sup>97</sup> *R. v. Simpson*, [1993] O.J. No. 308, 20 C.R. (4th) 1, at 22 (Ont. C.A.).

<sup>98</sup> *R. v. Simpson*, [1993] O.J. No. 308, 20 C.R. (4th) 1, at 22 (Ont. C.A.).

<sup>99</sup> In dissent, Deschamps J. is persuasive in her view that the majority should not have departed from the articulable cause language which had proved useful and workable. The change would risk confusion with the higher standard of reasonable ground required for arrest.

<sup>100</sup> *R. v. Simpson*, [1993] O.J. No. 308, 20 C.R. (4th) 1 (Ont. C.A.).

<sup>101</sup> The importance of this limit was recently stressed in *R. v. Houben*, [2006] S.J. No. 715, 44 C.R. (6th) 338 (Sask. C.A.) and *R. v. Linton*, [2007] O.J. No. 2265, 48 C.R. (6th) 224 (Ont. C.J.).

- (4) “[T]he investigative detention should be brief in duration and does not impose an obligation on the detained individual to answer questions posed by the police”.<sup>102</sup>

The Court had earlier emphasized that police officers may detain an individual only if there are reasonable grounds to suspect in all the circumstances that there is a “clear nexus between the individual to be detained and a recent or on-going criminal offence”<sup>103</sup> and that the detention is reasonably necessary on an objective view of the circumstances. This amounted to a major shift in Canadian law. Police no longer had power to stop based on a general suspicion of criminal activity. The overall reasonableness must be further assessed against all of the circumstances, most notably the extent to which the interference with individual liberty is necessary to the performance of the officer’s duty, the liberty interfered with, and the nature and extent of the interference.<sup>104</sup>

A detention for investigative purposes was, held Iacobucci J., subject to Charter scrutiny.<sup>105</sup> At a minimum, individuals who are detained for investigative purposes must under section 10(a) be advised, in clear and simple language, of the reasons for the detention. Investigative detentions carried out in accordance with the common law power recognized in this case would not infringe the detainee’s rights under section 9 of the Charter. Mandatory compliance with section 10(b) requirements could not be transformed into an excuse for prolonging, unduly and artificially, a detention that must be of brief duration. Other aspects of section 10(b) should be left for another day.<sup>106</sup>

Most commentators have been critical of the judicial readiness to authorize any form of investigative detention.<sup>107</sup> It is argued that complex

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<sup>102</sup> *R. v. Mann*, [2004] S.C.J. No. 49, 21 C.R. (6th) 1, at para. 45 (S.C.C.) (numbers here added).

<sup>103</sup> *R. v. Mann*, [2004] S.C.J. No. 49, 21 C.R. (6th) 1, at para. 34 (S.C.C.).

<sup>104</sup> *R. v. Mann*, [2004] S.C.J. No. 49, 21 C.R. (6th) 1, at para. 39 (S.C.C.).

<sup>105</sup> *R. v. Mann*, [2004] S.C.J. No. 49, 21 C.R. (6th) 1, at paras. 20-22 (S.C.C.).

<sup>106</sup> In *R. v. Suberu*, [2007] O.J. No. 317, 45 C.R. (6th) 47 (Ont. C.A.), Doherty J.A. held for the Ontario Court of Appeal that a brief interlude between the commencement of an investigative detention and the advising of the detained person’s right to counsel under s. 10(b) during which the officer makes a quick assessment of the situation to decide whether anything more than a brief detention of the individual may be warranted, is not inconsistent with the requirement that a detained person be advised of his or her right to counsel “without delay”. This appears to achieve a good compromise. However it is not clear why the Court did not apply its s. 7 remarks based on *R. v. Milne*, [1996] O.J. No. 1728, 107 C.C.C. (3d) 118 (Ont. C.A.) and rule that evidence of the incriminating statements during this investigative detention could not be used to incriminate.

<sup>107</sup> For comments on *Mann*, see Eric Gottardi, “*R. v. Mann*: Regulating State Intrusions in the Context of Investigative Detentions” (2004) 21 C.R. (6th) 27; Tim Quigley, “*Mann*, It’s a

police powers matters are a matter for Parliament and inconsistent with the *Hunter v. Southam*<sup>108</sup> view that the Charter is in place to constrain rather than authorize State action. The trumping consideration for me, again, is that Parliament, given its consistent law-and-order mood, would very likely opt for a more general power of investigative detention far less supportive of the rights of citizens than the Supreme Court. The *Mann*<sup>109</sup> regime is a constrained and balanced response that does not authorize police harassment of vulnerable groups on mere suspicion. Of course the limits must be rigorously insisted upon by courts if the rule of law is to be meaningful, and the courts must also, as in *Mann* itself, be prepared to exclude in the event of breaches of such important standards.

### 5. Roadblock Stops: *R. v. Clayton*

In *Clayton* (2005),<sup>110</sup> Doherty J.A., speaking for the Ontario Court of Appeal,<sup>111</sup> turned again to the ancillary powers doctrine to create roadblock stop powers distinct from the investigative detention power recognized in *Mann*.<sup>112</sup> At about 1:25 a.m. on September 24, 1999, an individual made a 911 call from a coffee shop located across from a strip club indicating that about 10 black men were congregated outside the club and that four had handguns. He described by model and colour four vehicles that he associated with the group of individuals in the parking area. A number of police vehicles converged on the scene. Two officers, Robson and Dickson, arrived at the rear exit to the parking lot at 1:26 a.m. and parked near that exit. They intended to stop any vehicle

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Disappointing Decision” (2004) 21 C.R. (6th) 41; David Tanovich, “The Colourless World of *Mann*” (2004) 21 C.R. (6th) 47; Benjamin Berger, “Race and Erasure in *R. v. Mann*” (2004) 21 C.R. (6th) 58; Lesley McCoy, “Some Answers from the Supreme Court on Investigative Detention . . . And Some More Questions” (2004) 49 Crim. L.Q. 268; James Stribopoulos, “The Limits of Judicially Created Police Powers: Investigative Detention after *Mann*” (2007) 52 Crim. L.Q. 299; Alec Fiszau, “Articulating Cause — Investigative Detention and its Implications” (2007) 52 Crim. L.Q. 327 and Christina Skibinsky, “Regulating *Mann* in Canada” (2006) 69 Sask. L. Rev. 197. See earlier Stephen Coughlan, “Search Based on Articulate Cause: Proceed with Caution or Full Stop?” (2002) 2 C.R. (6th) 49; James Stribopoulos, “A Failed Experiment? Investigative Detention: Ten Years Later” (2003) 41 Alta. L. Rev. 335; Tim Quigley, “Brief Investigatory Detentions: A Critique of *R. v. Simpson*” (2004) 41 Alta. L. Rev. 935; Patrick Healey, “Investigative Detention in Canada” (2005) Crim. L.R. 98; and James Stribopoulos, “In Search of Dialogue: The Supreme Court, Police Powers and the Charter” (2005) 31 Queen’s L.J. 1.

<sup>108</sup> [1984] S.C.J. No. 36, [1984] 2 S.C.R. 145 (S.C.C.).

<sup>109</sup> *R. v. Mann*, [2004] S.C.J. No. 49, 21 C.R. (6th) 1 (S.C.C.).

<sup>110</sup> *R. v. Clayton*, [2005] O.J. No. 1078, 27 C.R. (5th) 197 (Ont. C.A.).

<sup>111</sup> McMurtry C.J.O. and Lang J.A. concurred.

<sup>112</sup> *R. v. Mann*, [2004] S.C.J. No. 49, 21 C.R. (6th) 1 (S.C.C.).

attempting to exit the parking lot and to investigate the “gun call”. The first car they stopped was a sporty black Jaguar driven by a black man, Farmer, with another black man, Clayton, in the passenger seat. The Jaguar did not match, or even come close to, the description of any of the four vehicles provided by the 911 caller. One officer advised Clayton that he was investigating a gun call and told him to step out of the vehicle. As soon as the officer touched Clayton, a struggle ensued and Clayton ran towards the front of the strip club. Robson and Dickson gave chase. On his arrest he acknowledged he had a gun in his pocket. It was removed and he was arrested. Farmer was also arrested and found to be in possession of a gun. Both accused were charged with a number of firearms offences.

The Ontario Court of Appeal allowed the appeals, quashed the convictions and substituted acquittals. The Court held that the initial roadblock stop was unlawful. Justice Doherty held that as the police did not have reasonable grounds to suspect that either accused was implicated in criminal activity, the detention could not be justified as investigative detention under *Mann*.<sup>113</sup> There was no reasonable individualized suspicion. There were also no specific statutory powers to establish roadblocks. Justice Doherty then held that the ancillary police power can justify the use of a roadblock stop to investigate and prevent crime as well as apprehend offenders. Where the police do not have grounds to suspect any specific person or persons, however, the use of a roadblock stop could not, he held, be justified in furtherance of the police duty to investigate and prevent crime unless the police have reasonable grounds to believe both that a serious crime has been committed and that the roadblock stop may apprehend the perpetrator. Justice Doherty added that the existence of those reasonable grounds would not necessarily justify the use of a roadblock stop. If those prerequisites exist, then other factors, like the availability of other less intrusive investigative alternatives, have to be taken into account. The Court of Appeal concluded that the “roadblock” was unlawful because there was no imminent danger and because the police did not tailor their intervention to stop only the four vehicles identified in the 911 call. Had they properly tailored their response, Farmer and Clayton’s vehicle would not have been detained. As a result, their detention and subsequent searches violated sections 9 and 8 of the Charter. The evidence was furthermore excluded under section 24(2).

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<sup>113</sup> *R. v. Mann*, [2004] S.C.J. No. 49, 21 C.R. (6th) 1 (S.C.C.).

In the Supreme Court<sup>114</sup> all nine justices decided that on these facts there had been no section 8 or section 9 breaches and therefore no need for any remedy. Like Doherty J.A., the Court saw the need for a roadblock stop powers wider than *Mann*.<sup>115</sup> Justice Abella sets out loose parameters as follows:

The justification for a police officer's decision to detain, as developed in *Dedman* and most recently interpreted in *Mann*, will depend on the "totality of the circumstances" underlying the officer's suspicion that the detention of a particular individual is "reasonably necessary". If, for example, the police have particulars about the individuals said to be endangering the public, their right to further detain will flow accordingly. As explained earlier in *Mann*, searches will only be permitted where the officer believes on reasonable grounds that his or her safety, or that of others, is at risk.

The determination will focus on the nature of the situation, including the seriousness of the offence, as well as on the information known to the police about the suspect or the crime, and the extent to which the detention was reasonably responsive or tailored to these circumstances, including its geographic and temporal scope. This means balancing the seriousness of the risk to public or individual safety with the liberty interests of members of the public to determine whether, given the extent of the risk, the nature of the stop is no more intrusive of liberty interests than is reasonably necessary to address the risk.<sup>116</sup>

In the view of the Abella cohort, both the initial and the continuing detentions of Clayton and Farmer's car were justified based on the information the police had, the nature of the offence, and the timing and location of the detention. The initial detention in this case was reasonably necessary to respond to the seriousness of the offence and the threat to police and public safety inherent in the presence of prohibited weapons in a public place, and was temporally, geographically and logistically responsive to the circumstances known by the police when it was set up. The initial stop was consequently a justifiable use of police powers associated with the police duty to investigate the offences described by the 911 caller and did not represent an arbitrary detention contrary to section 9 of the Charter. The officers' safety concerns justified the searches incidental to detention.

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<sup>114</sup> *R. v. Clayton*, [2007] S.C.J. No. 32, 2007 SCC 32 (S.C.C.).

<sup>115</sup> *R. v. Mann*, [2004] S.C.J. No. 49, 21 C.R. (6th) 1 (S.C.C.).

<sup>116</sup> *R. v. Clayton*, [2007] S.C.J. No. 32, 2007 SCC 32, at paras. 30-31 (S.C.C.).



The Supreme Court in *Clayton*<sup>117</sup> is persuasive in deciding that the Ontario Court of Appeal got it wrong on the facts. However it is disappointing that Abella J. would return to a case-by-case approach, which the Court expressly sought to avoid when it set out limiting criteria for investigative detention in *Mann*.<sup>118</sup> The *Mann* regime is still intact in the case of stops based on individualized suspicion.

The Abella cohort of six justices has adopted an independent emergency stop power wider than necessary. In the interests of clarity and certainty it would have been preferable had the Court more clearly accepted Doherty J.A.'s twin criteria of reasonable grounds to suspect a serious crime and reasonable grounds for believing that a roadblock stop would find the culprit.

As Stephen Coughlan puts it,<sup>119</sup> a test of what is reasonably necessary in the circumstances provides little more guidance for the police than to guess whether they have power to blockade in other circumstances.

The Binnie cohort of three justices would have preferred to build this emergency stop power around the issue of reasonable grounds to believe that a firearms offence has been committed, encouraging Parliament to address any need for wider emergency powers. In their view, the following new common law police power should be recognized:

- (1) to form a blockade
- (2) on receipt of information the police consider reliable
- (3) about serious firearms offences underway or recently committed
- (4) limited to the premises where the offence allegedly occurred
- (5) sufficiently soon after the alleged incident to give police reasonable grounds for belief that the perpetrators may be caught.<sup>120</sup>

There is a profound and mind-boggling disagreement between Abella and Binnie JJ. as to the proper approach to justification under section 9. Justice Abella starts with the following proposition:

If the police conduct in detaining and searching Clayton and Farmer amounted to a lawful exercise of their common law powers, there was no violation of their *Charter* rights. If, on the other hand, the conduct fell outside the scope of these powers, it represented an infringement

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<sup>117</sup> *R. v. Clayton*, [2007] S.C.J. No. 32, 2007 SCC 32 (S.C.C.).

<sup>118</sup> *R. v. Mann*, [2004] S.C.J. No. 49, 21 C.R. (6th) 1 (S.C.C.).

<sup>119</sup> Stephen Coughlan, "Common Law Police Powers and the Rule of Law: Annotation to *R. v. Clayton*" (2007) 47 C.R. (6th) 266.

<sup>120</sup> *R. v. Clayton*, [2007] S.C.J. No. 32, 2007 SCC 32, at para. 89 (S.C.C.).

of the right under the *Charter* not to be arbitrarily detained or subjected to an unreasonable search or seizure.<sup>121</sup>

It has long been accepted that, unlike the test for section 8, a finding of unlawfulness does not necessarily mean the detention was arbitrary. That proposition now seems to have been reversed. On the other hand, Abella J. hastens to state that just because a detention is lawful, it is not exempt from Charter scrutiny. Yet, in the next breath, she announces that the ancillary powers doctrine is

consistent with *Charter* values because it requires the state to justify the interference with liberty based on criteria which focus on whether the interference with liberty is necessary given the extent of the risk and the liberty at stake, and no more intrusive to liberty than reasonably necessary to address the risk. The standard of justification must be commensurate with the fundamental rights at stake.<sup>122</sup>

The Binnie cohort called for a more meaningful standard of Charter scrutiny under which justification must be determined under section 1. “Reasonably necessary” was no substitute for Charter review. The more specific power they would have adopted could be justified under the *Oakes*<sup>123</sup> test for section 1 as it was carefully tailored and minimally intrusive.

In the end result both cohorts agree that a blockade power was, in the circumstances and given the threat of guns, legal, justified and constitutional. It is indeed unfortunate that the majority were not more concise in setting out the parameters to this new emergency stop power. This may lead to roadblock stops being upheld in less compelling circumstances.

## 6. Racial Profiling

One of the central policy issues facing the criminal justice system is how courts should respond to issues of racial profiling. The issue has not been directly addressed by the Supreme Court, which has indeed been criticized for ducking the issue in *Mann*.<sup>124</sup> The Supreme Court of

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<sup>121</sup> *R. v. Clayton*, [2007] S.C.J. No. 32, 2007 SCC 32, at para. 19 (S.C.C.).

<sup>122</sup> *R. v. Clayton*, [2007] S.C.J. No. 32, 2007 SCC 32, at para. 21 (S.C.C.).

<sup>123</sup> *R. v. Oakes*, [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103 (S.C.C.).

<sup>124</sup> *R. v. Mann*, [2004] S.C.J. No. 49, 21 C.R. (6th) 1 (S.C.C.). See, for example, David Tanovich, “The Colourless World of *Mann*” (2004) 21 C.R. (6th) 47; Benjamin Berger, “Race and Erasure in *R. v. Mann*” (2004) 21 C.R. (6th) 58; James Stribopoulos, “The Limits of Judicially

Canada has taken judicial notice of racism in *Williams*<sup>125</sup> respecting jury screening, and in *Golden*<sup>126</sup> it indicated that strip search standards had to be set taking into account evidence that police powers are disproportionately used against African-Canadians and Aboriginal people. However, issues of race have otherwise been avoided.

The approach of Doherty J.A. in *Simpson*<sup>127</sup> was in part aimed to protect against enforcement based on race. Several commentators suggested that the Court did not go far enough. Morden J.A. for the Ontario Court of Appeal in *Brown* (2003)<sup>128</sup> did indeed later go much further. The Court adopted the following definitions: “Racial profiling involves the targeting of individual members of a particular racial group, on the basis of the supposed criminal propensity of the entire group.”<sup>129</sup>

The Court also quoted a longer definition offered by the African Canadian Legal Clinic in an earlier case of *Richards* (1999),<sup>130</sup> as set forth in the reasons of Rosenberg J.A:

Racial profiling is criminal profiling based on race. Racial or colour profiling refers to that phenomenon whereby certain criminal activity is attributed to an identified group in society on the basis of race or colour resulting in the targeting of individual members of that group. In this context, race is illegitimately used as a proxy for the criminality or general criminal propensity of an entire racial group.<sup>131</sup>

According to the Court in *Brown*,<sup>132</sup> the attitude underlying racial profiling is one that may be consciously or unconsciously held. The police officer need not be an overt racist. His or her conduct may be based on

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Created Police Powers: Investigative Detention after *Mann*” (2007) 52 Crim. L.Q. 299; Alec Fiszau, “Articulating Cause — Investigative Detention and Its Implications” (2007) 52 Crim. L.Q. 327. Tim Quigley, “*Mann*, It’s a Disappointing Decision” (2004) 21 C.R. (6th) 41, at 44 points out that *Mann*’s clothing did not in fact match the description of clothing worn by the suspect. The police were looking for a “young male Aboriginal, approximately five feet eight inches tall, weighing 165 pounds” wearing a black jacket with white sleeves. *Mann* was wearing a pullover sweater with a kangaroo pouch pocket. Quigley suggests a serious concern that being Aboriginal and fitting a rather general description while in an inner-city area was held to amount to reasonable suspicion to provide grounds for the detention.

<sup>125</sup> *R. v. Williams*, [1998] S.C.J. No. 49, [1998] 1 S.C.R. 1128 (S.C.C.).

<sup>126</sup> *R. v. Golden*, [2001] S.C.J. No. 81, 47 C.R. (5th) 1 (S.C.C.).

<sup>127</sup> *R. v. Simpson*, [1993] O.J. No. 308, 20 C.R. (4th) 1 (Ont. C.A.).

<sup>128</sup> *R. v. Brown*, [2003] O.J. No. 1251, 9 C.R. (6th) 240 (Ont. C.A.). Laskin and Feldman J.J.A. concurred.

<sup>129</sup> *R. v. Brown*, [2003] O.J. No. 1251, 9 C.R. (6th) 240, at 246 (Ont. C.A.).

<sup>130</sup> *R. v. Richards*, [1999] O.J. No. 1420, 26 C.R. (5th) 286 (Ont. C.A.).

<sup>131</sup> *R. v. Richards*, [1999] O.J. No. 1420, 26 C.R. (5th) 286, at 295 (Ont. C.A.).

<sup>132</sup> *R. v. Brown*, [2003] O.J. No. 1251, 9 C.R. (6th) 240 (Ont. C.A.).

subconscious racial stereotyping. The Court held that the Crown counsel on appeal had been responsible for conceding the existence of the phenomenon of racial profiling. It further noted that the conclusion was supported by significant social science research and quoted from the *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System*:

The Commission's findings suggest that racialized characteristics, especially those of black people, in combination with other factors, provoke police suspicion, at least in Metro Toronto. Other factors that may attract police attention include sex (male), youth, make and condition of car (if any), location, dress and perceived lifestyle. Black persons perceived to have many of these attributes are at high risk of being stopped on foot or in cars. This explanation is consistent with our findings that, overall, black people are more likely than others to experience the unwelcome intrusion of being stopped by the police.<sup>133</sup>

The Court saw no dispute respecting the test to be applied under section 9 of the Charter. The question in *Brown*<sup>134</sup> was whether the police officer who stopped a motorist for speeding on the Don Valley Parkway in Toronto had articulable cause for the stop. If a police officer stops a person based on his or her colour (or on any other discriminatory ground), the purpose was improper and clearly would not be an articulable cause:

Accordingly, to succeed on the application before the trial judge, the respondent had to prove that it was more probable than not that there was no articulable cause for the stop, specifically, on the evidence in this case, that the real reason for the stop was the fact that he was black.<sup>135</sup>

To the court it was self-evident that a stop based solely on race constituted arbitrary detention contrary to section 9 and presumably violated section 8 on the basis of lack of reasonable grounds.

The comments in *Brown*<sup>136</sup> were largely *obiter* as the Court was ordering a new trial because of a reasonable apprehension of bias by the trial judge. The trial judge had indicated a concern about the seriousness of the accusations, admonished the defence counsel for the tone of his voice in cross-examination of the officer and referred to the amount of time being taken to present the application. After the evidence, the trial

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<sup>133</sup> (Toronto: Queen's Printer for Ontario, 1995) (Co-chairs: M. Gittens and D. Cole), at 358, quoted in *R. v. Brown*, [2003] O.J. No. 1251, 9 C.R. (6th) 240, at 246 (Ont. C.A.).

<sup>134</sup> *R. v. Brown*, [2003] O.J. No. 1251, 9 C.R. (6th) 240 (Ont. C.A.).

<sup>135</sup> *R. v. Brown*, [2003] O.J. No. 1251, 9 C.R. (6th) 240, at para. 11 (Ont. C.A.).

<sup>136</sup> *R. v. Brown*, [2003] O.J. No. 1251, 9 C.R. (6th) 240 (Ont. C.A.).

judge indicated he did not need to hear submissions from the Crown and dismissed the application. During the sentence hearing, the trial judge indicated his distaste for the matters raised during the trial and suggested that the accused should extend an apology to the officer.<sup>137</sup>

The Court of Appeal could have stopped there but went further. It held there was evidence before the trial judge capable of supporting a finding of racial profiling. Justice Morden observed that a racial profiling claim could rarely be proven by direct evidence. This would involve an admission by a police officer that he or she was influenced by racial stereotypes in the exercise of his or her discretion to stop a motorist. Accordingly, if racial profiling was to be proven it had to be done by inference drawn from circumstantial evidence. Where the evidence showed that the circumstances relating to a detention corresponded to the phenomenon of racial profiling and provided a basis for the Court to infer that the police officer was lying about why he or she singled out the accused person for attention, the record was then capable of supporting a finding that the stop was based on racial profiling. According to Morden J.A., this did not set the hurdle either too low (which could be unfair to honest police officers performing their duties in a professional and unbiased manner) or too high (which would make it virtually impossible for victims of racial profiling to receive the protection of their rights under section 9 of the Charter).

At face value, *Brown*<sup>138</sup> would appear to make it much easier than in the past for an accused person of colour to obtain a Charter remedy against racial profiling. A ground of distinction and narrowing in subsequent cases may be the ruling in *Brown* that the officer altered his initial notes, which cast a shadow on his credibility.

The definition of racial profiling relied on in *Brown*<sup>139</sup> is extremely wide, especially in its notion of unconscious racism. How exactly can that be established, not as a matter of statistical trend but in the case of the individual officer before the court? Section 8 and section 9 Charter arguments based on racial profiling are almost always rejected.<sup>140</sup> A notable

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<sup>137</sup> See similarly *R. v. Watson*, [2004] O.J. No. 4921, 191 C.C.C. (3d) 144 (Ont. C.A.). Interjections by a trial judge had prevented defence counsel from establishing a claim of racial profiling. A new trial was ordered.

<sup>138</sup> *R. v. Brown*, [2003] O.J. No. 1251, 9 C.R. (6th) 240 (Ont. C.A.).

<sup>139</sup> *R. v. Brown*, [2003] O.J. No. 1251, 9 C.R. (6th) 240 (Ont. C.A.).

<sup>140</sup> See, for example, *R. v. Greaves*, [2004] B.C.J. No. 1953, 24 C.R. (6th) 15 (B.C.C.A.), criticized by Tim Quigley, "Annotation: *R. v. Greaves*" (2005) 24 C.R. (6th) 15, at 17. The Court allowed the police to rely in part on their belief it was unusual to see a black man in the company of a white man in that area. See too *R. v. Smith*, [2004] O.J. No. 4979, 26 C.R. (6th) 375 (Ont. S.C.J.).

exception to this trend occurred in a cocaine case of *Khan* (2004),<sup>141</sup> where Molloy J. of the Ontario Superior Court disbelieved the police testimony and found that the accused had been singled out because he was a young black man driving a Mercedes.

Courts tend to reject racial profiling arguments where race was only part of the reason for police intervention. David Tanovich, a prolific advocate for taking racial profiling more seriously,<sup>142</sup> has urged courts to resort to section 15 guarantees and to declare a reverse onus in visible minority cases where it would be up to the State to demonstrate that the stop was not based on race. Police assessment of suspicion depends on experience and interpretation. The problem, suggests Tanovich, is that this can be influenced or distorted by unconscious racism:

For example, an officer may see a Black man in a White neighbourhood carrying a Plasma television and decide to stop him to investigate because, in the officer's mind, he appears "out of place". Alternatively, an officer may interpret a handshake between two Black men in a high crime area as a drug transaction. Such innocent behaviour might not be interpreted in such an incriminating manner if the men were White. Evasive action is another example. An African Canadian who has historically been harassed by the police or who is aware of a history of community harassment may understandably avoid a police officer who is approaching, not out of a case of consciousness of guilt, but to avoid being harassed, or in some cases, out of a sense of self-preservation.<sup>143</sup>

Some lower court judges have favoured a reverse onus for racial profiling.<sup>144</sup> However, Doherty J.A., for the Ontario Court of Appeal

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(border crossing) and the full review of rulings by David Tanovich, "E-Racing Racial Profiling" (2004) 41 Alta. L. Rev. 905.

<sup>141</sup> *R. v. Khan*, [2004] O.J. No. 3819, 24 C.R. (6th) 48 (Ont. S.C.J.). See, too, *R. v. Calderon*, [2004] O.J. No. 3474, 23 C.R. (6th) 1 (Ont. C.A.) (majority holding vehicle stop arbitrary in part because it was based on a stereotypical observation that car was too expensive for its occupants) and *R. v. Ferdinand*, [2004] O.J. No. 3209, 21 C.R. (6th) 65 (Ont. S.C.J.) (walking away from police in high crime area not amounting to reasonable grounds to detain). In *Ferdinand*, the court shied away from categorizing the conduct as racial profiling.

<sup>142</sup> See, for example, "Using the Charter to Stop Racial Profiling: The Development of an Equality-Based Conception of Arbitrary Detention" (2002) 40 Osgoode Hall L.J. 145; "E-Racing Racial Profiling" (2004) 41 Alta. L. Rev. 905; and "*R. v. Griffiths*: Race and Arbitrary Detention" (2003) 11 C.R. (6th) 149.

<sup>143</sup> David Tanovich, "The Colourless World of *Mann*" (2004) 21 C.R. (6th) 47, at 53.

<sup>144</sup> In *R. v. Ferdinand*, [2004] O.J. No. 3209, 21 C.R. (6th) 65 (Ont. S.C.J.), Laforme J. (as he then was) held that the accused had the burden of demonstrating detention and then the burden shifted to the Crown to demonstrate the detention was not arbitrary. In *R. v. McKennon*, [2004] O.J. No. 5021 (Ont. S.C.J.), Hill J. remarked enigmatically "I tend to the view that in a

in *Peart v. Peel Regional Police Services Board*,<sup>145</sup> concerning an unsuccessful civil suit alleging racial profiling, refused to reverse the ultimate burden. The reality of racial profiling could not be denied but the Court could not accept that “racial profiling is the rule rather than the exception where the police detain black men”.<sup>146</sup> Justice Doherty did hold that there would be a “significant tactical burden” on the defendant.<sup>147</sup>

Some point to the dangers of relying on anecdotal evidence of racial profiling or on less than rigorous statistical data. For example, Alan Gold has written that:

There is more than a real possibility of a vicious cycle or self-fulfilling prophecy regarding racial profiling which begins with claims, is fuelled by publicity, and leads to stronger beliefs and more claims.<sup>148</sup>

Few would suggest that racial profiling is not a serious social wrong to be taken seriously by courts. However Professor Ed Morgan<sup>149</sup> sees the articulable cause approach adopted in *Simpson*<sup>150</sup> as too restrictive. According to Morgan, depending on the context, sex, age, ethnic origin and sexual orientation are relevant grounds of investigation. He suggests that the *Simpson* principles should not be applied in other contexts such as immigration and border crossings, given the “ubiquitous threat of mass violence” since the September 11, 2001 attack on the World Trade Center. This view is surprisingly insensitive to the experience of Muslim and Arab Canadians who have presented significant anecdotal and survey

traffic stop case the discharge of proof regarding compliance with the Constitution and with the individual s. 9 Charter right should generally be on the government” (at para. 33).

<sup>145</sup> [2006] O.J. No. 4457, 43 C.R. (6th) 175 (Ont. C.A.).

<sup>146</sup> *Peart v. Peel Regional Police Services Board*, [2006] O.J. No. 4457, 43 C.R. (6th) 175, at 209 (Ont. C.A.).

<sup>147</sup> *Peart v. Peel Regional Police Services Board*, [2006] O.J. No. 4457, 43 C.R. (6th) 175, at para. 151 (Ont. C.A.).

<sup>148</sup> “Media Hype, Racial Profiling, and Good Science” (2003) 45 Can. J. Crim. 391. Mr. Gold had been hired by then Toronto Chief of Police Julian Fantino to refute a series of articles published in the *Toronto Star* asserting widespread racial profiling by the Toronto Police Service. See, too, critical reviews published in the same journal by Ron Melchers, “Do Toronto Police Engage in Racial Profiling?” (2003) 45 Can. J. Crim. 347 and Scot Wortley & Julian Tanner, “Data, Denials, and Confusion: The Racial Profiling Debate in Toronto” (2003) 45 Can. J. Crim. 367. The most rigorous studies showing racial profiling are Scot Wortley & Julian Tanner, “Inflammatory Rhetoric? Baseless Accusations? A Response to Gabor’s Critique of Racial Profiling Research in Canada” (2005) 47 Can. J. Crim. 581 and Professor Wortley’s year-long study of racialized statistics kept by the Kingston Police Force, online: <<http://www.police.kingston.on.ca/Data%20Collection%20Final%20Report%202005-09-15.pdf>>. See reviews by David Tanovich, *The Colour of Justice: Policing Race in Canada* (Toronto: Irwin Law, 2006), at 76-82.

<sup>149</sup> “Racial Profiling as an Investigative Tool” *Law Times* (October 15, 2002).

<sup>150</sup> *R. v. Simpson*, [1993] O.J. No. 308, 20 C.R. (4th) 1 (Ont. C.A.).

evidence to Parliamentary committees that they have been racially targeted.<sup>151</sup> Principles being developed in the context of criminal trials seem equally applicable.<sup>152</sup>

Professor Tanovich's recent major study of race issues in the Canadian justice system<sup>153</sup> certainly provides a strong basis for suggesting defence counsel and our courts are too reticent to address such concerns. There is a disturbing pattern of trial counsel and judges ignoring the admittedly difficult and sensitive issue of race despite considerable evidence of systemic discrimination in stops. It may be that counsel have found by experience that directly playing the race card is an unwise strategy, in practice hard to establish and also time-consuming and expensive. The problem is that if race is not raised at trial, courts of appeal will not be able to take judicial notice of this adjudicative fact on appeal.<sup>154</sup> Some say that *Mann*<sup>155</sup> and *Clayton*<sup>156</sup> are so broad that they can be the vehicles for racial profiling. Properly applied, I suggest they are not open to such abuse, especially if courts are prepared to resort to the remedy of exclusion for violations. Narrow interpretations of detention for section 9 and section 10 purposes could be avoided by relying on the section 15 guarantee against racial discrimination in the enforcement of laws.<sup>157</sup> That right has no triggering requirement.

In contrast to these judicial efforts, no federal or provincial Parliament has done anything legislatively about racial profiling. Governments are wary of requiring the keeping of racialized statistics in view of police opposition,<sup>158</sup> so transparency is not the norm.

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<sup>151</sup> Council on American-Islamic Relations Canada (CAIR-CAN), *Presumption of Guilt: A National Survey on Security Visitations of Canadian Muslims* (2005), online: <<http://www.caircan.ca/downloads/POG-08062005.pdf>>. Eight per cent of respondents reported visits by security officials at home or place of work.

<sup>152</sup> See, too, Sujit Choudhry & Kent Roach, "Racial and Ethnic Profiling: Statutory Discretion, Constitutional Remedies and Democratic Accountability" (2003) 41 Osgoode Hall L.J. 1; Reem Bahdi, "No Exit : Racial Profiling and Canada's War Against Terrorism" (2003) 41 Osgoode Hall L.J. 293 and David Tanovich, *The Colour of Justice: Policing Race in Canada* (Toronto: Irwin Law, 2006), at 105-17.

<sup>153</sup> David Tanovich, *The Colour of Justice: Policing Race in Canada* (Toronto: Irwin Law, 2006).

<sup>154</sup> *R. v. Spence*, [2005] S.C.J. No. 74, [2005] 3 S.C.R. 458 (S.C.C.).

<sup>155</sup> *R. v. Mann*, [2004] S.C.J. No. 49, 21 C.R. (6th) 1 (S.C.C.).

<sup>156</sup> *R. v. Clayton*, [2007] S.C.J. No. 32, 2007 SCC 32 (S.C.C.).

<sup>157</sup> See *obiter* pronouncements of the Nova Scotia Court of Appeal in *R. v. Smith*, [1993] N.S.J. No. 289, 23 C.R. (4th) 164 (N.S.C.A.) (race) and *R. v. White*, [1994] N.S.J. No. 516, 35 C.R. (4th) 88 (N.S.C.A.) (gender).

<sup>158</sup> See David Tanovich, *The Colour of Justice: Policing Race in Canada* (Toronto: Irwin Law, 2006).



#### IV. POWER TO INTERROGATE

##### 1. Section 7, Section 10(b) and Common Law Standards

Section 10(b) requires that a person arrested or detained must be informed of the right to counsel and of legal aid and any duty counsel programs<sup>159</sup> and, if the person asserts his or her right with reasonable diligence, the police must implement this by,

- affording privacy
- not eliciting evidence until counsel has been consulted
- allowing reasonable opportunity for counsel to be consulted
- permitting counsel to be present for plea bargaining, and not denigrating defence counsel.<sup>160</sup>

Section 7 affords a pre-trial right to silence against interrogation by undercover agents, which

- does not require that the accused be advised of that right
- applies on detention
- prohibits active elicitation “functionally equivalent to interrogation”<sup>161</sup>
- does not apply to non state agents, and
- allows for questioning after counsel has been consulted.

The principle of self-incrimination once described by the Supreme Court as the organizing principle of criminal law capable of growth<sup>162</sup> has now been reduced to a principle of “limited application”.<sup>163</sup>

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<sup>159</sup> *R. v. Bartle*, [1994] S.C.J. No. 74, [1994] 3 S.C.R. 173 (S.C.C.); *R. v. Prosper*, [1994] S.C.J. No. 72, [1994] 3 S.C.R. 236 (S.C.C.).

<sup>160</sup> *R. v. Manninen*, [1987] S.C.J. No. 41, [1987] 1 S.C.R. 1233 (S.C.C.), *R. v. Bartle*, [1994] S.C.J. No. 74, [1994] 3 S.C.R. 173 (S.C.C.); and *R. v. Burlingham*, [1995] S.C.J. No. 39, [1995] 2 S.C.R. 206 (S.C.C.).

<sup>161</sup> *R. v. Broyles*, [1991] S.C.J. No. 95, 2 S.C.R. 595 (S.C.C.).

<sup>162</sup> *R. v. P. (M.B.)*, [1994] S.C.J. No. 27, [1994] 1 S.C.R. 555 (S.C.C.).

<sup>163</sup> *R. v. B. (S.A.)*, [2003] S.C.J. No. 61, [2003] 2 S.C.R. 678 (S.C.C.). In *R. v. Jones*, [2006] O.J. No. 3315, 41 C.R. (6th) 84 (Ont. C.A.), the principle was held to have no application to routine border crossing screening.

In the context of police interrogation by known officers, the section 7 right to silence is not breached where police interrogators ignore repeated assertions of the right to silence.<sup>164</sup>

The revised common law voluntary confession rule<sup>165</sup> requires that a statement to a person in authority is inadmissible if it is the product of a threat or inducement, not of an operating mind, where oppressive conditions have resulted in involuntariness and if the police conduct would shock the conscience of the community.

The common law normally allows no adverse inference to be drawn from pre-trial silence, otherwise it would be a “snare and delusion” for police to advise of the right to silence.<sup>166</sup>

## 2. Gaps in Protection

Under this complex picture, the main control on police interrogation in custody lies not in the Charter but in the common law confession rule as revised in *Oickle*.<sup>167</sup> I have elsewhere argued that the majority in *Oickle* allowed police too much scope for coercive interrogations.<sup>168</sup>

The recent majority ruling in *Spencer*<sup>169</sup> makes it very clear that the police are to be given considerable leeway to offer inducements to obtain confessions without rendering a statement involuntary. Charged with robbery, the accused was very much concerned with whether his girlfriend would also be charged. The majority see the case as all about promises. Like the dissenters, I see the transcript as all about an implied threat to charge the girlfriend unless Spencer confessed. Yes, the police did not claim to have authority to offer leniency for his girlfriend but they certainly indicated they would speak to the Crown if he confessed. *Spencer* and *Oickle*<sup>170</sup> will encourage police to exploit emotions about possible

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<sup>164</sup> In its recent controversial and stunning ruling in *R. v. Singh*, [2007] S.C.J. No. 48, 2007 SCC 48 (S.C.C.), a 5-4 majority of the Supreme Court did not follow the trend in lower courts: see *R. v. Otis*, [2000] J.Q. no 4320, 37 C.R. (5th) 320 (Que. C.A.), *R. v. Roy*, [2003] O.J. No. 4252, 15 C.R. (6th) 282 (Ont. C.A.); *R. v. K. (C.)*, [2005] O.J. No. 4853, 36 C.R. (6th) 153 (Ont. C.J.) and *R. v. Reader*, [2007] M.J. No. 225, 49 C.R. (6th) 301 (Man. Q.B.).

<sup>165</sup> *R. v. Oickle*, [2000] S.C.J. No. 38, [2000] 2 S.C.R. 3 (S.C.C.).

<sup>166</sup> *R. v. Chambers*, [1990] S.C.J. No. 108, [1990] 2 S.C.R. 1293 (S.C.C.); *R. v. Turcotte*, [2005] S.C.J. No. 51, [2005] 2 S.C.R. 519 (S.C.C.).

<sup>167</sup> *R. v. Oickle*, [2000] S.C.J. No. 38, [2000] 2 S.C.R. 3 (S.C.C.).

<sup>168</sup> See Don Stuart, *Charter Justice in Canadian Criminal Law*, 4th ed. (Scarborough, ON: Thomson Carswell, 2005) at 134-42.

<sup>169</sup> *R. v. Spencer*, [2007] S.C.J. No. 11, 44 C.R. (6th) 199 (S.C.C.).

<sup>170</sup> *R. v. Oickle*, [2000] S.C.J. No. 38, [2000] 2 S.C.R. 3 (S.C.C.).

prosecution against partners. *Oickle* says police may use polygraphs and lie about their accuracy. The Ontario Court of Appeal in *Osmar*<sup>171</sup> found nothing in the Charter or *Oickle* to prevent police to pretend to be members of organized crime (the “Mr. Big” strategy) in their undercover investigations to obtain confessions. *Oickle* has resulted in disturbingly few judicial controls on interrogation.

There are some trial judges who have relied on *Oickle*<sup>172</sup> to exclude confessions on the basis that oppression has produced involuntariness, but they have often felt it necessary to buttress their rulings by also finding a section 7 breach.<sup>173</sup> The resort to section 7 is no longer available given the surprising and disappointing ruling by the 5-4 majority in *Singh*<sup>174</sup> that the section 7 pre-trial right to silence is subsumed by the voluntary confession rule.

In raising issues of right to counsel, right to silence and common law protections, I may be straying from my wide topic of investigative police powers under the Charter. I will rest content with identifying four gaps in the current complex regime:

- (1) Implementation duties in the case of the section 10(b) right to counsel exist only where a detainee knows enough to assert them.
- (2) The presence of a lawyer is required for plea bargain discussions<sup>175</sup> but not for interrogation.
- (3) There is still no section 7 Charter requirement that the accused be advised of the right to silence during custodial interrogation.

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<sup>171</sup> *R. v. Osmar*, [2007] O.J. No. 244, 44 C.R. (6th) 276 (Ont. C.A.).

<sup>172</sup> *R. v. Oickle*, [2000] S.C.J. No. 38, [2000] 2 S.C.R. 3 (S.C.C.).

<sup>173</sup> See recently *R. v. Hammerstrom*, [2006] B.C.J. No. 3188, 43 C.R. (6th) 346 (B.C.S.C.) (police tricked accused that the crime had been videotaped on a store surveillance tape) and, earlier, *R. v. Oliver*, [2001] O.J. No. 5984, 44 C.R. (5th) 89 (Ont. S.C.J.) (conduct of interrogator and silence in face of objective evidence of vulnerability and confusion) and *R. v. N.*, [2005] O.J. No. 357, 28 C.R. (6th) 140 (Ont. S.C.J.) (five-hour polygraph, hostile interrogation and shocking number of tricks). Before *R. v. Oickle*, [2000] S.C.J. No. 38, [2000] 2 S.C.R. 3 (S.C.C.), see, too, *R. v. S. (M.J.)*, [2000] A.J. No. 391, 32 C.R. (5th) 378 (Alta. P.C.) (where Ketchum Prov. Ct. J. excluded a confession in part because the videotape revealed the oppressive atmosphere and psychological brainwashing technique developed using the Reid method pioneered in the United States).

<sup>174</sup> *R. v. Singh*, [2007] S.C.J. No. 48, 2007 SCC 48 (S.C.C.).

<sup>175</sup> *R. v. Burlingham*, [1995] S.C.J. No. 39, [1995] 2 S.C.R. 206 (S.C.C.).

- (4) There is no free-standing discretion, as there is in the United Kingdom,<sup>176</sup> to exclude where police interrogation methods are considered oppressive and not just where they shock the community.

Regulation of police interrogation is one area where Parliament may have achieved a better balance than the courts. Under section 269.1 of the *Criminal Code*,<sup>177</sup> torture is an indictable offence punishable to a maximum of 14 years. Torture is widely defined in section 269.1(2) as “any act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person”.

Further under subsection 269.1(4), a statement obtained by torture is inadmissible in any proceedings over which Parliament has jurisdiction. This may be the vehicle to argue for further checks on police interrogation.

## V. REMEDY OF EXCLUSION FOR CHARTER BREACHES

### 1. Current Test

Conscripted evidence obtained in violation of the Charter, and evidence derived from that evidence, will generally affect the fairness of the trial and should be excluded. This does not require the consideration of the second and third *Collins* factors of seriousness of the violation and affect on the repute of the system unless the Crown establishes that they would have discovered the evidence without the Charter violation.<sup>178</sup>

Non-conscripted evidence requires a consideration of the second and third *Collins* factors of seriousness of the violation and the effect on the repute of the system. There is no automatic inclusion because the evidence is essential to the Crown’s case.<sup>179</sup>

Justice LeBel in his dissenting opinion in *Orbanski* (2005)<sup>180</sup> signalled that the Supreme Court will soon revise its approach to section 24(2). In particular, it is likely that the Court will make it beyond dispute that all

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<sup>176</sup> *Police and Criminal Evidence Act 1984* (U.K.), 1984, c. 60, s. 76(2). Under s. 76(8) oppression “includes torture, inhuman or degrading treatment or the use or threat of violence (whether or not amounting to torture)”.

<sup>177</sup> R.S.C. 1985, c. C-46.

<sup>178</sup> *R. v. Collins*, [1987] S.C.J. No. 15, [1987] 1 S.C.R. 265 (S.C.C.) and *R. v. Stillman*, [1997] S.C.J. No. 34, [1997] 1 S.C.R. 607 (S.C.C.).

<sup>179</sup> *R. v. Buhay*, [2003] S.C.J. No. 30, [2003] 1 S.C.R. 631 (S.C.C.).

<sup>180</sup> *R. v. Orbanski*; *R. v. Elias*, [2005] S.C.J. No. 37, 29 C.R. (6th) 205 (S.C.C.). Fish J. concurred. The majority did not find it necessary to address s. 24(2).

the *Collins*<sup>181</sup> factors must be considered even where the evidence is conscripted. Justice LeBel says the following:

Undoubtedly, the present case is not a proper one for a full-fledged review of the problems surrounding the interpretation and the method of application of s. 24(2), especially in the context of what is a partial dissent. Nevertheless, some general comments appear to be in order, because concerns about a quasi-automatic exclusion of evidence may have an impact on the definition of constitutional rights in the criminal process by Canadian courts.

It is likely that few *Charter* provisions have generated so much academic comment, conflicting jurisprudential developments, media rhetoric or just plain uneasiness as s. 24(2). Since the *Charter* came into force, our Court has returned on many occasions to the interpretation and application of this provision. It has developed and refined methods of analysis and application. Despite all these efforts, doubts and misunderstandings remain. They arise mostly from views which attempt to read into the jurisprudence of our Court the creation of an exclusionary rule in the case of conscriptive evidence.

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The creation and application of a rule, based on a presumption that conscriptive evidence necessarily affects the fairness of a trial, of almost automatic exclusion whenever such evidence is involved might be viewed as a clear and effective method to manage aspects of the criminal trial. Nevertheless, our Court has never adopted such a rule, which could not be reconciled with the structure and the wording of s. 24(2).<sup>182</sup>

There is a growing trend in lower court decisions to rely on the minority opinion in *Orbanski*<sup>183</sup> to require that all three *Collins*<sup>184</sup> factors be examined in every section 24(2) ruling. There is now very strong pressure on the full Supreme Court to conduct a review of its section 24(2) jurisprudence on conscripted evidence and to allow for more discretion.

For one who sees the judicial declaration and enforcement of Charter rights for accused since 1982 as having provided one of the very few real checks to the ever-increasing law-and-order frenzy of politicians of

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<sup>181</sup> *R. v. Collins*, [1987] S.C.J. No. 15, [1987] 1 S.C.R. 265 (S.C.C.).

<sup>182</sup> *R. v. Orbanski*; *R. v. Elias*, [2005] S.C.J. No. 37, 29 C.R. (6th) 205, at paras. 86-87, 98 (S.C.C.).

<sup>183</sup> *R. v. Orbanski*; *R. v. Elias*, [2005] S.C.J. No. 37, 29 C.R. (6th) 205 (S.C.C.).

<sup>184</sup> *R. v. Collins*, [1987] S.C.J. No. 15, [1987] 1 S.C.R. 265 (S.C.C.).

all stripes, talk of a Supreme Court review of the section 24(2) tests is cause for concern and reflection.

## 2. Problems: Conscripted and Discoverability

A review is indeed necessary. The distinction between conscripted and non-conscripted evidence, drawn by the Supreme Court in *Collins*<sup>185</sup> by Lamer C.J.C. as a “matter of personal preference”<sup>186</sup> and re-affirmed by Cory J. in *Stillman*,<sup>187</sup> is not easy to defend nor is it satisfactory. It is not clear why only a conscripted breach affects trial fairness and is necessarily more serious than, for example, a drug squad ransacking a private dwelling without bothering to get a warrant in deliberate violation of section 8. Justice LeBel’s remarks in *Orbanski*<sup>188</sup> are revisionist. For many years the effect of *Stillman* was the drawing of a bright line: conscripted evidence was almost always excluded and non-conscripted evidence almost always included. That reality may have made the task easier for busy trial judges but it was clearly far from what Parliament intended in 1982, given the legislative history and the discretionary wording of section 24(2).

A satisfactory definition of conscription has also proved elusive. In *Stillman*,<sup>189</sup> Cory J. did at one point speak in broad terms of one “compelled to participate in the creation or discovery of the evidence”.<sup>190</sup> Yet, in another breath, he speaks of a category approach of compelled incrimination “by means of a statement, the use of the body or the production of bodily samples”.<sup>191</sup> Courts often now quickly rely on this narrower category approach for definition. Especially when it comes to statements, the results are often puzzling. In the case of statements by accused to police obtained in violation of section 10(b) rights, if there is no issue of voluntariness in what sense can he or she be said to have been compelled? Why does forcing someone to reveal where drugs are stashed result in an unfair trial, whereas police finding the drugs on their own in breach of Charter standards does not? The emphasis on conscription

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<sup>185</sup> *R. v. Collins*, [1987] S.C.J. No. 15, [1987] 1 S.C.R. 265 (S.C.C.).

<sup>186</sup> *R. v. Collins*, [1987] S.C.J. No. 15, [1987] 1 S.C.R. 265, at para. 36 (S.C.C.).

<sup>187</sup> *R. v. Stillman*, [1997] S.C.J. No. 34, [1997] 1 S.C.R. 607 (S.C.C.).

<sup>188</sup> *R. v. Orbanski*; *R. v. Elias*, [2005] S.C.J. No. 37, 29 C.R. (6th) 205 (S.C.C.).

<sup>189</sup> *R. v. Stillman*, [1997] S.C.J. No. 34, [1997] 1 S.C.R. 607 (S.C.C.).

<sup>190</sup> *R. v. Stillman*, [1997] S.C.J. No. 34, [1997] 1 S.C.R. 607, at para. 75 (S.C.C.).

<sup>191</sup> *R. v. Stillman*, [1997] S.C.J. No. 34, [1997] 1 S.C.R. 607, at para. 80 (S.C.C.).

now seems inconsistent with the Supreme Court's view in *B. (S.A.)*<sup>192</sup> that the principle against self-incrimination is a principle of "limited scope".<sup>193</sup> When Binnie J. rethought the section 13 privilege against self-incrimination tests in *Henry*,<sup>194</sup> he limited the use of immunity protection to situations where the accused had been earlier actually compelled to testify.

The so-called doctrine of discoverability set out in *Stillman*<sup>195</sup> allows the second and third *Collins* factors<sup>196</sup> only to be considered in conscripted cases where the police would have found the evidence without violating the Charter. This seems to add an obtuse inquiry and is nonsensical.<sup>197</sup> Why ask this question at all? It is hard to think of any other question of remedy that turns not on the evidence before the court but rather on what might have been the reality. The fact that the police could have found the evidence without violating the Charter surely makes the violation more serious and therefore more likely to result in exclusion. The doctrine would be superfluous if the distinction between conscripted and non-conscripted evidence were to be abandoned.

### 3. Importance of *R. v. Buhay*

Hopefully when the Supreme Court comes to review it will be mindful of, and consistent with, its unanimous decision in *Buhay* (2003).<sup>198</sup> The Supreme Court there made it crystal clear that there are to be no such automatic rules of exclusion or inclusion. Justice Arbour writes for all

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<sup>192</sup> *R. v. B. (S.A.)*, [2003] S.C.J. No. 61, [2003] 2 S.C.R. 678 (S.C.C.). In *R. v. Singh*, [2007] S.C.J. No. 48, 2007 SCC 48 (S.C.C.) Charron J. for the 5-4 majority speaks of the fundamental principle against self-incrimination, then decimates it in her ruling that the s. 7 right to silence is subsumed under the voluntary confession rule.

<sup>193</sup> *R. v. B. (S.A.)*, [2003] S.C.J. No. 61, [2003] 2 S.C.R. 678, at para. 57 (S.C.C.).

<sup>194</sup> *R. v. Henry*, [2005] S.C.J. No. 76, 33 C.R. (6th) 215 (S.C.C.).

<sup>195</sup> *R. v. Stillman*, [1997] S.C.J. No. 34, [1997] 1 S.C.R. 607 (S.C.C.).

<sup>196</sup> *R. v. Collins*, [1987] S.C.J. No. 15, [1987] 1 S.C.R. 265 (S.C.C.).

<sup>197</sup> See further Don Stuart, *Charter Justice in Canadian Criminal Law*, 4th ed. (Scarborough, ON: Thomson Carswell, 2005), at 568-70. In *R. v. Harris*, [2007] O.J. No. 3185, 49 C.R. (6th) 220 (Ont. C.A.), Doherty J.A. comes very close to finding that Harris was the victim of racial profiling in finding that for certain groups proactive policing would be more than minimally intrusive and would indeed be provocative. He also holds that the seriousness of the violation can, in certain cases, trump the factor of seriousness of the offence. His decision to admit the evidence on the basis that the police could have got the evidence lawfully had they relied on their observation of the seatbelt violation is not persuasive. As with any such reliance on the obtuse discoverability doctrine, surely that consideration made the violation more serious and surely any remedy should be based on what actually happened?

<sup>198</sup> *R. v. Buhay*, [2003] S.C.J. No. 30, [2003] 1 S.C.R. 631 (S.C.C.). The *Buhay* principles were re-asserted in *R. v. Mann*, [2004] S.C.J. No. 49, 21 C.R. (6th) 1 (S.C.C.), to exclude evidence obtained in violation of newly declared criteria for investigative detention.

nine justices<sup>199</sup> and provides a tightly reasoned restatement of the current position of the Court respecting exclusion of non-conscripted evidence.

The Supreme Court decided that considerable deference should be given by courts of appeal to determinations by trial judges as to the second and third *Collins*<sup>200</sup> factors of seriousness of the violation and effect on the administration of justice. In the course of consideration of the third factor, Arbour J. writes for the Court, in a passage now frequently relied on, as follows:

Section 24(2) is not an automatic exclusionary rule . . . neither should it become an automatic inclusionary rule when the evidence is non-conscriptive and essential to the Crown's case.<sup>201</sup>

The combined effect of these pronouncements — deference to trial judges and no automatic inclusion — should and has resulted in greater exclusion of non-conscripted evidence.

A survey of Supreme Court and Court of Appeal section 8 cases earlier showed<sup>202</sup> a great reluctance to exclude non-conscripted evidence, especially in drug cases. A much more comprehensive recent survey of 148 section 8 and section 9 rulings, including those of trial judgments,<sup>203</sup> points to a different trend to exclusion in half the cases, even when serious drugs such as crack cocaine were involved. Given that *Buhay*<sup>204</sup> requires deference and that trial judges appear more likely to exclude than appeal courts, *Buhay* should and has led to more exclusion.

Of course, deference is an unruly tool of all courts of appeal. They tend to defer to the trial judge's findings only when so minded to do so! Deference also cuts both ways. Courts of appeal would now also be expected to defer to trial judge rulings not to exclude under section 24(2). However under *Buhay*<sup>205</sup> it should be reversible error to fail to exclude merely because the evidence is essential to the Crown's case. More exclusion is a matter of celebration for those of us who believe that a real risk of exclusion of evidence is the most effective way to give meaning to pre-trial Charter rights of accused.

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<sup>199</sup> Chief Justice McLachlin and Gonthier, Iacobucci, Major, Bastarache, Binnie, LeBel and Deschamps JJ. concurred.

<sup>200</sup> *R. v. Collins*, [1987] S.C.J. No. 15, [1987] 1 S.C.R. 265 (S.C.C.).

<sup>201</sup> *R. v. Buhay*, [2003] S.C.J. No. 30, [2003] 1 S.C.R. 631, at para. 71 (S.C.C.).

<sup>202</sup> See Don Stuart, "Eight Plus Twenty-Four Two Equals Zero" (1998) 13 C.R. (5th) 50.

<sup>203</sup> See Nathan Gorham, "Eight Plus Twenty-Four Two Equals Zero-Point-Five" (2003) 6 C.R. (6th) 257.

<sup>204</sup> *R. v. Buhay*, [2003] S.C.J. No. 30, [2003] 1 S.C.R. 631 (S.C.C.).

<sup>205</sup> *R. v. Buhay*, [2003] S.C.J. No. 30, [2003] 1 S.C.R. 631 (S.C.C.).



Another important aspect of the section 24(2) ruling is that the Court returns to a pronouncement of Sopinka J. in *Kokesch* (1994)<sup>206</sup> that the factor of police good faith requires that the belief be reasonably held. In many respects the *Buhay*<sup>207</sup> judgment is a “Sopinka-fest”, with the Court placing considerable reliance on Sopinka J.’s views expressed when he was on the Court or as co-author of a leading evidence book. Here, Arbour J. was concerned that one officer had demonstrated a “casual attitude”<sup>208</sup> to the accused’s Charter rights and the other “blatant disregard”.<sup>209</sup> This was held not to amount to good faith.

Stephen Coughlan has long maintained that such conduct should not mitigate the seriousness of the violation in such cases, writing that “[M]embers of the public are entitled to expect that police will not be careless about respecting rights”.<sup>210</sup>

Justice Doherty of the Ontario Court of Appeal has held that it is not helpful to label conduct as good or bad faith as: “Police conduct can run the gamut from blameless conduct, through negligent conduct to conduct demonstrating a blatant disregard for Charter rights”<sup>211</sup> and “Police misconduct resulting in a Charter violation can be placed on a continuum ... between the two extremes of a good faith error and a blatant disregard for constitutional rights.”<sup>212</sup>

Recently the British Columbia Court of Appeal in *Washington*<sup>213</sup> wrestled for a year over the question of whether the police had acted in good faith when they conducted a warrantless search of an airport package found by airport authorities to contain drugs. It was agreed that the police action was in clear violation of the Supreme Court’s ruling in *Buhay*<sup>214</sup> that section 8 required a warrant in such circumstances. *Buhay* had been handed down by the Supreme Court six weeks before this police action in British Columbia. Justice Ryan (Lowry J.A. concurring) found that the police had acted in good faith and admitted the evidence.

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<sup>206</sup> *R. v. Kokesch*, [1990] S.C.J. No. 117, [1990] 3 S.C.R. 3 (S.C.C.).

<sup>207</sup> *R. v. Buhay*, [2003] S.C.J. No. 30, [2003] 1 S.C.R. 631 (S.C.C.).

<sup>208</sup> *R. v. Buhay*, [2003] S.C.J. No. 30, [2003] 1 S.C.R. 631, at para. 60 (S.C.C.).

<sup>209</sup> *R. v. Buhay*, [2003] S.C.J. No. 30, [2003] 1 S.C.R. 631, at para. 60 (S.C.C.).

<sup>210</sup> “Annotation to *F.D.*” (2002) 8 C.R. (6th) 156 (Man. C.A.).

<sup>211</sup> *R. v. Kitaitchik*, [2002] O.J. No. 2476, 4 C.R. (6th) 38, at para. 41 (Ont. C.A.), relying on C. Hill. “The Role of Fault in Section 24(2) of the Charter” in J. Cameron, ed., *The Charter’s Impact on the Criminal Justice System* (Scarborough, ON: Carswell, 1996), at 57.

<sup>212</sup> *R. v. Harris*, [2007] O.J. No. 3185, 49 C.R. (6th) 220, at para. 62 (Ont. C.A.).

<sup>213</sup> *R. v. Washington*, [2007] B.C.J. No. 2394 (B.C.C.A.).

<sup>214</sup> *R. v. Buhay*, [2003] S.C.J. No. 30, [2003] 1 S.C.R. 631 (S.C.C.).

Justice Rowles in dissent relied on Supreme Court dicta in *Kokesch*,<sup>215</sup> *Law*<sup>216</sup> and *Buhay* that good faith cannot be found where police made an unreasonable error as to a Charter standard *or* were ignorant of it.

#### 4. *R. v. Grant*: Dangers of Favouring Reliability over Rights

The Ontario Court of Appeal decision *R. v. Grant*<sup>217</sup> points to the dangers that a fully discretionary section 24(2) test may lead to far less exclusion. Now that the Supreme Court has granted leave to appeal this may well be the case for full reconsideration of section 24(2) principles.

Justice Laskin decided for the Court that a young man stopped on the street because he looked “suspicious” and asked questions about his criminal record, had been psychologically detained to trigger and violate the section 9 guarantee against arbitrary detention. The most significant part of the judgment in *Grant*<sup>218</sup> is the decision that, although the evidence of the finding of a loaded gun was conscripted, it should not be excluded under section 24(2).

Justice Laskin seizes on the concurring opinion of LeBel J. in *Orbanski*<sup>219</sup> to indicate that the Supreme Court no longer believes in an automatic or near-automatic exclusion of conscripted evidence found by a Charter breach and that all three *Collins*<sup>220</sup> factors must always be considered. Justice Laskin breaks new ground in deciding that it is appropriate in conscripted cases to look at the degree of trial unfairness. Given the reliability of the evidence and the nature of the police conduct, here the impact on trial fairness was held to lie at the less serious end of trial fairness. It seems odd that a judge can acknowledge that a trial is even somewhat unfair and yet admit the evidence. The problem here is of the Supreme Court’s making in their overinflated use of the phrase “fairness of the trial” to reflect their often disputed view that Charter breaches involving conscripting the accused against himself or herself are always more serious than non-conscriptive Charter breaches.

In his analysis of trial fairness in this case and the second and third *Collins*<sup>221</sup> factors, Laskin J.A. emphasizes the factor of reliability of the

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<sup>215</sup> *R. v. Kokesch*, [1990] S.C.J. No. 117, [1990] 3 S.C.R. 3 (S.C.C.).

<sup>216</sup> *R. v. Law*, [2002] S.C.J. No. 10, [2002] 1 S.C.R. 227 (S.C.C.).

<sup>217</sup> *R. v. Grant*, [2006] O.J. No. 2179, 38 C.R. (6th) 58 (Ont. C.A.).

<sup>218</sup> *R. v. Grant*, [2006] O.J. No. 2179, 38 C.R. (6th) 58 (Ont. C.A.).

<sup>219</sup> *R. v. Orbanski*; *R. v. Elias*, [2005] S.C.J. No. 37, 29 C.R. (6th) 205 (S.C.C.).

<sup>220</sup> *R. v. Collins*, [1987] S.C.J. No. 15, [1987] 1 S.C.R. 265 (S.C.C.).

<sup>221</sup> *R. v. Collins*, [1987] S.C.J. No. 15, [1987] 1 S.C.R. 265 (S.C.C.).

evidence. This focus is not apparent in the Supreme Court of Canada's rulings to exclude non-conscripted evidence of drugs in both *Buhay*<sup>222</sup> and *Mann*,<sup>223</sup> or in the Ontario Court of Appeal decisions by Doherty J.A. to exclude in *Simpson*<sup>224</sup> and *Clayton*.<sup>225</sup> Justice Laskin contrasts cases of statements obtained in violation of section 10(b) which, he says, raise reliability issues.<sup>226</sup> There is, however, a mountain of case law excluding confessions for section 10(b) violations where it was clear the statement was voluntary and therefore there was no issue of reliability. An undue focus on reliability of the evidence and guilt will inevitably substantially reduce Charter guarantees in place to protect both the guilty and the innocent from unlawful State intrusion.<sup>227</sup>

According to Laskin J.A. there was no bad faith and no institutional indifference to individual rights. Given that the Court decided that the stop was in violation of *Mann*<sup>228</sup> and section 9, and that such good faith arguments were not accepted in *Mann* itself, this view is certainly of doubtful authority. Justice Laskin also purports to distinguish *Clayton*<sup>229</sup>

<sup>222</sup> *R. v. Buhay*, [2003] S.C.J. No. 30, [2003] 1 S.C.R. 631 (S.C.C.).

<sup>223</sup> *R. v. Mann*, [2004] S.C.J. No. 49, 21 C.R. (6th) 1 (S.C.C.).

<sup>224</sup> *R. v. Simpson*, [1993] O.J. No. 308, 20 C.R. (4th) 1 (Ont. C.A.).

<sup>225</sup> *R. v. Clayton*, [2005] O.J. No. 1078, 27 C.R. (5th) 197 (Ont. C.A.).

<sup>226</sup> *R. v. Grant*, [2006] O.J. No. 2179, 38 C.R. (6th) 58, at para. 54 (Ont. C.A.).

<sup>227</sup> In *R. v. Davis-Harriot*, [2007] O.J. No. 2481, 49 C.R. (6th) 265 (Ont. S.C.J.), Shaughnessy J. found that the accused had been arrested for dangerous driving but had not been advised of his s. 10(b) rights without delay. He refused to extend *R. v. Suberu*, [2007] O.J. No. 317, 45 C.R. (6th) 47 (Ont. C.A.) to this situation. There were no legitimate police safety concerns and the trial judge had erred in relying on police training methods that conflicted with the Charter. He indicated he would have excluded statements that there was a gun in the back seat but for the decision in *R. v. Grant*, [2006] O.J. No. 2179, 38 C.R. (6th) 58 (Ont. C.A.). Applying *Grant*, he admitted the statements. There was no issue of reliability, no "flagrant abuse", no use of force and no bad faith. In Hill J.'s lengthy judgment in *R. v. Aguirre*, [2006] O.J. No. 5071, 45 C.R. (6th) 323 (Ont. S.C.J.), *Grant* was relied on to admit statements in a sexual predator case where the initial arrest at a school under the provincial *Trespass to Property Act*, R.S.O. 1990, c. T.21 had been in breach of its provisions. In *R. v. Padavattan*, [2007] O.J. No. 2003, 45 C.R. (6th) 405 (Ont. S.C.J.), Ducharme J. greeted *Grant* with enthusiasm and admitted breathalyzer evidence on the basis that the Charter violation in question had been technical. As a result of *Grant*, trial courts now apply a virtually automatic rule of exclusion for guns found following a Charter violation: see *R. v. B. (L.)*, [2007] O.J. No. 3290, 86 O.R. (3d) 730 (Ont. C.A.); *R. v. Beckford*, [2007] O.J. No. 3065 (Ont. S.C.J.); and *R. v. Ismail*, [2007] O.J. No. 3851 (Ont. S.C.J.). Prior to *Grant*, evidence of the finding of a gun was excluded given multiple Charter breaches: *R. v. Barrett*, [2007] O.J. No. 3680 (Ont. S.C.J.). See too recently *R. v. Johnson*, [2007] O.J. No. 5099 (Ont. S.C.J.), Spies J. In other contexts there has been some resistance to *Grant*; see footnote 239.

<sup>228</sup> *R. v. Mann*, [2004] S.C.J. No. 49, 21 C.R. (6th) 1 (S.C.C.).

<sup>229</sup> *R. v. Clayton*, [2007] S.C.J. No. 32, 2007 SCC 32 (S.C.C.).

on the basis that there was no evidence of “systemic or institutional failure, or inadequate training”<sup>230</sup>.

When *Clayton*<sup>231</sup> reached the Supreme Court, the nine justices found no Charter violations, so they did not have to consider the decision to exclude in the court below. However Abella J. for some reason found it necessary to comment on Doherty J.A.’s conclusion that institutional failures of the police to adequately train their officers significantly aggravated the seriousness of the breach. Justice Abella said:

What is under constitutional scrutiny is the police conduct, not police training. The officers’ good faith in carrying out their duties is the issue in this case. To go further and examine the training behind such conduct would risk transforming the inquiry into a protracted pedagogical review of marginal relevance to whether the police conduct itself represented a breach of sufficient severity to warrant excluding the evidence.<sup>232</sup>

Yet, in the next paragraph, Abella J. acknowledges that there was no doubt that police training is important. She was, however, of the view that there was no evidence that the police were the subject of improper training in answering gun calls. Justice Binnie agreed that lack of training was not in issue in this case but he added that Doherty J.A. made an important point. According to Binnie J.:

A *Charter* violation caused by systemic failure would raise greater concerns for the administration of justice than an isolated act of a single misguided police officer.<sup>233</sup>

Professor David Tanovich has expressed concern at the failure of trial counsel in *Grant*<sup>234</sup> and other cases to raise the issue of race.<sup>235</sup> Grant is black. In *Grant*, where there was no real light cast on why the police thought Grant was acting suspiciously, the issue of systemic racism ought to have been addressed at trial and may have affected the analysis as to the violation and remedy.

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<sup>230</sup> *R. v. Grant*, [2006] O.J. No. 2179, 38 C.R. (6th) 58, at para. 63 (Ont. C.A.).

<sup>231</sup> *R. v. Clayton*, [2007] S.C.J. No. 32, 2007 SCC 32 (S.C.C.).

<sup>232</sup> *R. v. Clayton*, [2007] S.C.J. No. 32, 2007 SCC 32, at para. 51 (S.C.C.).

<sup>233</sup> *R. v. Clayton*, [2007] S.C.J. No. 32, 2007 SCC 32, at para. 129 (S.C.C.).

<sup>234</sup> *R. v. Grant*, [2006] O.J. No. 2179, 38 C.R. (6th) 58 (Ont. C.A.).

<sup>235</sup> David Tanovich, “The Further Erasure of Race in *Charter* Cases” (2006) 38 C.R. (6th) 84. In *R. v. L.B.*, [2007] O.J. No. 3290, 86 O.R. (3d) 730 (Ont. C.A.) and *R. v. Harris*, [2007] O.J. No. 3185, 49 C.R. (6th) 220 (Ont. C.A.), the accused were also black but race was not directly mentioned in either case at trial or on appeal.

The general danger of the *Grant*<sup>236</sup> decision is that focusing more on reliability and seriousness of the offence will result in far less exclusion of evidence found following Charter violations. This will considerably diminish the importance of the Charter standards that the courts, and the Supreme Court in particular, have been at pains to put in place since the entrenchment of the Charter in 1982.

Commendably, there is resistance by some trial judges to *Grant*,<sup>237</sup> especially at the level of the provincial courts where the vast majority of criminal trials now occur.<sup>238</sup> Judges at this level of immersion are in the best position to know on a daily basis about whether Charter standards are being applied and what remedy is warranted.

Consider the following two recent provincial court decisions<sup>239</sup> faced with police conduct showing, at best, indifference to Charter standards.

In *Nguyen*,<sup>240</sup> Lane J. held that section 10(b) right to counsel had been breached. Police did not inform an accused of rights following a roadside test demand where there was a reasonable opportunity of consulting a lawyer during a 34-minute delay in administering the test. His section 10(a) right to be informed of the reason for his arrest had also been breached as the accused had not been advised as to the reason for the administrative detention following the demand for a roadside test.

Justice Lane was fully aware of *Grant*<sup>241</sup> and indeed applied it on the issue of detention. But she held that in this case the evidence should be excluded under section 24(2). The fairness of the trial was affected by the 34-minute delay. The Charter breaches were serious. It was disturbing that an experienced officer did not appreciate the Charter rights involved. The breaches raised concerns about the quality of

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<sup>236</sup> *R. v. Grant*, [2006] O.J. No. 2179, 38 C.R. (6th) 58 (Ont. C.A.).

<sup>237</sup> *R. v. Grant*, [2006] O.J. No. 2179, 38 C.R. (6th) 58 (Ont. C.A.).

<sup>238</sup> Cheryl Webster & Anthony Doob, "The Superior/Provincial Criminal Court Distinction: Historical Anachronism or Empirical Reality?" (2003) 48 *Crim. L.Q.* 77.

<sup>239</sup> See, too, decisions to exclude in *R. v. Herter*, [2006] A.J. No. 1058, 40 C.R. (6th) 349 (Alta. Prov. Ct.), rev'd [2007] A.J. No. 1498 (Alta. Q.B.) (motorist not advised of reason for detention under s. 10(a) where this was easy to do and detained in "drunk tank" for eight hours because he was uncooperative); *R. v. Payne*, [2006] N.J. No. 259, 41 C.R. (6th) 234 (N.L.S.C. (T.D.)) (arrest of murder suspect and seizure of blood-stained clothing in violation of ss. 8 and 9 where police could reasonably have been expected to have knowledge of extent of powers); *R. v. Champion*, [2007] O.J. No. 4180 (Ont. C.J.) (breathalyzer where s. 10(b) right to consult lawyer in private breached); and *R. v. Williams*, [2007] O.J. No. 4305 (Ont. S.C.J.) (marijuana and crack cocaine found by confronting a known drug dealer in the street in violation of ss. 8 and 9).

<sup>240</sup> *R. v. Nguyen*, [2007] O.J. No. 1201, 45 C.R. (6th) 276 (Ont. C.J.).

<sup>241</sup> *R. v. Grant*, [2006] O.J. No. 2179, 38 C.R. (6th) 58 (Ont. C.A.).

education and training provided to OPP officers, and the extent to which misunderstandings of section 10(a) and (b) rights might be a systemic problem. They also raised concerns about the extent to which efficiency and expediency prevail over fundamental Charter rights of detained persons, especially those persons who are not taken into custody and released at the scene. The admission of the evidence of the 34-minute delay would bring the administration of justice into greater disrepute than would the exclusion of the evidence.

Justice Lane concluded with strong words:

[T]he admission of the evidence of the 34-minute delay would bring the administration of justice into greater disrepute than would the exclusion of the evidence. To paraphrase my brother Brophy in *R. v. Wegener*, [2006] O.J. No. 5280 at para. 54, not to exclude the evidence would be to effectively say that s. 10(a) and (b) rights do not matter, that police need not implement them, “because the drinking and driving problem in our society is of such a nature that the *Collins* test will allow you a free pass.” The courts, as guardians of process values, must be vigilant to ensure that basic Charter rights are recognized and implemented throughout the justice system. For the long-term good of the system, I find that the evidence should be excluded.<sup>242</sup>

In *D. (J.)*<sup>243</sup> Jones J., sitting as a Youth Court judge, decided that a stop of a youth late one cold night on a Toronto street for a CPIC check as proactive policing in a high crime area constituted arbitrary detention contrary to section 9. This did not meet the *Mann*<sup>244</sup> requirement for investigative detention of a reasonable ground to connect the person to a specific crime.<sup>245</sup> Section 8 had also been violated. Justice Jones decided in no uncertain terms that the evidence against J.D. of a replica gun and burglary tools found in violation of sections 8 and 9 should be excluded. The evidence was conscripted and derived from conscripted evidence not otherwise discoverable. Although the evidence of the weapon and burglary tools was reliable, all the evidence had to be excluded because

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<sup>242</sup> *R. v. Nguyen*, [2007] O.J. No. 1201, 45 C.R. (6th) 276 (Ont. C.A.), at para. 50 (S.C.C.).

<sup>243</sup> *R. v. D. (J.)*, [2007] O.J. No. 1365, 45 C.R. (6th) 292 (Ont. C.J.). Earlier in *R. v. V. (S.)*, [2005] O.J. No. 4098, 32 C.R. (6th) 389 (Ont. C.J.), Cole J. identified institutional problems of Toronto police not having received training as to the limits *R. v. Mann*, [2004] S.C.J. No. 49, 21 C.R. (6th) 1 (S.C.C.) had imposed on their powers to question youth.

<sup>244</sup> *R. v. Mann*, [2004] S.C.J. No. 49, 21 C.R. (6th) 1 (S.C.C.).

<sup>245</sup> According to Jones J., there was no arbitrary detention of another youth stopped at the same time because after the stop a police officer recognized him as one possibly out on a robbery bail. It is difficult to see why this *ex post facto* reason for interest meant there was no s. 9 violation in the stop in the case of that youth as well.

the section 9 violation was wilful and serious. It arose in a context of institutional indifference to individual rights. The blatant disregard for Charter rights could only be the result of inadequate police training. Proactive policing must not become a euphemism for institutionalized, unconstitutional police conduct designed to remove undesirables from the street in high crime areas. The Court had to be mindful of the potential impact of proactive policing on the constitutional rights of the indeterminate number of young people subjected to the same arbitrary detention and questioning in the name of this police initiative.

In the course of her judgment, Jones J. quoted the view of Laforme J., now of our Ontario Court of Appeal, in *Ferdinand* (2004).<sup>246</sup>

It needs repeating once gain: stopping and investigating people merely because of some “Spidey sense” being engaged goes far beyond the standards our society demands and expects of our police. Young people have the right to “just hang out” especially in their neighbourhood and to move freely without fear of being detained and searched on a mere whim, and without being advised of their rights, and without their consent. Mere hunches do not give the police the grounds to “surprise” a group of young people or to “get right on them” for investigative purposes without something further that provides a lawful basis for doing so.<sup>247</sup>

## 5. Reform Options

Only one justice of the *Stillman*<sup>248</sup> court remains on the court — McLachlin C.J.C. It may well be that she will lead her Court to make it clear that the factor of seriousness of the violation is the key and must always be considered. Hopefully the newly composed Court will not find favour with the lonely vision of Justice L’Heureux-Dubé in her dissent in *Burlingham*.<sup>249</sup> She advocated a return to a stress on the reliability of evidence of guilt and a test that exclusion would be rare and only where the community would be shocked. If she had had her way, years of careful development of Charter rights for accused would have been reduced to nothing significant.

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<sup>246</sup> *R. v. Ferdinand*, [2004] O.J. No. 3209, 21 C.R. (6th) 65, at 77-78 (Ont. S.C.J.).

<sup>247</sup> *R. v. D. (J.)*, [2007] O.J. No. 1365, 45 C.R. (6th) 292, at para. 86 (Ont. C.J.).

<sup>248</sup> *R. v. Stillman*, [1997] S.C.J. No. 34, [1997] 1 S.C.R. 607 (S.C.C.).

<sup>249</sup> *R. v. Burlingham*, [1995] S.C.J. No. 39, [1995] 2 S.C.R. 206 (S.C.C.).

Michael Davies<sup>250</sup> supports the earlier approach of the New Zealand Court of Appeal in *Goodwin*<sup>251</sup> which asserted the rights-centred approach of *prima facie* exclusion even though New Zealand's Bill of Rights<sup>252</sup> has no express remedy of exclusion of evidence. A presumption of exclusion was recently advocated by David Ormerod<sup>253</sup> for British courts interpreting European Convention of Human Rights provisions. The wording of our section 24(2) is, however, based on a presumption of admissibility, which appears to preclude any such approach being adopted in Canada.

Professor Steven Penney<sup>254</sup> may have the most intellectually honest model in suggesting that the Supreme Court abandon the distinction between conscripted and non-conscripted evidence, adopt the view that deterrence is the only valid aim of exclusion and mandate a "bright line rule mandating exclusion for all but reasonable, inadvertent infringements".<sup>255</sup>

James Stribopoulos,<sup>256</sup> however, points to the shortfalls in the United States jurisprudence in making deterrence the only goal of the exclusionary rule. He sees a need to continue to maintain the goal of judicial integrity in sanctioning unlawful police practices.

In contrast, Richard Fraser and Jennifer Addison<sup>257</sup> go so far as to suggest Parliament use the notwithstanding clause to stop the Supreme Court excluding "reliable and pivotal evidence" under section 24(2). Their exclusive focus on evidence of guilt is out of step with a system of entrenched rights of those accused of crime and effective remedies for breach, and the worldwide trend to recognize a discretion to exclude evidence obtained by police in violation of declared standards. What of

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<sup>250</sup> "Alternative Approaches to the Exclusion of Evidence under s. 24(2) of the Charter" (2002) 46 *Crim. L.Q.* 21.

<sup>251</sup> *R. v. Goodwin*, [1993] 2 N.Z.L.R. 153 (C.A.). The Court, however, reversed itself in *R. v. Shaheed*, [2002] 2 N.Z.L.R. 377 (C.A.).

<sup>252</sup> *New Zealand Bill of Rights Act 1990* (N.Z.), 1990/109.

<sup>253</sup> "ECHR and the Exclusion of Evidence: Trial Remedies for Article 8 Breaches" (2003) *Crim. L. Rev.* 61.

<sup>254</sup> "Taking Deterrence Seriously: Excluding Unconstitutionally Obtained Evidence under Section 24(2) of the Charter" (2004) 49 *McGill L.J.* 105.

<sup>255</sup> "Taking Deterrence Seriously; Excluding Unconstitutionally Obtained Evidence under Section 24(2) of the Charter" (2004) 49 *McGill L.J.* 105, at 143.

<sup>256</sup> "Lessons from the Pupil: A Canadian Solution to the American Exclusionary Rule Debate" (1999) *B. C. Int'l. & Comp. L. Rev.* 81, at 138.

<sup>257</sup> "What's Truth Got to Do With It? The Supreme Court of Canada and Section 24(2)" (2004) 29 *Queen's L.J.* 823.



the truth of abusive police practices? Does the State end always justify the means?

## 6. Revise Criteria to Emphasize Seriousness of Breach as Key

The approach under section 24(2) should be discretionary in all cases as the drafters of the Charter intended. For reasons expressed earlier, the Supreme Court should abandon the distinction between conscripted and non-conscripted evidence and the doctrine of discoverability.

It is one thing to call for a discretionary exercise, as section 24(2) was clearly intended to be. However there are dangers in “proportionality”<sup>258</sup> if this comes down to balancing the seriousness of the violation and the seriousness of the offence. A criminal trial under an entrenched charter of rights for accused has to concern itself with the truth of police abuse and not just the truth of the guilt of the accused. Were the remedy of exclusion to turn on the seriousness of the offence, the Charter will cease to provide protection whenever the judge decides the offence is serious, and in such cases the police end will always justify the means. Charter standards for policing must be applied to all offences. There cannot be a *de facto* two-tier system where one is a “Charter-free zone”.

Justice Berger of the Alberta Court of Appeal recently put this well in his dissenting opinion in *Calder*:<sup>259</sup>

Section 24(2) of the *Charter* contemplates an analysis premised upon the reasonable person, dispassionate and fully apprised of the circumstances of the case. The Court is obliged to balance the community’s natural condemnation of crime against Canadian society’s desire that our fundamental rights and freedoms be upheld and that the police conduct themselves in good faith. That balancing takes place regardless of whether the crime is minor or serious.<sup>260</sup>

The majority in *Calder* held that despite findings of serious police misconduct contrary to the Charter, the evidence should be admitted because the drug arrest at a public event attended by hundreds had led to the discovery of a loaded rifle. Public safety concerns about firearms overrode the findings of police misconduct. That view is similar to the

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<sup>258</sup> David Paciocco, *Getting Away with Murder: The Canadian Criminal Justice System* (Toronto: Irwin Law, 1999), at 172-73.

<sup>259</sup> *R. v. Calder*, [2006] A.J. No. 1303, 42 C.R. (6th) 397 (Alta. C.A.).

<sup>260</sup> *R. v. Calder*, [2006] A.J. No. 1303, 42 C.R. (6th) 397, at para. 22 (Alta. C.A.), relying on Sopinka J. in *R. v. Feeney*, [1997] S.C.J. No. 49, [1997] 2 S.C.R. 13, at 69-70 (S.C.C.) and Iacobucci J. in *R. v. Burlingham*, [1995] S.C.J. No. 39, [1995] 2 S.C.R. 206, at 242 (S.C.C.).

ruling of the Ontario Court of Appeal in *Grant*<sup>261</sup> and *B. (L.)*.<sup>262</sup> In *B. (L.)*, Moldaver J.A. did not have to consider section 24(2) since he found no Charter violation. But he indicates that exclusion should only be for egregious police behaviour and that “most Canadians” would not countenance not having a trial on the merits for one found with a gun. This is a test that exclusion should be rare and only when the community would be shocked. In the Supreme Court, the only support for that position lies in L’Heureux-Dubé J.’s dissenting opinion in *Burlingham*.<sup>263</sup>

The remedy of exclusion has proved to be an important vehicle to hold agents of the State indirectly accountable and to seek to persuade police to comply with Charter standards in future cases. The remedy of exclusion will only be effective if there is in reality a real risk of exclusion. Where there are patterns of inclusion despite police breaches, there will be less incentive for police to take the Charter seriously. Those preferring alternative remedies, such as civil suits and police complaints procedures, now bear a heavy burden of demonstrating their comparative efficacy. They have thus far proved to be a poor and low-visibility response to systemic problems of police abuse or ignorance of their powers. Police are rarely, if ever, disciplined for Charter breaches which uncover evidence of criminality. Civil litigation is expensive, rarely successful<sup>264</sup> and highly unlikely where the accused is in prison.<sup>265</sup>

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<sup>261</sup> *R. v. Grant*, [2006] O.J. No. 2179, 38 C.R. (6th) 58 (Ont. C.A.).

<sup>262</sup> *R. v. B. (L.)*, [2007] O.J. No. 3290, 86 O.R. (3d) 730 (Ont. C.A.).

<sup>263</sup> *R. v. Burlingham*, [1995] S.C.J. No. 39, [1995] 2 S.C.R. 206 (S.C.C.).

<sup>264</sup> A Vancouver police officer recovered compensation from the RCMP for two unlawful vehicle stops by Texas troopers acting on a joint training exercise with the RCMP to identify suspicious profiles called “Pipeline Convoy”. His vehicle was searched because “his eyelashes were fluttering and his eyes were flashing”. Nothing was found. See CBC news, online: <<http://www.cbc.ca/canada/story/2005/01/28/texas-bc050128.html>>.

In *Nassiah v. Peel Regional Police Services Board*, [2007] O.H.R.T.D. No. 14, the Ontario Human Rights Tribunal awarded a woman \$20,000 in damages for racial profiling held to be racial discrimination contrary to the *Human Rights Code*, R.S.O. 1990, c. H.19. In February 2003, an officer responded to an allegation by a Sears store detective that Ms. Nassiah, a black woman, had shoplifted an item worth less than \$10. She repeatedly denied the claim but was submitted to two body searches before she was released even though a store videotape showed her to be innocent. On May 11, 2007, the Tribunal found that the officer had subjected her to a more intensive, suspicious and prolonged investigation because of her race. He had stereotypically assumed that she might not speak English and had called her a “fucking foreigner” during the investigation.

<sup>265</sup> See *Peart v. Peel Regional Police Services Board*, [2006] O.J. No. 4457, 43 C.R. (6th) 175 (Ont. C.A.), respecting racial profiling, where the Court refused to reverse the burden of proof. See, too, the Ontario Court of Appeal’s rulings that a constitutional tort requires proof of a wilful breach: *Ferri v. Ontario (Attorney General)*, [2007] O.J. No. 397 (Ont. C.A.) and *Hawley v. Bapoo*, [2007] O.J. No. 2695 (Ont. C.A.). In contrast, in *Hill v. Hamilton-Wentworth Regional Police Services Board*, [2007] S.C.J. No. 41, 2007 S.C.C. 41 (S.C.C.), a 6-3 majority of the Supreme Court recognized the tort of negligent investigation.

The Court should stand back and consider lessons from the previously overwhelming trend to include non-conscripted evidence. It should declare that the seriousness of the violation is the key factor and that taking entrenched Charter rights for accused seriously requires the real risk of exclusion of evidence obtained for serious violations of the Charter even if the evidence is reliable and probative, and even if the offence is serious. Consistent with its approach in *Buhay*<sup>266</sup> to non-conscripted cases, the Supreme Court should declare that there must be no automatic inclusion based on the fact that the evidence was reliable and probative and/or essential to the Crown's case.

In considering the section 24(2) remedy, courts must be concerned with the long-term integrity of the justice system if Charter standards for accused are ignored and/or operate unequally against vulnerable groups, such as those of colour and young persons. There is certainly important evidence in lower court rulings of systemic Charter disregard by the police in their established proactive tactics invoked against youth and persons of colour. The Charter is in place to try to ensure minorities are fairly treated by the State.

The Supreme Court should state more clearly than it did in *Buhay*<sup>267</sup> that a Charter breach will be considered serious where the police have shown wilful or negligent disregard of those standards and that police misperception or ignorance of Charter standards should only mitigate the breach where they have shown due diligence in their attempt to comply. The Court should disavow the utility of labels such as good or bad faith or flagrant, which have proved troublesome.

## VI. CONCLUSION

Generally speaking, the courts have done a reasonably good job in setting out Charter standards for the police which try to balance civil liberties and the need for effective police powers. They have, in general, achieved a reasonable balance comparatively free of the law-and-order politics that dominates Parliament.

The Charter as interpreted by our courts is certainly no panacea. Sometimes the standards have been set too low. There are also unmistakable signs of law and order interpretations creeping into Charter jurisprudence and diminishing Charter standards. It has been suggested

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<sup>266</sup> *R. v. Buhay*, [2003] S.C.J. No. 30, [2003] 1 S.C.R. 631 (S.C.C.).

<sup>267</sup> *R. v. Buhay*, [2003] S.C.J. No. 30, [2003] 1 S.C.R. 631 (S.C.C.).

that the Supreme Court reconsider its approaches in a number of areas, such as the triggering devices of “reasonable expectation of privacy” for section 8 and “detention” for sections 9 and 10. The Court should revisit the issue of section 10(b) and right to silence protections particularly in the context of custodial interrogation. Perhaps, most importantly, the Court should announce a revised set of criteria for the exclusion of evidence under section 24(2) to make it clear that the seriousness of the violation is determinative and not the reliability of the evidence or the seriousness of the offence.

Hopefully, our courts and the new look Supreme Court in particular will continue to be independent in asserting what Dickson C.J.C. saw as the important role of “guardians of the Charter”. If so, in these times of law and order and public security hype, our criminal justice system will remain one which balances and respects minority rights of all Canadians, including those of the accused.

