

IN THE SUPREME COURT OF CANADA
(On appeal from the Court of Appeal for Ontario)

B E T W E E N:

BRADLEY HARRISON

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

APPELLANT'S FACTUM

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Court File No. C32487

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PART I-STATEMENT OF FACTS

OVERVIEW

1. Mr. Harrison was arbitrarily stopped while driving on a highway because he was “suspiciously” driving within the posted speed limit. Although the police officer initially was of the view that there had been a traffic violation before the stop, the police officer knew that in fact no traffic violation had been committed and that he had no grounds to stop the vehicle. When asked by the trial judge why he continued with the stop in the absence of any grounds whatsoever, the officer testified that having started his police lights, it would undermine the integrity of the police in the eyes of the public if he discontinued the unlawful stop. After arresting the Appellant for driving while under suspension, the police officer searched the vehicle, starting with the trunk, ostensibly to locate the Appellant’s missing driver’s licence. The officer testified that while the licence was not evidence, he wanted to search the vehicle so that he could mail the licence back to the Ministry of Transportation. The trial judge made the following findings: that the police officer had stopped Mr. Harrison without any lawful authority, that the officer knew that he did not have reasonable and probable grounds to stop the car, that the police officer had flagrantly and brazenly disregarded constitutional rights, that the search of the car was unreasonable and without lawful authority, that the officer had searched the vehicle on the false premise that he was looking for the Appellant’s license, that the conduct of the officer was not in good faith and that the police officer had intentionally misled the court while testifying. The conduct of the officer was found by the trial judge to be “blatant”, “flagrant”, and “defying credibility”. Every conceivable negative factual finding about the nature of the breach, the seriousness of the breach and the credibility of the police officer was

10 made by the trial judge. The multiple constitutional violations by the officer, however, were very fruitful-77 pounds of cocaine were located in two sealed boxes in the trunk of the vehicle.

2. The trial judge found the breaches to be extremely serious. In two paragraphs, he considered whether the administration of justice would be brought into disrepute by the admission of the evidence. Having noted only the seriousness of the drug offence and the importance of the evidence to the Crown's case, the trial judge balanced the conduct of the police officer as against that of the Appellant. He concluded that although the officer's behaviour in conducting the detention and search was as brazen as his explanation for his actions in court, it "pale(d) in comparison" to the criminal conduct of the Appellant. Both the trial judge
20 and the majority of the Court of Appeal relied on the seriousness of the offence alone, to the virtual exclusion of all other factors, to justify the admission of the evidence. Madam Justice Cronk vigorously dissented.

3. The approach to s.24(2) advanced by the majority is inconsistent with this Honourable Court's jurisprudence. The seriousness of the offence, alone, should not be the predominant or overriding consideration. The inquiry under s.24(2) is not a question of whose conduct is worse, the police or the accused. The effect of this approach is that the seriousness of the offence will virtually trump all other considerations even in the face of a finding of flagrant disregard for constitutional rights. An individual accused of a crime will always lose such a popularity
30 contest. In the result, s.24(2) will have no application to real evidence in serious offences. Such an approach to s.24(2) will lead to the Orwellian result that while the *Charter* theoretically applies equally to all, it will apply to some more equally than others. The result, if the approach of the majority of the Court of Appeal is adopted, is the exemption of those charged with serious offences from *Charter* protection.

4. While s.24(2) is not an automatic exclusionary rule, neither is it an automatic inclusionary rule where the evidence is real and the offence is serious. Judicial condonation of serious and flagrant constitutional breaches has significant long-term effects on the administration of justice and invites police officers to ignore constitutional restraints with
40 impunity in the investigation of serious offences. This, in turn, will reduce constitutional

10 protection for all offences. Section 24(2) should not be minimized so as to “reduce the *Canadian Charter of Freedoms* to a Petty Thieves’ Bill of Rights”.

Michael Davies, *Alternative Approaches to the Exclusion of Evidence under s.24(2) of the Charter* (2002), 46 Crim. L.Q. 21 at 28

THE FACTS

5. The Appellant and Sean Friesen were jointly tried on one count of trafficking in cocaine. At the end of the Crown’s case, Mr. Friesen successfully brought a motion for a directed verdict¹ and accordingly, only the Appellant was convicted.

20

6. On October 24, 2004, at approximately 4 pm, the Appellant and Mr. Friesen were driving a red Dodge Durango on Highway 11 in Kenogami in an area that is frequented by cottagers. The rental agreement was in Mr. Friesen’s name. Both Mr. Friesen and the Appellant were sharing driving duties and storing their luggage. At the time of the stop, the Appellant was driving. Cst. Bertoncello testified that as the vehicle passed him, he noted that there was a missing front licence plate. He activated his police lights and turned to stop the vehicle. When he observed the back licence plate of the vehicle, Cst. Bertoncello noted that the vehicle was from Alberta where no front vehicle plate is required. Before completing the stop, Cst. Bertoncello admitted that he was fully aware that the absence of the front licence plate did not

30 constitute any offence under the *Highway Traffic Act*, R.S.O. 1990, c.H.8. At the time that the officer decided to continue the stop, he knew that there was absolutely no lawful basis for stopping the vehicle.

Appellant’s Record, Volume 2 Evidence of P.C. Bertoncello, p. 106, l. 23 to p. 107, l. 16; p. 129, l. 25 to p. 130, l. 8; p. 161, ll. 5-8; p. 164, ll. 5-7

7. Cst. Bertoncello conducted a computer check and determined that the vehicle had been rented in Vancouver three days earlier. Notwithstanding the absence of any grounds to continue with the stop, Cst. Bertoncello claimed his suspicions were aroused because rental vehicles “are commonly used through members of organized crime, drug traffickers”. The trial judge found as

40 a fact that this was “wild speculation”. In addition, Cst. Bertoncello testified that the fact that the

¹ Mr. Friesen successfully argued that the rental agreement in his name was hearsay. Having excluded the rental agreement, the trial judge concluded that the Crown could not prove possession in respect of Mr. Friesen and thereby acquitted him.

10 Appellant was driving the posted speed limit on a highway in the afternoon was “suspicious” because “it’s very rarely that you get somebody driving directly on the speed limit”.

Appellant’s Record, Volume 2 Evidence of P.C. Bertoncello, p. 107, ll. 23-30; p. 129, ll. 3-5; p. 131, ll. 6-10

8. When asked by the trial judge why he would stop a vehicle that was driving within the speed limit and had broken no laws, Cst. Bertoncello testified that having already activated his police lights in the view of other vehicles, police “integrity” in the eyes of the public would be undermined if he deactivated the lights. The integrity of the police, therefore, would be better served, in Cst. Bertoncello’s view, by stopping a law-abiding citizen with absolutely no grounds rather than to simply turn his roof lights off. He further attempted to justify the stop on the basis
20 that the vehicle was a rental and finally “just to complete the traffic stop”. The trial judge found as a fact that the officer’s concern about other motorists’ perception of the integrity of the police could “in no way constitute reasonable grounds” for the detention. In argument, Crown counsel at trial conceded that the stop was “absolutely arbitrary” and that the reasons provided by the officer were not reasonable.

Appellant’s Record, Volume 2 Evidence of P.C. Bertoncello, p. 170, ll. 3-20
Submissions of Crown Counsel, p. 200, l. 22 to p. 201, l. 30

9. Cst. Bertoncello told the Appellant that he had been stopped because the vehicle did not have a front license plate notwithstanding that he knew this was not a traffic offence. He asked
30 for the registration, insurance, rental agreement and licence. The Appellant was able to produce all the documents but after searching around in his pockets, was unable to produce his licence. He identified himself verbally and provided his date of birth. Cst. Bertoncello questioned the Appellant during which the Appellant readily admitted that his license was suspended one-week earlier. Before conducting a computer check, he questioned Mr. Friesen and the Appellant separately because he was suspicious about drug activity. Mr. Friesen indicated that he had met the Appellant through a friend in Vancouver for a year or more. The Appellant indicated that he had met the Appellant through a friend in Vancouver and had known him for several months. A computer check confirmed the Appellant had been truthful about his name and the fact that indeed his licence had been suspended one week earlier as a result of missed support payments.
40 Mr. Friesen produced a valid driver’s licence.

Appellant’s Record, Volume 2 Evidence of P.C. Bertoncello, p. 108, ll. 3-6; p. 110, ll. 18-25; p. 113, ll. 5-19; p. 132, l. 20 to p. 133 l.3

10 10. It was evident throughout his testimony that from the outset, Cst. Bertoncello was intent on investigating a drug offence. Cst. Bertoncello testified that he had recently taken a “drug interdiction course” and that, as taught in the course, the vehicle had a “lived in look” because there were coffee cups, an A&W paper bag and a Tim Horton’s box. The vehicle was also messy. Cst. Bertoncello made these notations in his notebook before the Appellant was under arrest for driving while suspended.

Appellant’s Record, Volume 2 Evidence of P.C. Bertoncello, p. 109, l. 25 to p. 110, l. 4; p. 111, ll. 20-25; p. 133, ll. 24-25

20 11. Rather than issue a summons, the police officer decided to arrest the Appellant and detained him in the police cruiser. Cst. Bertoncello advised the Appellant that he would be searching the vehicle “incident to arrest” to locate the missing licence. Mr. Friesen was removed from the vehicle. Two other police cruisers arrived on scene to assist with the search of the vehicle for the licence. According to Cst. Bertoncello, while he knew that the license had absolutely no evidentiary value to the charge of driving while under suspension, he thought it would be a good idea to find it and turn it over to the Ministry of Transportation. This was the sole basis offered by the police officer for the search of the vehicle.

Appellant’s Record, Volume 2 Evidence of P.C. Bertoncello, p. 108, l. 3 to p. 109, l. 5; p. 114, ll. 10-13; p. 137, ll. 8-20; p. 140, ll. 4-15; p. 142, l. 28 to p. 146, l. 2; p. 157, ll. 8-16; p. 162, ll. 10-30

30 12. Cst. Bertoncello conceded that he did not have reasonable grounds to obtain a search warrant to search for drugs or weapons nor did he attempt to obtain the consent of either the Appellant or Mr. Friesen to search the vehicle.

Appellant’s Record, Volume 2 Evidence of P.C. Bertoncello, p. 148, ll. 13-25

40 13. Cst. Bertoncello admitted that he was suspicious about a possibility that there were drugs, weapons or cash in the vehicle. In cross-examination, he admitted that these issues were always in the back of his mind before and during the search. He ultimately conceded that he was in fact also searching for drugs and weapons. This was borne out by the officer’s conduct. At no time did he ask the Appellant where he kept his wallet or to identify his jacket or his luggage. The only question asked was whether there were drugs or weapons in the vehicle. The trial judge utterly rejected, as he was entitled to do, the police officer’s claim that he was truly searching boxes in the trunk of the vehicle for the driver’s licence. He concluded that Cst. Bertoncello’s

10 “avowed purpose for the search was certainly not reasonable”.

Appellant’s Record, Volume 1 Trial Judge’s Ruling on *Charter* Motion, p. 13, l. 14-15
Appellant’s Record, Volume 2 Evidence of P.C. Bertoncello, p. 145, l. 18 to p. 147, l. 25

14. Although the Appellant’s jacket and bag were in the back seat of the vehicle, Cst. Bertoncello did not consider first searching them in his search for the driver’s licence. In fact, the Appellant’s license was ultimately found in his coat pocket in the rear seat. Rather, Cst. Bertoncello accompanied by the two other police officers, went to the trunk of the vehicle where they observed two cardboard boxes and two duffle bags. The police first searched a duffle bag that was identified as Mr. Friesen as his own. Mr. Friesen was asked whether there were drugs
20 or weapons in the vehicle and he indicated that there was not. Mr. Friesen was asked what was in the boxes and he advised that they contained dishes and other items from his mother. Cst. Bertoncello asked him what was in the boxes and Mr. Friesen said he was not sure. The two boxes were taped and had a piece of cardboard over the handles so that you could not see inside. Cst. Bertoncello testified that this raised his suspicion as it is “not a normal thing when transporting dishes or anything”. He further maintained that he continued his search for the licence in the boxes because “it could be anywhere” and he has found licences in “a lot of odd spots”. The boxes were moved and appeared to be heavy. The two sealed boxes were opened, searched and found to contain 77 lbs of cocaine. Neither the Appellant’s fingerprints nor Mr. Friesen’s were located on the packages. The Appellant was arrested for trafficking in cocaine.
30 After his arrest, the Appellant indicated that he did not know about the cocaine and that the boxes were from Freisen.

Appellant’s Record, Volume 2 Evidence of P.C. Bertoncello, p. 117, ll. 15-30; p. 118, ll.16-21; p. 120, ll. 3-5; p. 151, ll. 25-29; p. 153, ll. 8-15; Comments of Crown Counsel, p. 234, ll. 18-25

TRIAL JUDGE’S RULING

15. The trial judge concluded that the stop of the vehicle and the detention of the Appellant violated s.9 of the *Charter*. In addition, the trial judge concluded that the warrantless search of
40 the vehicle was without reasonable cause, not a valid search incident to arrest and accordingly, violated s.8 of the *Charter*. The trial judge found that the officer’s explanations for stopping the vehicle and detaining the two accused “are contrived and defy credibility.” With respect to the officer’s assertion that the search was for the purpose of locating the Appellant’s licence, the trial judge concluded that it was “contrived, and that the officer’s main and probably only real

10 intention was to look for drugs”. With respect to s.9 of the *Charter*, the trial judge concluded that the stop was arbitrary as there were no reasonable grounds to suspect criminal activity, the suspicion that the driver might be suspended was “wild speculation” and the claim that it was necessary to continue the unlawful stop to maintain the integrity of the police could “in no way constitute reasonable grounds”. With respect to s.8 of the *Charter*, the trial judge rejected the claim that there was a basis to seize the licence and concluded that after “having had the benefit of hearing the officer’s testimony, I can attach little credibility to his explanation”. The trial judge held that the search was not truly incidental to arrest and there were no reasonable and probable grounds to conduct the search.

20 Appellant’s Record, Volume 1 Trial Judge’s Ruling on *Voir Dire*, p. 6, ll. 35-37; p. 8, ll. 8-18; p. 9, ll. 28-35; p. 11, l. 38 to p. 12, l. 11

16. Both at trial and appeal, counsel agreed that the fairness of the trial would not be implicated as the evidence was not conscriptive. The sole issues, therefore, were the seriousness of the breach and whether the admission of the evidence would bring the administration of justice into disrepute.

17. With respect to the seriousness of the breach, the trial judge concluded that the conduct of the officer was not born of “error or ignorance” and that his intention was to take whatever steps were necessary to determine whether his suspicions about drugs were correct. The trial judge
30 concluded that the officer’s actions “can only be described as brazen and flagrant”. The trial judge further rejected a finding of good faith, that the officer was merely being careless or acting on an honest but mistaken belief. He further found that there was a blatant disregard of *Charter* rights and accordingly, that the breaches were “extremely serious”.

Appellant’s Record, Volume 1 Trial Judge’s Ruling on *Voir Dire*, p. 15, l. 12 to p. 16, l. 8; p. 17, ll.27-29

18. On appeal, the Respondent acknowledged that the trial judge’s factual findings “preclude attenuation of the seriousness of the breaches”.

Appellant’s Record, Volume 1 Reasons of Cronk J.A., p. 77 at para. 137

40 19. The trial judge’s consideration of the third prong of the balancing test, in its entirety, is as follows:

This brings us to the third question to be determined under the *Collins* test, and that is whether excluding the evidence would have a more serious impact on the repute of the administration of justice than admitting it. This factor relates to the seriousness of the

10 offence and the importance of the evidence to the case for the Crown. In the case at bar, the Crown, it would appear, has no case without the drugs. More significantly, in view of the vast quantity of cocaine in question, the charges are extremely serious. It is important to consider the degree of criminality involved in the possession for the purposes of distribution of 77 pounds of cocaine and the societal damage resulting from that amount of such a dangerous drug.

In *R. v. Puskas*, Justice Moldaver stated at page 7:

20 “To exclude the evidence under these circumstances, where the guilty of the respondent for a serious offence is clearly established by real evidence and where the exclusion of the evidence would result in his acquittal, would, in my opinion have a greater negative effect on the repute of justice than its admission.

I adopt that statement and find that it applies to the facts of this case. Accordingly, after carefully balancing the seriousness of the breaches against the effect of exclusion, I am satisfied that the evidence should not be excluded. As blatant as the arresting officer’s behaviour was in conducting the detention and the search and as brazen as his explanation for his actions in this court, they pale in comparison to the criminality involved in the possession for the purposes of distribution of 77 pounds of cocaine, is such is proven.²

30 Appellant’s Record, Volume 1 Ruling on *Voir Dire*, p. 17, l. 30 to p. 18, l. 38

MAJORITY JUDGMENT OF COURT OF APPEAL FOR ONTARIO (O’CONNOR A.C.J.O. AND MACPHERSON, J.A.)

20. On February 11th, 2008, O’Connor A.C.J.O. and MacPherson J.A. dismissed the appeal while Cronk J.A. dissented. With respect to the seriousness of the breach, the majority concluded that while appellate deference was necessary in respect of the trial judge’s findings of fact, there were circumstances which attenuated the seriousness of the breach that were not elaborated on by the trial judge. The majority concluded that the breaches did not fall “in the
40 most egregious category” because the conduct was not systemic in nature or the result of operational policies or guidelines or an order from a senior officer. Rather, the conduct was characterized as “some flawed decisions during the roadside encounter and later when testifying”. Further, the majority held that the trial judge did not conclude that the breaches were deliberate, a description that “tends to paint a picture of a more planned and premeditated course

² Following the *voir dire*, the trial proper was heard on two successive dates, May 24th and 25th, 2006. Cst.’s Bertoncello and James testified on behalf of the Crown. The defence called three witnesses, Mr. Harrison, Ms. Trudy Elizabeth Copping (Mr. Harrison’s common law spouse; they have three children together) and Ms. Tammy Copping (Trudy Copping’s sister). Mr. Harrison was convicted on May 29th, 2006 and sentenced on July 31, 2006 to a period of 5 years incarceration.

10 of action.” In addition, the majority relied on the fact that the vehicle was rented and the search was of a car and “nothing more”.

Appellant’s Record, Volume 1 Reasons of Majority, p. 46, para. 4-5; p. 55, para. 42-45

21. With respect to the third prong of the *Collins* inquiry, Justices O’Connor and MacPherson diminished the gravity of the trial judge’s decision to juxtapose the arresting officer’s behaviour with the criminality involved. The majority ruled that the trial judge may have made use of a “slight mischaracterization” of the *Collins* test. Despite the trial judge’s finding of “flagrant” and “brazen” police misconduct, the majority concluded that the conduct of the officer was not systemic and not deliberate and that absent these findings, the officer’s misconduct was not in
20 the most egregious category of breaches. The majority, holding that the seriousness of the offence was the most important factor, held:

The trial judge’s ruling in this case was faithful to the proper analytical approach under s.24(2). He described the police misconduct in blunt terms. He did not condone it at all—he condemned it. And then, he admitted the evidence because of his careful assessment of all three *Collins* factors. In particular, he focused-appropriately-on the “serious social evi[l] that is cocaine trafficking”.

Appellant’s Record, Volume 1 Reasons of Majority, p. 60, para. 65

30 **DISSENTING JUDGMENT OF CRONK J.A.**

22. Justice Cronk concluded that the trial judge significantly erred in law in his approach to the balancing exercise at the final stage of the s.24(2) analysis in that he failed to address whether condoning the constitutional misconduct would exact a greater toll on the integrity of the justice system than would excluding it. Further, the trial judge and the majority of the Court of Appeal for Ontario erred when assessing the effect of excluding the cocaine on the reputation of the administration of justice when they focused on the seriousness of the offence and the significance of the cocaine to the Crown’s case to the virtual exclusion of all other relevant considerations.

40 Appellant’s Record, Volume 1 Reasons of Cronk J.A., p. 65, para. 83

23. Justice Cronk concluded that with respect to the seriousness of the violation, the trial judge’s findings of fact were entitled to great deference. She further held that the reasons of the majority constituted a significant attack on the findings of fact through an attempt to “read down” the seriousness of the misconduct and the portrayal of the police officer’s actions as the product of “flawed decision-making, innocent mistakes or errors in judgment.”

10 Appellant's Record, Volume 1 Reasons of Cronk J.A., p. 73-74, para. 117-119

24. With respect to the third prong of the *Collins* analysis, Justice Cronk concluded that the trial judge and the majority had erred in failing to undertake the requisite balancing exercise. In particular, they failed to advert to the negative impact that admitting the evidence would have on the repute of the administration of justice as a consequence of the judicial condonation of the extremely serious *Charter* breaches. It is respectfully submitted that having regard to the seriousness of the breaches, the multiple breaches and the conduct of the officer in misleading the court, Justice Cronk correctly concluded as follows:

20 But, in the end, where the evidence was obtained as a result of serious and deliberate police misconduct, including an attempt by a police officer to mislead the court about the basis for his impugned conduct, respect for the values enshrined in the *Charter* must take precedence and the court must dissociate itself from such misconduct. What occurred here was disdainful of the rights and freedoms protected by the *Charter*. Accordingly, on a proper balancing of all relevant factors in this case, I conclude that the trial judge's decision to admit the evidence of the cocaine must be set aside. While excluding the evidence could bring the administration of justice into disrepute, on the record in this case, the administration of justice would be brought into greater disrepute by admitting it. To hold otherwise, on the facts of this case and in the circumstances of this case, would invite the disregard of *Charter* rights by the police, with an unspoken "assurance of impunity".

30 Appellant's Record, Volume 1 Reasons of Cronk J.A., p. 80, para. 145; p. 85, para. 165

PART II-QUESTIONS IN ISSUE

25. The Appellant raises the following points in issue:

1. At what point does serious police misconduct, which led to the discovery and seizure of real evidence of a substantial quantity of drugs, so taint the administration of justice as to require the exclusion of evidence?
- 40 2. Whether the balancing exercise required at the final stage of the s.24(2) *Charter* analysis, as mandated by this Court in *R. v. Collins*, requires a consideration of the fact that by admitting evidence obtained in violation of the *Charter*, the Court condones constitutional misconduct by police authorities?
3. Whether in considering the effect on the repute of the administration of justice, the concept of disrepute involves a consideration of community views?
4. Whether the seriousness of the offence is the overriding consideration in assessing the third branch of the *Collins* test?
5. Whether any one factor, including the seriousness of the criminality at issue, takes

- 10 precedence over all other relevant factors on a s.24(2) analysis?
6. Whether the fact that the constitutional breaches were the result of individual as opposed to institutional police misconduct plays any role in the decision to admit unconstitutionally obtained evidence under s.24(2)?

PART III - THE LAW

OVERVIEW

26. *Charter* protections are available to all, no matter the nature of the crime or the individual
20 accused. It is the founding and animating principle of the *Charter*. It is also the very principle at issue in the present case. There is no legal authority for the proposition that, in the face of a flagrant and brazen breach, the nature of the offence alone is the predominant, overriding nor indeed most compelling consideration in the analysis of whether the admission of unconstitutionally obtained evidence would bring the administration of justice into disrepute. The seriousness of the offence cannot override other relevant factors and cannot overwhelm serious and flagrant breaches. To do so neuters the *Charter* by precluding its application in the vast majority of criminal cases. Having rejected mandatory exclusionary rules, a mandatory inclusionary rule for serious offences is not consistent with the s.24(2) balancing approach.
- 30 27. The protection of constitutionally enshrined rights is not a painless process. In the face of clear and flagrant breaches, cogent and reliable evidence may be excluded and convictions accordingly forfeited. While the price is high, so too is the value of a constitutional democracy. It must apply to all individuals and to all types of offences with equal force. If evidence were excluded only where the offence is not serious, if the exclusion were “painless” or easily palatable, the *Charter* would have very little application and offer only limited protection to Canadians. Conduct is criminalized precisely because it is serious. But for a small number of crimes, Parliament and courts have described virtually all forms of offences as serious: gun crimes, sexual assaults, drug offences, criminal organizations, terrorist offences, financial crimes, impaired driving and child pornography have all, quite properly, been characterized as serious
40 offences. The seriousness of the offence, however, does not disentitle an individual to *Charter* protection nor should it allow for increased tolerance of flagrant and brazen police disregard of constitutional rights. As stated by La Forest J., “(i)t may be at times difficult to accept that an

10 individual-even a dangerous individual-should be allowed to escape the clutches of the law because law enforcement bodies must be kept within constitutional norms. But that is the price of freedom.”

R. v. Wise, [1992] 1 S.C.R. 527, per La Forest J. at p. 567

28. Appellate deference is accorded to a trial judge’s ruling on s.24(2) subject to an application of the wrong legal principles or unreasonableness. It is respectfully submitted that the majority erred in failing to accord deference to the trial judge’s findings of fact so as to undermine the seriousness of the breach. The majority “read down” the seriousness through recharacterization of the officer’s actions as “flawed decisionmaking” and the introduction of
 20 irrelevant considerations. The majority and the trial judge erred in law in characterizing the inquiry under the third prong of the *Collins* test as a consideration as to whether the police conduct “paled in comparison to the criminality involved”. As noted by Cronk J.A., the juxtaposition of the arresting officer’s behaviour with the criminality involved constituted more than merely a “slight mischaracterization” of the balancing test. The test as articulated is an error of law and a misstatement of the inquiry that has the significant effect of excluding all other relevant considerations from the determination of whether the admission of the evidence would bring the administration of justice into disrepute.

Appellant’s Record Volume 1 Reasons of the Majority, p. 46, 51, 57 at para. 3, 25, 54

Appellant’s Record, Volume 1 Reasons of Cronk J.A., p. 64-65 at para. 82-83

30 See *R. v. Greffe*, [1990] 1 S.C.R. 755 at p. 784; *R. v. Wise*, *supra* at p. 567; *R. v. Buhay*, [2003] 1 S.C.R. 631 at para. 44-46

SERIOUSNESS OF THE BREACH

29. The factual findings of a trial judge are entitled to significant deference in the course of appellate review. The Crown did not at any time at trial or on appeal, attempt to attenuate the significant adverse factual findings made by the trial judge in respect of the seriousness of the breaches of s.8 and s.9 of the *Charter*. As summarized by Cronk J.A., the trial judge found:

- 40 (i) Bertoncello’s explanations for stopping the SUV and detaining its occupants were “contrived and “def[ie]d] credibility”;
- (ii) When he stopped the SUV, Bertoncello was not acting in “error or ignorance” regarding the scope of his legal authority. To the contrary, on his own admission, he knew that he did not have reasonable grounds to stop the SUV. The trial judge found as a fact that “(t)he officer essentially admitted that he had no reasonable grounds to suspect that the

- 10 occupants of the S.U.V. were implicated in criminal activity. His suspicion that the driver might be a person suspended from operating a motor vehicle was wild speculation. His concern about the effect on other motorists' perception of the integrity of the police should he fail to carry through with the stop can in no way constitute reasonable grounds";
- (iii) The officer's explanation for his search of the SUV was also "contrived", "somewhat incredible" and "extremely difficult to accept as valid". His explanation had "little credibility";
- 20 (iv) Contrary to his claim to the appellant that the purpose of the search of the SUV was to look for the appellant's driver's licence, Bertoncello's only reason for conducting the search was "to follow up on his suspicion that there might be drugs in the vehicle". In fact, the trial judge concluded that this explanation "was contrived, and that the officer's main and probably only real intention was to look for drugs";
- (v) The officer's avowed purpose for the search was "certainly not reasonable". The search was not a search incident to arrest and none of the pre-requisite purposes described in *Cloutier v. Langlois* were present;
- 30 (vi) Indeed, the police officer's intention *throughout* the roadside encounter was "to take whatever steps were necessary to determine whether his suspicions were correct, including searching the vehicle for drugs, notwithstanding the accuseds' *Charter* protection".
- (vii) The officer's actions in so doing were "brazen" and "flagrant".
- (viii) The search "went...beyond legal limits" and was not a search incidental to the appellant's arrest for driving under suspension.
- 40 (ix) Bertoncello was neither "simply careless in assessing [his] authority for his investigation", nor operating on an honest but mistaken belief concerning his authority to conduct the search.
- (x) There was no reason for Bertoncello "to have been motivated by urgency or the necessary to preserve evidence".
- (xi) Bertoncello did not employ physical violence, force, coercion or threats. But he also "made no effort to request consent for the search".
- 50 (xii) The search "was not conducted in good faith".
- (xiii) The *Charter* breaches were "extremely serious".

10 30. Notwithstanding these factual findings, the majority concluded that the officer did not plan to breach the *Charter*, that the breaches were not deliberate and that the breaches were the product of “flawed decisions during the roadside encounter and later when testifying”. Justice Cronk concluded that the recharacterization of the trial judge’s findings to innocuous flawed decisions or mistakes constituted a “significant attack on the findings of fact that were made by the trial judge at the second stage of his *Collins* analysis, including his key finding that the *Charter* breaches were extremely serious.”

Appellant’s Record, Volume 1
Appellant’s Record, Volume 1

Reasons of Cronk J.A., p. 73 at para. 117-119
Reasons of Majority, p. 59, para. 60

20 31. The majority of the Court of Appeal erred in law when they accepted the trial judge’s findings of fact yet erroneously rehabilitated the seriousness of the breach in three significant respects: (i) in concluding that the breach was less serious because it was not “systemic”; (ii) in concluding that a finding of brazen and flagrant constitutional violations was less serious than a deliberate breach and (iii) in relying on the fact that the breach related to “a car, nothing more”.

Appellant’s Record, Volume 1

Reasons of Majority, p. 59, para. 44, 60

(i) *There is NO Need to Find a Systemic Breach Before Excluding This Evidence*

30 32. Both when considering the seriousness of the offence and the balancing inquiry, it is respectfully submitted that the majority erred in concluding that the breach was not serious as it was the conduct of a single officer rather than a pattern of misconduct. In this regard, O’Connor and MacPherson JJ.A. held:

40 [4] The trial judge recognized that the breaches did not fall in the most egregious category. While the trial judge did not elaborate to any great extent, there are circumstances which attenuate the seriousness of the breaches which support his conclusion. For example, the officer’s conduct was not shown to be systemic in nature, or the result of operational policies or guidelines, or even an order from a senior officer. The actions involved were those of one officer, who had been on the force for four years and who made some flawed decisions during the roadside encounter and later when testifying...

Appellant’s Record, Volume 1

Reasons of Majority, p. 46, at para. 4; see also p. 59 at para. 60

33. The seriousness of a breach does not require proof that the breach was borne of a general police policy or systemic police abuse of constitutional rights. Widespread systemic constitutional abuses are not a prerequisite to establishing the seriousness of the breach. Such a

10 threshold would be an impossible burden to meet largely because in Canada, widespread systemic abuse is a rarity rather than a constant. But for a narrow range of cases such as a policy of roadside stops or a police policy regarding access to free legal advice, the large majority of constitutional breaches adjudicated by the courts are borne of the specific facts and circumstances of the case and the acts and conduct of particular state agents. Further, it is arguable that an officer acting under the direction of his superior or on the basis of a Ministry policy was acting in “good faith” such that the seriousness of the breach is lessened rather than heightened. This was the case in *R. v. Caslake* where the police officer’s reliance on an R.C.M.P. inventory search policy in his warrantless search of a vehicle in police custody was held to be indicia of good faith that reduced the seriousness of the breach. On the other hand, an individual officer choosing to disregard the *Charter* does not diminish the egregiousness of the breach.

34. It is respectfully submitted that Justice Cronk was correct when she concluded:

[36] ... I do not accept that the police misconduct is reduced to constitutional insignificance, or that its effects are minor or *de minimis*, because only one police officer, acting on his own, knowingly violates a citizen’s constitutional rights. The protections afforded by the *Charter* are not limited to cases where systemic, institutional or premeditated police misconduct or state action is in issue.

30 That the conduct was that of a single officer, acting alone is not analogous to a finding of good faith. The conduct of a rogue officer does not in any way mitigate the seriousness of the breach. In addition, at no time did this particular police officer claim ignorance of the law.

R. v. Caslake, [1998] 1 S.C.R. 51 at p. 21, para. 34

Appellant’s Record, Volume 1 Reasons of Cronk J.A., p. 77 at para. 136 .

35. In the Appellant’s case, the trial judge found that the officer, knowing that he had no legal basis to do so, stopped a vehicle. The only explanation the police officer could provide is that having activated his emergency lights, it would undermine the public confidence in the police if he deactivated them and did not continue with the unlawful stop. The police officer did not feel that an unlawful stop and search would undermine public confidence in the police more than merely deactivating his emergency lights. The police officer then knowingly, and without any lawful basis, conducted a search of the vehicle. The trial judge rejected the officer’s evidence and concluded that his one and only objective was to stop and search the vehicle for

10 drugs. It was, in the words of Wilson J. in *Clarkson v. The Queen*, a “clear case of deliberate exploitation by the police of the opportunity to violate the appellant’s rights”. That it was not systemic is not a relevant consideration.

See *R. v. Genest*, [1989] 1 S.C.R. 59 at p. 91; *Clarkson v. The Queen*, [1986] 1 S.C.R. 383

36. It is submitted that the majority further erred in failing to consider whether there was any lawful basis to stop and search the vehicle rather than whether there was a system or policy in place. The absence of any grounds to conduct a search rendered the constitutional violation more serious. In *R. v. Mann*, this Honourable Court held that a pat down search that extended into the individual’s pocket was unconstitutional. Recognizing the need to carefully scrutinize
20 police conduct, Iacobucci J. held:

Police powers and police duties are not necessarily correlative. While the police have a common law duty to investigate crime, they are not empowered to undertake any and all action in the exercise of that duty. Individual liberty interests are fundamental to the Canadian constitutional order. Consequently, any intrusion upon them must not be taken lightly and, as a result, police officers do not have *carte blanche* to detain. The power to detain cannot be exercised on the basis of a hunch nor can it become a *de facto* arrest.

R. v. Mann, [2004] 3 S.C.R. 59 at para. 35, see also 40

30 37. Similarly, in *R. v. Greffe*, this Honourable Court held that “in this case, the absence of proof of reasonable and probable grounds, or even of “objective articulable facts” to support the officer’s suspicions, makes the unreasonable search a more serious *Charter* violation”. Cst. Bertoncello testified that he did not have any basis to stop the vehicle for a traffic violation nor did he have reasonable and probable grounds to obtain a search warrant for the vehicle. The trial judge found that the breach was rendered more serious given that the police officer had knowingly stopped a vehicle in the absence of any lawful grounds and that he had conducted an illegal search on the ruse that he was looking for the Appellant’s licence. It is respectfully submitted that the fact that there was no general police policy to stop law abiding citizens and search their vehicles in Kirkland lake did not minimize the seriousness of the breach.

40 *R. v. Greffe*, *supra* at p. 796 per Lamer J.

(ii) The Battle of Adjectives: Flagrant and Brazen are At Least on Par with Deliberate

38. It is respectfully submitted that the majority erred in concluding that a “flagrant” and “brazen” breach is less serious than a deliberate breach. In minimizing the seriousness of the breach, the majority relied on the fact that the trial judge did not use the word “deliberate” in

10 defining the breach as this “tends to paint a picture of a more planned and premeditated course of action than the records reveals”. In considering the seriousness of the breach, the majority held that a “fair reading of the officer’s evidence does not reveal that he had a carefully thought out plan or practice to breach the *Charter*”. The majority characterized the trial judge’s findings as to the seriousness of the breach as a “serious mistake” flowing from “flawed decision making”. As Brandeis J. stated in *Olmstead v. United States*, “(t)he greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding”. In the Appellant’s case, the trial judge found that while the officer was certainly zealous, he was not well-meaning nor without understanding of his flagrant disregard of the *Charter*.

20 Appellant’s Record, Volume 1 Reasons of Majority, para, 4 and 42
Olmstead v. United States, 277 U.W. 438 (1928) at p. 479 cited in *R. v. Dymont*, [1988] 2 S.C.R. 417 at pp. 436-437

39. The characterization of the police conduct as an accidental mistake deriving from flawed decision making is not borne out. The police conduct in this case could not, on the most generous reading, be characterized as a reasonable misunderstanding of the law. The trial judge found as follows:

I am satisfied that his explanations for stopping the vehicle and detaining the two accused are contrived and defy credibility.

30 The officer essentially admitted that he had no reasonable ground to suspect that the occupants of the S.U.V. were implicated in criminal activity.

After considering the evidence adduced on the voir dire and having had the benefit of hearing the officer’s testimony, I can attach little credibility to his explanation and I am satisfied, as indicated earlier, that his only reason for conducting the search was to follow up on his suspicion that there might be drugs.

40 ... In that respect, I am satisfied upon the evidence that the police officer was not in “error or ignorance” as to the scope of his authority. He effectively acknowledged that he was aware that he did not have reasonable grounds to stop the S.U.V. His subsequent search went not only beyond legal limits, but as I have already pointed out, his explanation for doing so, was somewhat incredible. It seems apparent that, regardless of whether or not he ever addressed his mind to the legality of the stop and then the search, his intention throughout was to take whatever steps were necessary to determine whether his suspicions were correct, including searching the vehicle for drugs, notwithstanding the accuseds’ *Charter* protections. His actions in that respect can only be described as brazen and flagrant.

Appellant’s Record, Volume 2 Reasons of Trial Judge, p. 130, ll. 27-30; p. 133, ll. 20-25; p. 135, l. 29 to p. 136, l. 7; p. 139, l. 8 to p. 141, l. 20

Also see Appellant’s Record, Volume 1, Reasons of Cronk J.A. p. 73 at para. 118-119

10 40. “Brazen” and “flagrant” are not synonymous with accident or mistake. In the Oxford Dictionary, “brazen” is defined as bold and shameless. Flagrant is defined as “conspicuous and blatant”. In other words, the trial judge who repeatedly characterized the conduct and testimony of the police officer as “brazen and flagrant” concluded that the police officer had executed an unlawful stop and an unlawful search boldly, shamelessly, conspicuously, and blatantly. He found that the officer knew that he did not have reasonable grounds but was intent on searching the vehicle nonetheless. One cannot accidentally or mistakenly be flagrant or brazen. Flagrant and brazen conduct is obviously deliberate. The characterization of the police officer’s conduct in this manner by the trial judge was a finding of deliberateness rather than innocent mistake or inexperience. A plain reading of the words flagrant and brazen conduct would lead a reasonable
20 observer to conclude that the conduct is even more egregious than deliberate conduct.

41. Further, there is no requirement that a breach be deliberate and willful and flagrant. As Le Dain J. wrote in *R. v. Therens*:

The relative seriousness of the constitutional violation has been assessed in the light of whether it was committed in good faith, or was inadvertent or of a merely technical nature, or whether it was deliberate, willful or flagrant. Another relevant consideration is whether the action which constituted the constitutional violation was motivated by urgency or necessity to prevent the loss or destruction of the evidence. (*emphasis added*)

30 *R. v. Therens*, [1985]1 S.C.R. 13 at p. 652 per Le Dain J.; See also *R. v. Belnavis*, [1997] 3 S.C.R. 341 at para. 41

42. It is respectfully submitted that the breaches were “a larger pattern of disregard” by Cst. Bertoncello. The majority erred in failing to consider the fact that there was no urgency, no grounds to stop the vehicle, no grounds to search the vehicle and that the search for the licence, which the officer admitted was not evidence, was found to be a false reason for the search proffered by the officer during his testimony. Finally, while the trial judge was not required to make the unusual finding that the officer’s explanations “defied credibility”, he did so and concluded that his testimony before a court of law was flagrant as well.

R. v. Greffe, *supra* at p. 796 per Lamer J.

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(iii) The Search of “a car, nothing more”

43. It is respectfully submitted that the majority erred when they diminished the seriousness of the breach by concluding that the search of the SUV was a search “of a car, nothing more”, a

10 factor that the trial judge considered explicitly and found in the circumstances of this case, did
not undermine the seriousness of the breach. This Honourable Court has never held that
investigative stops of vehicles are unfettered or that constitutional rights do not apply to
individuals in vehicles. In fact, as recently noted by Binnie J. in *R. v. Kang Brown*: “Drug
trafficking is a serious matter, but so are the constitutional rights of the traveling public.” While
that case had to do with the use of sniffer dogs at an airport, there is no doubt that the “traveling
public” must also include those driving automobiles.

R. v. Kang-Brown, [2008] SCC 18 at para. 105 per Binnie J.

44. While it is well-established that there is a lessened expectation of privacy in a vehicle, as
20 articulated by Cronk J.A., this does not mean that there is no privacy interest in a vehicle or its
contents. Cronk J.A. correctly noted in the present case that:

In my view, the appellant’s privacy interest was a reasonable but reduced one. While his
expectation of privacy in the SUV and its contents was certainly not high, it was not
negligible. The fact remains that his privacy interest was violated-unlawfully and
intentionally. While the existence of a reasonable expectation of privacy is highly relevant to
the assessment of an inadvertent or good faith breach of the *Charter*, it is less relevant where-
as here-the *Charter* violations were flagrant, brazen and not in good faith.

Appellant’s Record, Volume 1 Reasons of Cronk J.A., p. 76, para. 129-131

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45. In an analysis of an accused’s expectation of privacy, the totality of the circumstances
must be considered including the accused’s presence at the time of the search, possession or
control of the property or place being searched, ownership of the property or place, historical use
of the property or item, ability to regulate access, existence of a subjective expectation of privacy
and the objective reasonableness of the expectation. In this case, it was clear that although the
rental agreement was in the co-accused’s name, the co-accused and the Appellant were
alternating driving duties, were both using the car fully and had both placed their belongings in
the vehicle. Individuals who own a car are not accorded any greater expectation of privacy than
those members of society who may rent vehicles occasionally. Further, the boxes were in the
40 rear cargo area of the SUV, not in plain view, were sealed and the contents were not visible, a
fact which lead Laskin J.A. of the Ontario Court to state in the case of *R. v. Calderon*:

[98] A person’s expectation of privacy in a car, though reasonable, is less than in a person’s
home or office; *R. v. Belnavis* (1997), 118 C.C.C. (3d) 405 at 424 (S.C.C.). Still, unlike in
Belnavis, the expectation of privacy in a car’s trunk, which is under lock and key, is greater
than in the interior of a car, where items are ordinarily in plain view or easily accessible. I

- 10 draw an analogy to the facts of *Buhay*, where the Supreme Court found that the officer's perception that the right to privacy in a bus depot locker was "given up" was not reasonable.

R. v. Calderon, [2004] CanLII 7569 at para. 98 per Laskin J.A.

46. The scope of police powers to stop vehicles has been, for public policy reasons, very broadly interpreted to allow for the regulation of traffic and inspection to protect public safety. While the reasonable expectation of privacy in a car "for the good of all, be greatly reduced", courts must be vigilant to ensure that these broad investigative powers are not misused to allow for arbitrary stops or harassing investigative detentions. Investigative stops of law-abiding individuals driving a car are not unrestricted. In *R. v. Mellenthin*, a motorist was stopped on a highway spot check program. There was no other basis for the detention. Upon being stopped, the driver was questioned and drugs were seized. In affirming the trial judge's decision to exclude the evidence, Cory J. held that "(r)andom stop programs must not be turned into a means of conducting either an unfounded general inquisition or an unreasonable search".
- 20

R. v. Belnavis, *supra* p. 25-26 at para. 39 per Cory J.; *R. v. Mellenthin*, [1992] 3 S.C.R. 615 at p. 13 per Cory J.

47. An officer can only stop a vehicle for a legitimate purpose and once stopped, the only questions that may be asked are those related to driving offences. More intrusive procedures can only be undertaken if the police officer has reasonable and probable grounds, grounds that the officer in this case conceded he did not have As stated by Cory J. in *R. v. Mellenthin*:
- 30

The unreasonable search carried out in this case is the very kind which the Court wished to make clear is unacceptable. A check stop does not and cannot constitute a general search warrant for searching every vehicle, driver and passenger that is pulled over. Unless there are reasonable and probable grounds for conducting the search, or drugs, alcohol or weapons are in plain view in the interior of the vehicle, the evidence flowing from such a search should not be admitted.

- 40 It would surely affect the fairness of the trial should check stops be accepted as a basis for warrantless searches and the evidence derived from them was to be automatically admitted. To admit evidence obtained in an unreasonable and unjustified search carried out while a motorist was detained in a check stop would adversely and unfairly affect the trial process and most surely bring the administration of justice into disrepute.

R. v. Mellenthin, *supra* at p. 18-19

48. The abuse of this broad police power, therefore, in stopping vehicles in the absence of any legitimate basis to stop and search the vehicle aggravates the seriousness of the breach. Where there are insufficient grounds to stop or search a vehicle, the police must leave the

10 individual alone. As stated by Iacobucci J. dissenting in part in *R. v. Belnavis*, this is no less true or any less important in the case of an automobile.

R. v. Belnavis, *supra* at para. 96 per Iacobucci J.

49. Further, the unavailability of any lawful investigatory techniques to search the vehicle does not mitigate the breach nor can it be viewed as an excuse or justification. Rather, it indicates a blatant disregard for the *Charter* and a willingness of a police officer to engage in knowingly unlawful investigatory techniques at all costs. Sopinka J. in *R. v. Kokesch*, in excluding drugs from a grow operation obtained through an unlawful perimeter search, held that the absence of lawful investigative means aggravates the seriousness of the breach:

20 Where the police have nothing but suspicion and no legal way to obtain other evidence, it follows that they must leave the suspect alone, not charge ahead and obtain evidence illegally and unconstitutionally. Where they take this latter course, the *Charter* violation is plainly more serious than it would be otherwise, not less. Any other conclusion leads to an indirect but substantial erosion of the *Hunter* standards: the Crown would happily concede s.8 violations if they could routinely achieve admission under s.24(2) with the claim that the police did not obtain a warrant because they did not have reasonable and probable grounds. The irony of this result is self-evidence. It should not be forgotten that *ex post facto* justification of searches by their results is precisely what the *Hunter* standards were designed to prevent: see *Hunter*, *supra*, per Dickson J. (as he then was), at p. 160; and *Grefe*, *supra*, at
30 pp. 790 and 798.

R. v. Kokesch, [1990] 3 S.C.R. 3 at p. 29 per Sopinka J.

50. In the instant case, the majority relied on the fact that the vehicle was rented and that after the discovery of the cocaine, the Appellant claimed that he did not own the boxes. In *R. v. Belnavis*, Cory J. for the majority held that there may be situations in which a passenger can establish a reasonable expectation of privacy in a vehicle having regard to the terms on which the passenger came to be a passenger and the relationship between the owner and the passenger. By way of example, the court held that “(i)f two people were traveling together on an extended
40 journey and were sharing driving responsibilities and expenses, each would be likely to have an equal expectation of privacy in the vehicle”. In the instant case, the Appellant and the co-accused were fully sharing use of the vehicle and driving duties. This triggers an expectation of privacy in the vehicle. The Appellant’s statement after the discovery of the drugs did not negate his expectation of privacy in vehicle. In *Belnavis*, this Honourable Court held that the passenger of the vehicle could assert an expectation of privacy depending on the circumstances in which

10 they came to be a passenger or if they could demonstrate a reasonable expectation of privacy in relation to the items seized. This is an “either or” proposition. If the individual has a reasonable expectation of privacy in the vehicle, then a constitutional claim may be made. If not, the individual must demonstrate an expectation of privacy in the seized items. A constitutional claim does not require, however, both the demonstration of a reasonable expectation of privacy in the vehicle as well as a reasonable expectation of privacy in the item seized before a constitutional claim can be asserted.

R. v. Belnavis, *supra* at para. 19, 23 per Cory J.

THE THIRD PRONG OF COLLINS IS A BALANCING ACT

20 51. The third prong of the *Collins* test, requiring consideration of whether the exclusion of the evidence would do more harm to the administration of justice than its admission, is the critical balancing exercise. It is respectfully submitted that the majority of the Court Appeal for Ontario articulated an incorrect test resulting in a significant misinterpretation of s.24(2) as follows:

30 [49] In determining what is better for the reputation of the system of justice, courts take the perspective of a reasonable member of the community. As pointed out above, courts look to the effect of the admission of the evidence on trial fairness and to the seriousness of the *Charter* breach involved. At the third stage of the *Collins* test, courts consider the seriousness of the offence, the reliability of the evidence and the importance of the evidence to the case: see *R. v. Evans* (1991) 63 C.C.C. (3d) 289 at 311 (S.C.C.); *Buhay*, *supra*, at para. 67; *R. v. Kitaichik*, (2002), 166 C.C.C. (3d) 14 at para. 47 (Ont. C.A.)

Appellant’s Record, Volume 1 Reasons of Majority, pp. 56-57 at para. 49

52. This analysis is inherently flawed and inconsistent with this Honourable Court’s jurisprudence. Where the only factors to be considered at the third stage are the seriousness of the offence, the reliability of the evidence and the importance of the evidence, there can be no meaningful balancing analysis as all the factors invariably tip the scales towards admission, a fact that Justice Cronk was very much alive to when she wrote that:

40 [83] With respect, I am of the opinion that the trial judge erred in his approach to the requisite balancing exercise at the final stage of the s.24(2) analysis mandated by *R. v. Collins* (1987), 33 C.C.C. (3d) 1 (S.C.C.). In particular, the trial judge failed to address whether condoning the constitutional misconduct in this case, by admitting the evidence of the cocaine, would exact a greater toll on the integrity of the justice system than would excluding it. Moreover, when assessing the effect of excluding the cocaine on the reputation of the administration of justice, the trial judge focused – to the virtual exclusion of all other relevant considerations –

- 10 on the seriousness of the crime alleged and the significance of the cocaine to the Crown's case. This too was an error. As a result of these errors, it falls to this court to determine afresh whether the evidence of the cocaine should have been admitted.

Appellant's Record, Volume 1 Reasons of Cronk J.A., p. 65, para. 83

53. In the third prong of the *Collins* test, the trial judge in the Appellant's case reduced the balancing inquiry to a contest between the seriousness of the offence and the seriousness of the conduct of the police - a contest that the accused is invariably bound to lose. The trial judge concluded that the evidence should be admitted as the police officer's behaviour "pale(d) in
20 comparison" to the criminality involved. While acknowledging that the juxtaposition of the arresting officer's behaviour with the criminality involved "may" constitute a "slight mischaracterization" of the s.24(2) test, the majority of the Court of Appeal proceeded to apply the same analysis and relying on community values, elevated the seriousness of the offence as the most important factor to the virtual exclusion of all other relevant considerations.

Appellant's Record, Volume 1 Reasons of Majority, p. 59, para. 49; p. 58, para. 55

54. The approach to s.24(2) endorsed by the majority reduces all constitutional breaches involving narcotics to a question of the quantity and type of narcotic. There is no doubt that narcotics provide reliable evidence that is central to the Crown's case. However, there can be no
30 principled application of s.24(2) where admission or exclusion turns arbitrarily on the quantity and type of drug involved. In so doing, the long-term impact on the integrity of the justice system through the judicial condonation of egregious police conduct is ignored. The prospective impact of the admission of the evidence on the administration of justice was not addressed by the trial judge or the majority as it was articulated in *R. v. Buhay*, where this Honourable Court wrote that "[t]he expressed concern of the trial judge that admitting the evidence in these circumstances may encourage similar police conduct in the future is in line with this purpose of the *Collins* test."

R. v. Buhay, *supra* para. 70 per Arbour J.

40 **(i) *The Problem with the "Whose Conduct is Worse" Approach***

55. It is a fundamental distortion of s.24(2) to merely ask "Who is worse-the police or the accused". Reducing the inquiry to a comparison of the police conduct as against the accused's conduct, to the exclusion of other relevant considerations, will virtually always lead in favour of

10 admission rendering the exclusion of evidence an exceptional remedy. Police conduct, short of violence, will virtually always “pale in comparison” to alleged criminal conduct and accordingly will trump any breach no matter how flagrant or brazen. Indeed, this is precisely the approach advanced by the majority of the Court of Appeal. Notwithstanding a finding that the police officer displayed a flagrant and brazen disregard for constitutional rights and then was dishonest about his conduct in court, the majority concluded that only more serious police behaviour such as an unreasonable search of a home or a police assault “may” tip the scales in favour of exclusion:

20 By way of illustration, had the police officer in this case engaged in more egregious conduct, such as entering the appellant’s home without a warrant, or threatening or assaulting the appellant, that may well have tipped the balance in favour of exclusion. The same holds true in terms of the nature and quantity of the drugs seized—a small amount of marijuana may well have yielded a different result. In our view, this is precisely the dichotomy of result that s.24(2) envisions and its progeny permit.

Appellant’s Record, Volume 1 Reasons of Majority, p. 59 at para. 62

56. In short, only a physical beating of Mr. Harrison or a seizure of a small amount of marijuana would result in exclusion. Otherwise, the police officer was entitled to deliberately violate the Appellant’s constitutional rights with impunity. Such an analytic framework will
30 always have the result of “overwhelming” all other relevant considerations under s.24(2) leading to certain admission of narcotics in any drug case.

Appellant’s Record, Volume 1 Reasons of Cronk J.A., p. 81 at para. 150

57. An officer who has demonstrated a casual attitude to *Charter* rights and a casual attitude to the obligation to give truthful testimony in a court of law should expect a finding that his conduct “pales in comparison” to the accused’s alleged crime. The majority concluded that it was sufficient that the trial judge did not condone the police behaviour because he strongly criticized the officer in his judgment. Scolding, even a judicial one, is not a meaningful remedy under s.24(2). Condonation of unacceptable police conduct speaks to condonation through the
40 admission of evidence in a criminal case, not verbal reprimands of police in a judgment.

58. Further, the comparison of police behaviour as against the accused cannot be meaningful. While the unlawful stop in this case netted the police officer a fruitful search, it is wholly unknown how many vehicles were or are unlawfully stopped and searched with no results. Only where the unlawful search has been fruitful is the constitutional infringement litigated in a court.

10 While this case occurred in the context of northern Ontario on a public highway, the potential use of this type of unfettered police disregard of constitutional rights to conduct unlawful investigative stops and searches in circumstances involving minorities is real. Random stops involving law-abiding citizens who are unlawfully stopped, however, are generally not adjudicated. As stated by La Forest J. in *R. v. Belnavis*:

20 Moreover, the Court's understanding of the implications of the police action may be obscured by the fact that most cases that come before them relate to someone who has already been convicted. The courts have little "feel" for what this means to persons who have committed no wrong or any idea of the number of such people who may be harassed by the overly zealous elements in any police force. If such a draconian regime is to be imposed, it should be done by Parliament, which is in a position to gather data, and to present evidence justifying its need. The court's job is not to restrict the rights of the citizen; it is to protect them (See *Landry, supra*, at p. 187).

R. v. Belnavis, supra at para. 65 per La Forest J.

59. This reality was highlighted in the case of *R. v. Calderon*, a decision of the Ontario Court of Appeal. In that case, a similarly unlawful roadside detention and search of passengers driving a rental vehicle led to the discovery of 22 lbs of marihuana. In excluding the evidence, the court noted that the arresting officer had been acting on a "hunch" that the Appellant was a drug courier. The officer testified that he had 10-20 hunches in the past, each involving road-side stops and searches, without having made a single arrest. The second arresting officer had stopped between 50-100 cars without arresting a single person. Those other 60-120 persons who had been cumulatively stopped and searched at the whim of the officers without having been found to engage in unlawful activity presumably had no recourse with respect to the officer's *Charter* violations. Their stories were never heard and considered by a court. A s.24(2) approach to balancing which considers only the singular actions of the police officer at the time of the breach will further immunize police transgressions that are never brought to the attention of the court, and reinforce a police mindset that violating *Charter* rights is a win-win proposition as either evidence will be found and admitted or not found and the violation is never heard about again. It is for this very reason that the court is required to consider the long term impact of the administration of justice through the admission of the evidence.

R. v. Calderon, supra at para. 72

(ii) *Seriousness of Offence Does NOT Stand Alone*

10 60. While the seriousness of the breach is a stand-alone consideration, it is important to note that the seriousness of the offence is not a stand-alone prong of *Collins*. Rather, seriousness of the offence is one of many factors subsumed under the third prong of the *Collins* inquiry and must be balanced as against other factors. The nature of the offence is neither the overriding nor definitive factor as urged by the majority of the Court of Appeal where a breach has been found to be extremely serious. If the seriousness of the offence is elevated to the most important consideration, the *Charter* will offer little protection whenever an individual is accused of a serious crime. There is nothing in *Charter* jurisprudence or legislative history that neutralizes its application merely to frivolous, minor or summary conviction offences.

20 61. It is respectfully submitted that where there is a finding of deliberate police misconduct and disregard for constitutional rights, the admission of the evidence will virtually always bring the administration of justice into disrepute. Neither the seriousness of the offence nor the importance of the evidence to the case can outweigh such a finding. This is consistent with the case law from this Honourable Court and appellate courts across the country. This Honourable Court has repeatedly held that the inclusion of evidence in serious cases such as murder or drug offences is warranted where the breaches have been found to be deliberate or flagrant.

See, for example, *R. v. Stillman*, [1997] 1 S.C.R. 607; *R. v. Collins*, *supra*; *R. v. Burlingham*, [1995] 2 S.C.R. 206; *R. v. Buhay*, *supra*; *R. v. Greffe*, *supra*; *R. v. Mann*, *supra*

30 62. The plain wording of the provision is instructive:

Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

40 The exclusion of evidence is not framed as an exceptional remedy nor is it a remedy of last resort. Automatic exclusionary rules, automatic inclusionary rules and every other formulation of the remedial provision were considered in the wording of the remedial provisions in the *Charter* and rejected. Section 24(2) strikes a midway point between the extremes of automatic inclusion and mandatory exclusion. The compromise requires the trial judge to approach the impact of the exclusion and inclusion of evidence holistically having regard to the reputational impact on the administration of justice. The reputation on the administration of justice involves a consideration of

10 the importance of the constitutional values at stake and the informed, dispassionate and objective member of the public. Balancing requires a consideration of all relevant factors equally without the elevation of any one consideration above all others. It is respectfully submitted that the majority has rewritten and restricted the application of s.24(2) in a manner wholly inconsistent with this Honourable Court's jurisprudence. The net result achieved by the new formulation of the remedial provision neuters *Charter* rights exempting the majority of offences from *Charter* application and wholly ignores the requisite balancing that must be undertaken in the consideration of the appropriate remedy for a constitutional violation.

See McLachlin C.J.C.'s discussion of the history of s.24(2) in *R. v. Stillman*, *supra* at para. 236-239

20 63. The focus on the nature of the offence further distorts the balancing inquiry in that it is particularly prone to the shifting winds of public opinion. Virtually every type of offence has been characterized as a serious offence:

- In *R. v. Bernshaw*, drunk driving was said to be a very serious offence that "leaves a terrible trail of death, injury, heartbreak and destruction". It was described as an offence that has a "far greater impact on Canadian society than any other crime";
- In *R. v. L.B.*, the Ontario Court of Appeal held that possession of a handgun is a serious offence as it "conjures up images of horror and anguish the likes of which few could have
30 imagined twenty-five years ago when the *Charter* first came to being. Sadly, in recent times, such images have become all too common children left dead and dying; families overcome by grief and sorrow; communities left reeling in shock and disbelief";
- Child pornography has been held to be a serious crime by a number of appellate courts (*R. v. Woroby*; *R. v. L.F.*);
- Living off the avails of prostitute is a "serious offence" . (*R. v. Francoeur*);
- Breaking and entering into a private home has been characterized as a serious offence (*R.
40 v. Arsenault*);
- In *R. v. Smith*, the British Columbia Court of Appeal held that theft from mail is "an extremely serious offence and that the public demands, I am sure, that the sanctity of its mail be upheld";
- Conspiracy to commit fraud on the public has been characterized by the Ontario Court of Appeal as a "very serious offence" (*R. v. Serfaty*);
- Theft of significant amounts of money has been deemed by the British Columbia Court of
50 Appeal to be "serious" (*R. v. Skalbania*);

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- Fraud over \$5,000 is a “serious offence” (*R. v. Wilson*);
- Money Laundering, proceeds of crime and terrorism offences are, as is evidenced by the preamble to the Anti-terrorism Act, serious offences which threaten the very fabric of Canadian society.

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Most crimes in the *Criminal Code* can fairly be characterized as serious. At various times, however, certain crimes may garner more public attention and awareness. Recently, this is so of impaired driving, sexual assault, gun crimes and white-collar crimes - all are offences to which the public has recently become more educated, media aware and attentive. Public sensitivity to a particular crime, however, does not make it more or less serious, nor should the courts afford less *Charter* protection to those who are alleged to commit the serious crime of the day.

R. v. Bernshaw, [1995] 1 S.C.R. 254 at para. 16; *R. v. L.B.*, [2007] ONCA 596 (CanLII) at para. 80; *R. v. Woroby*, 2003 MBCA 41 at para. 24; *R. v. L.F.*, [2002] O.J. No. 2604 at para. 48; *R. v. Francoeur*, [1998] O.J. No. 4104 at para. 1; *R. v. Arsenault*, [1999] B.C.J. No. 2361 at para. 7; *R. v. Smith*, [1976] B.C.J. 618 at para. 2; *R. v. Serfaty*, [2006] O.J. No. 2281 at para. 9; *R. v. Skalbania*, [1998] B.C.J. 2872 at p. 6; *R. v. Wilson*, [2003] O.J. No. 1047 at para. 8

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64. It is respectfully submitted that the factors underlying the administration of justice require the court to consider the broad impact of the admission of unconstitutionally obtained evidence in the legal process, a factor never explored by the majority. In *R. v. Collins*, Lamer J. concluded that s.24(2) requires a consideration of “all the circumstances” including, but not limited to what kind of evidence was obtained; what *Charter* right was infringed; was the *Charter* violation serious or was it of a merely technical nature; was it deliberate, willful or flagrant or was it inadvertent or committed in good faith; did it occur in circumstances of urgency or necessity; were there other investigatory techniques available; would the evidence have been obtained in any event; is the offence serious; is the evidence essential to substantiate the charge; and are other remedies available. The factors identified in *Collins* are designed to calibrate and assess the true nature and import of the violation in the context of the charge-deliberateness, exigent circumstances, alternative avenues, seriousness of the offence and importance of the evidence. These factors must all be balanced. No formulation of the test as articulated in *Collins* would lead to the question posed by the majority in the Appellant’s case: would a reasonable member of the community find that excluding from evidence such a large quantum of drugs as a result of police action would bring the administration of justice into greater disrepute.

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R. v. Collins, *supra* p. 283-284 per Lamer J.

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65. While s.24(2) is not a remedy for police misconduct, the administration of justice will be brought into disrepute “from judicial condonation of unacceptable conduct by the investigatory or prosecutorial agencies.” Further, the court must consider “the long-term consequences of regular admission or exclusion of this type of evidence”. The majority gave no consideration to the nature of the *Charter* right infringed in the circumstances of this case or to the long-term impact of admission. In a free society, the police cannot be permitted to stop and search citizens in the complete absence of any lawful grounds. Such pretext stops are based on a hunch or speculation, racial minorities tend to be targeted and the practice results in a large number of unlitigated *Charter* violations.³ Such police conduct brings the administration of justice into

20 further disrepute as it involves fabrication by the police to justify the stop. The police behaviour is judicially condoned through the admission of unlawfully gathered evidence. In contrast, a court, in excluding the evidence, as stated by Sopinka J. in *R. v. Kokesch*, “dissociates” itself from the egregious police conduct. Lamer J. in *R. v. Collins* framed the issue as follows:

... the administration of justice would be brought into greater disrepute, at least in my respectful view, if this Court did not exclude the evidence and dissociate itself from the conduct of the police in this case which, always on the assumption that the officer merely had suspicions, was a flagrant and serious violation of the rights of an individual.

30 *R. v. Kokesch*, *supra* at p. 27 per Sopinka J.
R. v. Collins, *supra* at p. 288 per Lamer J.
 See *R. v. Power*, [2001] N.J. No. 267 (Nfld. C.A.)

66. There is no support for the conclusion that the broader impact on the administration of justice is not overwhelmed by the seriousness of the offence. In *R. v. Burlingham*, Iacobucci J. for the majority noted:

40 ...I underscore that we should never lose sight of the fact that even a person accused of the most heinous crimes, and no matter the likelihood that he or she actually committed those crimes, is entitled to the full protection of the *Charter*. Short-cutting or short-circuiting those rights affects not only the accused, but also the entire reputation of the criminal justice system. It must be emphasized that the goals of preserving the integrity of the criminal justice system as well as promoting the decency of investigatory techniques are of fundamental importance in applying s.24(2).

R. v. Burlingham, *supra* at para. 50 per Iacobucci J.

³ Nathan J. S. Gorham, *Eight Plus Twenty-Four Two Equals Zero-Point-Five* (2003), 6 C.R. (6th) 257 at p. 3

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67. The long-term consequences to the administration of justice through the admission of unconstitutionally obtained evidence figures centrally in the balancing prong. In *R. v. Greffe*, this Honourable Court excluded evidence of heroin obtained through a rectal search. Having found that there were multiple *Charter* violations and that there was evidence of bad faith, the import of the seriousness of the offence in the balancing exercise was considered as follows:

20

In general terms, the purpose of the section is to prevent having the administration of justice brought into further disrepute by the admission of the evidence in the proceedings. As I stated in *Collins, supra*, at p. 281, this further disrepute results from the admission of evidence that would deprive the accused of a fair hearing or from judicial condonation of unacceptable conduct by the investigatory and prosecutorial agencies. as well and this is a point that bears repetition especially when a very serious crime might go unpunished because of the exclusion of the evidence, it is the long-term consequences of regulator admission or exclusion of the evidence on the reputé of the administration of justice that must be considered. **In other words, while I, and sure most people, would like to see the appellant convicted and punished severely for the offence with which he is charged, the long-term effect of admitting evidence obtained in a manner that infringed the *Charter* on the basis that the offence is a very serious one, would lead to the result that s.24(2) will only be used to exclude evidence when less serious crimes are involved.** (emphasis added)

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R. v. Greffe, supra at p. 784 per Lamer J.

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68. In the Appellant's case, rather than considering the long-term effect of the admission of the evidence, the majority judgment focused on present community values by framing the issue as follows: would a reasonable member of the community find that excluding from evidence such a large quantum of drugs as a result of police action would bring the administration of justice into greater disrepute. As stated by Cronk J.A., the central question not asked was whether "condoning the constitutional misconduct by admitting evidence obtained in violation of important *Charter* rights would do more harm to the integrity of the justice system than would excluding evidence that is essential to the Crown's case." The judiciary should not tolerate, accept or applaud police officers, as integral agents of the judicial system, for committing constitutional violations. Where a judge condemns the individual police officer for flagrant misconduct while nonetheless admitting the evidence, the only message reinforced to that officer, and the police at-large, is that the judiciary condones the breach and will continue to admit the evidence. If the balance is struck in favor of admitting evidence in the case of flagrant breaches because the offence is serious, police officers will be rewarded for disregarding constitutional rights in serious cases. Faced with the assurance that illegally obtained evidence

10 will almost always be admitted in a serious case, the police would suffer no meaningful repercussions for flagrantly disregarding constitutional rights. In this case, it is respectfully submitted that to allow the police to benefit from the flagrant and blatant infringement of the Appellant's constitutional rights is to "invite the perception that the police are legally entitled to reap the benefit" of their disregard for the constitution.

Appellant's Record, Volume 1 Reasons of Majority, pp. 60-61 at para. 65-70
Appellant's Record, Volume 1 Reasons of Cronk J.A., p. 80 at para. 144
R. v. Wittmer, 2008 SCC 33 at para. 26, per Fish J.

69. As stated by McLachlin C.J.C. in *R. v. Stillman*, the repute of the administration of justice
20 is not determined by simple reference to the barometer of current public opinion. The approach of the majority to s.24(2) approximates the community shock test long rejected by this Honourable Court. Lamer J. in *Collins* acknowledged that the concept of disrepute involves "some element of community views, and the determination of disrepute thus requires the judge to refer to what he conceives to be the view of the community at large". This is not analogous, however, to the general community tolerance test. Public opinion is fickle and not the appropriate forum in which to safeguard the protection of constitutional rights.

70. There is an additional yet significant concern with respect to public opinion as an aide to guide the court's decisions—the questions posed of the public typically do not reflect the
30 complex tasks in which the court is engaged. The majority judgment asked whether a member of the public would be offended if a large quantity of drugs were excluded because of a violation of a constitutional right. The framing of the question compels the answer. The answer would be the same if the question asked was whether a member of the public would be offended if guns were excluded because of a constitutional violation or if unconstitutionally obtained evidence were excluded in the case of a sexual assault on a child. The problem with these simplified questions is that they do not capture the myriad of factors that are engaged in a s.24(2) analysis—they mislead the public into believing that the justice system fails when evidence is excluded. Further, they depersonalize the judicial system from the individual—denying the inextricable link between their decision and their constitutional rights. Therefore, the general
40 public opinion, inflamed by misperceptions, does not drive the inquiry under s.24(2). If the question posed were whether a member of the public would be willing to be arbitrarily searched by police officers, acting at will, in support of police effort to curtail serious crime, the general

10 public opinion may be quite different. If, as a prelude to the question, the public were informed that police officers engaged in between 60 and 120 searches of people they suspected to be involved in the drug trade without ever finding drugs, as was the case in *R. v. Calderon*, the general public may well conclude that the administration of justice would be brought into disrepute if the evidence were admitted. Whether the administration of justice would be brought into disrepute through the admission of evidence should not be informed by the person on the street's view of crime. The administration of justice is a broader, more complicated inquiry.

71. This Honourable Court in *Collins*, cognizant of the obvious dangers of a populist approach to the remedial provision, rejected the use of public opinion polls to consider
20 community views in a s.24(2) analysis. As stated by Lamer J. in *Collins*:

...Members of the public generally become conscious of the importance of protecting the rights and freedoms of accused only when they are in some way brought closer to the system either personally or through the experience of friends or family. Professor Gibson recognized the danger of leaving the exclusion of evidence to uninformed members of the public when he stated at p. 246:

30 The ultimate determination must be with the courts, because they provide what is often the only effective shelter for individuals and unpopular minorities from the shifting winds of public passion.

The *Charter* is designed to protect the accused from the majority, so the enforcement of the *Charter* must not be left to that majority.

R. v. Collins, *supra* p. 282 per Lamer J.; See also David H. Doherty, *Stevens: S.24(2) of the Charter on Appeal* (1983), 35 C.R. (3d) 30 at p. 33 in which he states "Judicial musings as to the public perception of their rulings are subjective in the extreme and do not provide a predictable basis for determining as to the admissibility of evidence."

72. Similarly, Sopinka J., writing in separate concurring reasons in *Burlingham* rejected an
40 approach to s.24(2) which required a consideration of the "monolithic public opinion":

It is for this reason that the test with respect to what could bring the administration of justice into disrepute was stated in *Collins* to be grounded in longer-term community values rather than the public passion of the moment. These long-term community values are to be assessed in terms of the views of the hypothetical, reasonable, well-informed and dispassionate person in the community.

R. v. Burlingham *supra* at para. 142 per Sopinka, Cory, Iacobucci and Major JJ.

73. It is from the perspective of the reasonable person, dispassionate and fully apprised of the
50 circumstances, that the community's views must be assessed. As stated by Lamer J., "(t)he

10 reasonable person is usually the average person in the community, but only when that community's current mood is reasonable." The community views cannot be assessed when the community is being "wrought with passion" or operating under the "stress due to current events". Further, long term community values, such as respect for *Charter* rights, and limits on police investigatory powers, inform the inquiry.

R. v. Collins, *supra* at p. 282 per Lamer J.

74. The long-term consequences of the majority's proposed restriction of s.24(2) need not be considered in a vacuum. While the upshot of the decision may not be entirely measurable, as, for example, the effect of the decision on the psyche of police officers would be difficult to gauge,
 20 there are other ways to evaluate the decision's effect. To date, more than 15 cases have applied the majority decision. The most alarming pattern that has emerged from a review of these cases has been the elevation of the seriousness of the offence as the predominant consideration in the s.24(2) analysis. A significant number of cases post-*Harrison* have reduced the third prong of the *Collins* test to a consideration of: (1) seriousness of the offence, (2) reliability of evidence, and (3) importance of the evidence, a recitation of the *Harrison* test. The true balancing, as envisaged by Lamer J., has been swept aside. These cases have begun the march towards returning Canadian law to its pre-*Charter* days in which reliable evidence was admitted, regardless of its source or the manner in which it was obtained. The judgment in *Harrison* has unfortunately made the courts question the strong line of cases that rejected an automatic
 30 inclusionary rule in favour of a more expansive view of civil rights and a more rounded approach to the admission of evidence. If allowed to stand, the decision of the majority can only be seen as an acknowledgment that the historical approach of the courts was wrong.

Examples of case post *Harrison* that use the *Harrison* balancing test include: *R. v. Tiffin*, [2008] O.J. No. 1525 at para. 49 (O.C.A.); *R. v. Jackson*, [2008] O.J. No. 2484 at para. 58; *R. v. Brown*, [2008] O.J. No. 1763; *R. v. Kelsy*, [2008] O.J. No. 2407, at para. 44; *R. v. Kenyon*, [2008] O.J. No. 1636 at para. 74-75

75. The decision in *Harrison* has additionally been applied to support the following propositions which, prior to *Harrison*, had little, if any, jurisprudential support:

- 40 • A lack of evidence of systemic police misconduct or racial profiling diminishes the officer's breach. (*R. v. Bellamy*, para. 76)
- The views of the direct community affected by the allegations should be considered under s.24(2) analysis (*R. v. Atlookan*)

10 *R. v. Atlookan*, [2008] O.J. No. 2829 at para. 39-40; *R. v. Bellamy*, [2008] O.J. No. 2138 at para. 76

76. The impact of the majority judgment's s.24(2) analysis, which elevates the seriousness of the offence to the critical factor, is highlighted in the decision of *R. v. Atlookan*. In *Atlookan*, the trial judge relied on the majority judgment in *Harrison* to admit marijuana and oxycodone as evidence against the accused who was charged with possession and trafficking offences when he was found in possession of these narcotics in Eabametoong, a remote First Nations Community. The trial judge admitted the evidence and ruled that:

20 The people of Eabametoong First Nation have made it clear that they consider the presence and use of intoxicants in their community a significant problem and a danger to their health and well-being. These are legitimate and important societal concerns that are addressed not only by helping those who fall victim to the scourge of drugs and alcohol, but also by the detection, arrest and prosecution of those who seek to harm the community.

This is a significantly flawed analysis that has consistently been rejected by this Honourable Court. An assessment of community standards should only reflect the Canadian community at-large. The analysis is not community specific as the *Charter* should never be fragmented or applied differently from between communities.

R. v. Atlookian, *supra*, para. 39-40

30 77. In addition, the approach of the majority is at odds with the majority of appellate courts. As evidenced in Appendix A, no appellate court in the past has ever shied away from excluding significant quantities of narcotics in the face of a flagrant constitutional breach. The controlling issue in all of these cases has been the seriousness of the police officer breach. These cases illustrate the protectionist approach with which the appellate courts have historically guarded *Charter* rights. The elevation of the specific quantity of drugs in the present case as the most important factor, despite the significant, flagrant and brazen conduct of the police officer, can only be seen as an outlier among contemporary Canadian jurisprudence and a danger to the significant line of precedent on s.24(2) in the past.

See Appendix A

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A CORRECT APPLICATION OF THE THIRD PRONG OF THE COLLINS TEST

10 78. Relying on the nature and gravity of the offence as the sole basis for the admission of the evidence can only result in an unprincipled and arbitrary application of s.24(2). It is impossible to draw a principled line as to when the seriousness of the offence must “tip” the scales: should evidence of 50 lbs of cocaine be excluded; should evidence of 25 lbs of cocaine be excluded; should 5 lbs of cocaine be excluded; should 1 gram of cocaine be excluded; should a marijuana grow-op be excluded; should 1 lb of marijuana be excluded; should 1 gram of marijuana be excluded; should there be a different standard depending on the nature of the drug; should evidence involving cocaine offences always be admitted notwithstanding the seriousness of the breach. It is respectfully submitted that focusing solely on the seriousness of the offence is an unprincipled and arbitrary application of s.24(2). It is respectfully submitted that Justice Cronk
20 correctly concluded that the approach to s.24(2) must be holistic, comprehensive and mindful of all relevant factors in order to be principled:

[150] The reliability of the evidence, the amount and type of the drug seized, and the seriousness of the alleged crime do not overwhelm the s.24(2) analysis at the expense of the consideration of other factors that are relevant to the admissibility determination. Were it otherwise, whenever serious crime is alleged in circumstances where significant constitutional violations lead to the discovery of important, non-conscriptive real evidence, the evidence would be admitted under s.24(2). This approach must be rejected. It would deprive those charged with serious crimes of the protection of the individual freedoms afforded to all
30 Canadians under the *Charter* and, in effect, declare that in the administration of the criminal law “the ends justify the means”. That theory is not the foundation of our constitutional order and system of criminal justice. It would be tantamount to treating s.24(2) as a rule of virtually automatic evidentiary inclusion in the circumstances of serious crime involving non-conscriptive real evidence of a dangerous drug. The Supreme Court of Canada has clearly rejected this view of s.24(2): see *Buhay* at para. 71; and *Mann* at para. 57.

Appellant’s Record, Volume 1 Reasons of Cronk J.A., p. 81, para. 150

79. The decision of Justice Cronk comes with significant jurisprudential support. This Honourable Court has excluded evidence in murder cases and serious drug trafficking offences
40 in the face of a deliberate or flagrant breach. In each case, a flagrant and deliberate breach was found by the court that could not be judicially condoned through the admission of the evidence, despite the seriousness of the offence. McLachlin C.J.C. in *R. v. Stillman* characterized the issue as follows:

In assessing this factor (the third group of *Collins factors*) I am mindful of the argument that those accused of serious offences are entitled to *Charter* protection as those accused of lesser offences. I am also of the view that the seriousness of offence should seldom if ever serve as the sole basis for admitting evidence obtained through bad faith or a serious violation of the

10 accused's constitutional rights. This said, the seriousness of the offence may affect the repute of the system of justice, the ultimate criterion for admission of the evidence under s.24(2). As such, as *Collins* states, it constitutes a factor to be considered. (emphasis added)

R.v. Stillman, *supra* per McLachlin C.J.C. at para. 269

80. Justice Cronk's dissent is additionally supported by this Honourable Court's affirmation of the importance of protecting the integrity of the justice system as a whole. Public confidence need not be maintained by a generous policy of admission of unconstitutionally obtained evidence. To the contrary. For example, in *R. v. Genest*, a search of a biker location pursuant to
20 a Narcotic Control Act warrant was found to have been unlawful. Weapons were located. The majority of the Quebec Court of Appeal (Owen and Beauregard JJ.A.) held that the trial judge had erred in excluding evidence given the serious crime and the importance of the evidence to the case. LeBel J. (as he then was) held as follows:

...A refusal to give effect to the legal guarantees would bring the administration of justice into disrepute as would a too technical or finicky application of these guarantees in cases of minor violations.

30 Without wanting to paralyze or adopt an interpretation of its requirements which is too ethereal, one must recognize that the Charter strengthens the rules which generally governed police actions. Crime must be checked: officers of the law, such as judges and the Crown, must act within the limits of the law and must respect the fundamental freedoms recognized by the Constitution, subject to reasonable limits which the Constitution itself recognizes the need for. The Constitution states that we all work under the authority of the law. The law constitutes the ultimate standard for judging police action, as it does for the acts of the courts in our society. The rejection of this norm undermines the very basis of the values of the type of society in which we live. One must guard against a too utilitarian conception of fundamental liberties in the application of s.24(2) where one puts them aside as soon as they interfere with the actions of public bodies or police forces.

40 *R. v. Genest*, [1986] 32 C.C.C. (3d) 8 per Lebel J. at p. 38

81. On appeal, this Honourable Court upheld the dissent as follows:

In his analysis of the effect the admission of the evidence would have on the administration of justice, Owen J.A. considered the effect of excluding it and the effect of admitting it. He pointed out that exclusion of the evidence would mean an automatic acquittal, while admission would mean a trial on the merits with the possibility of an acquittal if the facts of the case warranted it. ...

50 With respect, I think that such an approach would mean that in almost every case evidence would be admitted. Any time evidence is excluded there is a strong chance of an acquittal without a trial on the merits. If Owen J.A.'s approach were followed, exclusion of evidence

10 under s.24(2) would be very rare, probably only in those cases where a conviction was likely in any event. While the purpose of the rule is not to allow an accused to escape conviction, neither should it be interpreted as available only in those cases where it has no effect at all on the result of the trial. The consideration whether to exclude evidence should not be so closely tied to the ultimate result in a particular case. Lamer J. for the Majority in *Collins, supra*, held that courts should consider the effect on the administration of justice of excluding evidence, but that factor alone should not decide the case. (emphasis added)

R. v. Genest, supra, at p. 25 per Dickson C.J.C.

20 82. How then is the seriousness of the offence calibrated in the balancing exercise? Guidance was provided by this Honourable Court in *R. v. Greffe* where evidence was excluded after a finding of a serious breach:

...There is no doubt that what is at issue in this case is a serious offence, indeed a serious social evil, the possession and importation of drugs. Further, there is no doubt that but for the exclusion of the evidence, the appellant would be convicted of the counts against him. It must not be forgotten, however, that the inquiry under s.24(2) cannot be focused solely on the specific prosecution at issue; it is the long-term consequences of regular admission or exclusion of this type of evidence on the repute of the administration of justice which must be considered. As the Chief Justice noted in *Genest, supra*, at p. 82:

30 While the purpose of the rule is not to allow an accused to escape conviction, neither should it be interpreted as available only in those cases where it has no effect at all on the result of the trial. The consideration whether to exclude evidence should not be so closely tied to the ultimate result in a particular case.

In balancing the long-term consequences of regularly admitting the evidence in this case in the light of how it was obtained against the consequences of excluding it, I conclude that the balance tips in favour of exclusion. The administration of our system of justice will be brought into greater disrepute if this Court were to condone, taking the record as it is given to us by the police and the prosecution, the practice of using an arrest for traffic warrants as an

40 artifice to conduct a rectal exam of an accused who the police do not have reasonable and probable grounds to believe is carrying drugs. In fact, even if reasonable and probable grounds existed, support for which was not established by the Crown, there is still the admission by the Crown that the police deliberately failed to provide the appellant with the proper reason for the arrest, thereby infringing his rights under s.10(a) of the *Charter*. The Crown refers to this as “foolish” and a “blunder”, but in fact, it amounts to the police deliberately misleading the appellant and using deception, it can only lead to an inference of extreme bad faith on the part of the police in that they willfully circumvented the *Charter*, a factor which further supports the exclusion of the evidence in this case. This is especially so when what is involved is a violation of the right to counsel as well as a violation of the right to

50 be secure against unreasonable searches. It would be easy, but at the same time very dangerous, to allow the knowledge that the appellant must have had in respect of his possession of the drugs, to influence this Court’s assessment of whether the evidence should be excluded. To do so would be to import an *ex post facto* chain of reasoning that finds no place in an inquiry pursuant to s.24(2) of the *Charter*. (emphasis added)

10 *R. v. Greffe*, *supra* at p. 797-798 per Lamer J.

83. Similarly, in *R. v. Feeney*, real evidence was excluded in a murder case. The police were found to have flagrantly disregarded the accused's privacy interest. In rejecting the trial judge's finding that the breaches were not deliberate, willful or flagrant, Justice Sopinka held that the police did not have subjective grounds for a warrantless arrest in a dwelling house. Accordingly, the police either knew they were trespassing or should have known and accordingly could not have been held to have acted in good faith. In considering the effect of exclusion on the repute of the administration of justice, Justice Sopinka stated as follows:

20 The serious disregard for the appellant's *Charter* rights in the case at bar suggests that the admission of the evidence would bring greater harm to the repute of the administration of justice than its exclusion. The shirt, shoes, cigarettes and money were inadmissible under s.24(2), along with the statements and the fingerprints. If the exclusion of this evidence is likely to result in an acquittal of the accused as suggested by L'Heureux-Dubé J. in her reasons, then the Crown is deprived of a conviction based on illegally obtained evidence. Any price to society occasioned by the loss of such a conviction is fully justified in a free and democratic society which is governed by the rule of law.

R. v. Feeney, [1997] 2 S.C.R. 13, at para 83 per Sopinka J

30 84. Similarly, in *R. v. Stillman*, real evidence was excluded in a murder case. In considering the administration of justice, Cory J. balanced the seriousness of the offence as against the other relevant factors as follows:

The *Charter* rights of the accused were infringed by the actions of the police. Those actions could be taken to be abusive. It is easy to understand the sense of frustration of the police officers. They were attempting to obtain evidence implicating the person they suspected had murdered a young girl. Yet *Charter* rights are the rights of all people in Canada. They cannot be simply suspended when the police are dealing with those suspected of committing serious crimes. Frustrating and aggravating as it may seem, the police are respected and admired

- 10 agents of our country, must respect the *Charter* rights of all individuals, even those who appear to be the least worthy of respect. Anything less must be unacceptable to the courts.

R. v. Stillman, *supra*, per Cory J. at para. 126

85. Since the advent of the *Charter*, this court has repeatedly been willing look at the individual litigant and make a decision that balances both the need to ensure that justice is served in the present, while also recognizing the need for police officers to have the tools available to protect society and the need for each individual to be protected from intrusive and abusive police conduct in the future. In the instant case, the facts do not afford any generous interpretation of the conduct of the police officer – repeated and multiple *Charter* breaches, the complete absence of any basis to stop and search the vehicle, a finding that the officer conducted a search of the vehicle for the “license” as a ruse to search for drugs, compounded by his dishonesty in the witness stand constitute lawless, flagrant and deliberate violations.
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Conclusion

86. Even when real evidence is excluded, courts frequently feel compelled to comment that they do so “reluctantly”. The exclusion of evidence when rights have been infringed need not be done gingerly or apologetically where a flagrant, serious breach has been found. Once all of the circumstances have been considered dispassionately, if the admission of the evidence would bring the administration of justice into disrepute, the court has a duty rather than a discretion to exclude the evidence. Section 24(2) should not be measured by the yardsticks of police efficiency or general community views. To do so, threatens democracy and invites a rejection of our constitutional foundation. As stated by Binnie J., a “society that valued police efficiency above other values would be a police state”.
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See *R. v. Therens*, para. 78 per Le Dain

R. v. Clayton, [2007] SCC 32 at para. 68 per Binnie J.

PART IV – SUBMISSIONS REGARDING COSTS

87. The Appellant offers no submissions as to costs.

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PART V – STATEMENT OF THE ORDER SOUGHT

88. It is respectfully requested that the Appellant's appeal be allowed, the convictions quashed and a verdict of acquittal be entered or in the alternative, that a new trial be ordered.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 19th day of August, 2008.

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Marie Henein
Counsel to the Appellant

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PART VI – TABLE OF AUTHORITIES

10

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	Michael Davies, <i>Alternative Approaches to the Exclusion of Evidence under s.24(2) of the Charter</i> (2002), 46 Crim. L.Q. 21 at 28	3
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	David H. Doherty, <i>Stevens: S.24(2) of the Charter on Appeal</i> (1983), 35 C.R. (3d) 30 at p. 33	32
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APPENDIX A: Coast-to-Coast Case Law: Where A Flagrant and Deliberate Breach Has Been Found, The Evidence has been Excluded⁵**Ontario**

Case Name	Jurisdiction	Facts	Item/Amount	Decision
<i>R. v. Calderon</i> , [2004] 188 CCC 481	Ontario Court of Appeal	Breaches of s. 8, 9, and 10(b) – breaches cumulative and serious – breaches not inadvertent or technical – admission would bring administration of justice into disrepute	Significant quantity of marijuana	Excluded
<i>R. v. Sutherland</i> , [2000] 150 CCC 231	Ontario Court of Appeal	Errors and omissions in search warrant reflecting casual and inattentive attitude of officer – warrant invalid – officer flagrantly careless in preparation of info to obtain and showing no appreciation for significance of intrusion upon privacy of home – exaggerated by fact that search warrant unjustifiably executed at night. Most serious Charter violation.	substantial quantity of cocaine, some marihuana, hashish, L.S.D., Psilocybin, three handguns with ammunition	Excluded
<i>R. v. Monney</i> , [1997] 120 CCC 97	Ontario Court of Appeal	Finding that seriousness of violations favours exclusion of the evidence	Significant quantity of heroine	Excluded
<i>R. v. M.(A.)</i> , [2006] 208 CCC 438	Ontario Court of Appeal	Court of appeal concurred with trial judge finding that: “To admit the evidence is effectively to strip A.M. and any other student in a similar situation of the right to be free from unreasonable search and seizure”	Drugs (10 bags of marihuana and 10 magic mushrooms)	Excluded
<i>R. v. Zammit</i> , [1993] 81 CCC 113	Ontario Court of Appeal	Search was conducted with no reasonable and probable grounds as it was there was no evidence from which to obtain a warrant – therefore significant breach	Marijuana	Excluded

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In only 1 case did an appellate court make a finding that there was a serious breach of an accused’s *Charter* rights and yet admitted real evidence: *R. v. Calder*, [2006] 213 CCC 342

<i>R. v. Byfield</i> , [2005] 193 CCC 139	Ontario Court of Appeal	Finding that the investigative stop utilized by the police is the type of conduct that lends itself to racial profiling. The trial judge erroneously found evidence of good faith when there was none.	Cocaine and proceeds of crime	Excluded on appeal
<i>R. v. Batzer</i> , [2005] 200 CCC 330	Ontario Court of Appeal	Finding of bad faith where police searched vehicle after a pat-down search provided no drugs. Extended search went beyond any concern for officer safety.	22 gr of Cocaine and 13 ecstasy pills	Excluded
<i>R. v. Hosie</i> , [1996] O.J. No. 217	Ontario Court of Appeal	Finding that police acted carelessly in effecting defective warrant in a manner that was not inadvertent, trivial or technical in nature. Seriousness of breach not mitigated by good faith of officers. Finding that the courts should not condone language in warrants that deprives judicial officers from being able to balance privacy interests against interest in detecting crime.	68 marihuana plants	Excluded

Saskatchewan

Case Name	Jurisdiction	Facts	Item/Amount	Decision
<i>R. v. Rutten</i> , [2006] 205 CCC 504	Saskatchewan Court of Appeal	Multiple Charter violations (8 & 10(b)). Finding that the Charter violations were not merely technical, but that the police disregarded well settled law in relation to limits of a legal search and the requirements for a valid consent.	Cocaine (43.5gr) And marihuana in a pickle jar with rolling papers	Excluded
<i>R. v. Perello</i> , [2005] 193 CCC 151	Saskatchewan Court of Appeal	Finding of bad faith as A arrested without reasonable and probable grounds – the arrest was unlawful and arbitrary – the seizure of cash and van unlawful	Psilocibin (magic mushrooms) and proceeds of crime (\$55K)	Excluded
<i>R. v. Ladouceur</i> , [2002] 165 CCC 321	Saskatchewan Court of Appeal	Finding that there was no authority for random check-stop operation and therefore the breach was serious	4.5 kg of marihuana	Excluded

<i>R. v. Neilsen</i> , [1988] 43 CCC 548	Saskatchewan Court of Appeal	Warrantless search where there was found to be no reasonable and probable grounds for search, leading to finding that the breach was serious	two film tubes containing hashish oil, a further small glass vial, a "hot knife", and some rolling papers	Excluded
<i>R. v. Ironeagle</i> , [1989] 49 CCC 339	Saskatchewan Court of Appeal	Finding that conduct of police deliberate and serious violation of A's right of protection against arbitrary detention and unreasonable search	Drugs and drug paraphernalia	Excluded

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British Columbia

Case Name	Jurisdiction	Facts	Item/Amount	Decision
<i>R. v. Lau</i> , [2003] 175 CCC 273	British Columbia Court of Appeal	In executing valid warrant police not knocking but breaking door with battering ram and entering with guns drawn – police policy of unannounced entry in marihuana grow cases – statute authorizing use of force only in exigent circumstances – manner of search unreasonable – not good faith – breach of rights flagrant or blatant	Significant quantity of marihuana	Excluded
<i>R. v. Lam</i> , [2003] 180 CCC 279	British Columbia Court of Appeal	Findings that officer intent on seizing drugs even if manner of search disabled ability to proceed with charges – officer found to show disdain for Charter	108 lbs of marihuana	Excluded
<i>R. v. Vu</i> , [2004] 184 CCC 545	British Columbia Court of Appeal	Finding that officers did not act in good faith in searching vehicle outside of residence when warrant was only for residence.	Marihuana grow-op	Excluded
<i>R. v. Bohn</i> , [2000] 145 CCC 320	British Columbia Court of Appeal	Finding of an absence of good faith, not because police made deliberate mistake but because there actions were unreasonable and showed a pattern of disregard for Charter. Multiple Charter violations exacerbated serious breach (s.8 and 10(b))	Marihuana grow-op	Excluded
<i>R. v. Schedel</i> , [2003] B.C.J. No. 1430	British Columbia Court of Appeal	"The violation was anything but inadvertent or of a merely technical nature. Nor was it motivated by urgency. While there was reference to the need to prevent loss of evidence, there was no attempt to identify what evidence might have been lost. The situation was one where the evidence could	Marihuana grow-op	Excluded

		have been obtained without Charter violation. The circumstance that the Vancouver Police Department deliberately adopted a policy of ignoring the most fundamental rule protecting citizens from an unreasonable invasion of their dwelling put this violation in my view at the most serious end of the spectrum”		
<i>R. v. Dreyer</i> , [2008] B.C.J. No. 308	B.C. Court of Appeal	The breach was serious. There was a deliberate abuse of the limited search power. The officer showed bad faith and tried to justify it based on a spurious claim of safety.	3 grams of cocaine, measured into 6, ½ gram packages	Excluded

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New Brunswick

Case Name	Jurisdiction	Facts	Item/Amount	Decision
<i>R. v. Mitchell</i> , [2006] 204 CCC 289	New Brunswick Court of Appeal	Finding that search of vehicle was not lawful search incident to arrest – no relationship btw offence for which A arrested and reasons for search and therefore the police did not act in good faith Court pointed out that “I cannot escape the fact that in all of the reported cases in which the police were held not to have acted in good faith the evidence was ultimately excluded”	Crack cocaine (25 gr)	Excluded
<i>R. v. Pellerin</i> , [1999] 132 CCC 434	New Brunswick Court of Appeal	Warrantless search of uninhabited farmland owned by A – police showed reckless disregard for A’s rights tantamount to bad faith –admitting evidence would encourage warrantless searches	45 kg of hashish	Excluded
<i>R. v. LeBlanc</i> , [2007] N.B.J. No. 101	New Brunswick Court of Appeal	Trial judge correctly found that inclusion of evidence would bring administration of justice into disrepute.	Significant quantities of Cocaine, Oxycontin and marijuana	Excluded
<i>R. v. Bagnell</i> , [2001] N.B.J. No. 36	New Brunswick Court of Appeal	Upholds trial judge’s decision. Trial judge found that: “This violation is serious. It is not inadvertent or technical, nor was it committed in good faith. The officer flagrantly ignored the accused’s explicit lack of consent and deliberately searched the latter’s bag with no right or reason to do so. Good faith must never be confused with a righteous zeal to detect crime that ignores the rights of citizens.	A significant quantity of ecstasy pills	Excluded

		The violation in this case is significantly aggravated by the fact that this evidence could never support a search on the basis of officer safety, and despite this fact, the witness urged upon this Court an interpretation of the facts that was illogical, without reason and at times absurd.”	
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Alberta

Case Name	Jurisdiction	Facts	Item/Amount	Decision
<i>R. v. Lam</i> [2003] 178 CCC 59	Alberta Court of Appeal	Upheld trial judge’s ruling that: “The conduct by the police was wrong. It must be discouraged and can not be condoned by admitting the evidence of marihuana and cash monies into evidence.”	Significant quantity of marijuana and cash – 1 gram of heroin	Excluded
<i>R. v. Goncalves</i> , [1992] A.J. No. 476	Alberta Court of Appeal	Beyond dispute that entering a private dwelling home without a proper warrant is a serious Charter violation. The trial judge found that: “the administration of justice will be brought more into disrepute of the right to be secure against unlawful search and seizure is seen by the average citizen as being diminished by the police committing warrantless searches and seizures.”	500 grams of cocaine and significant drug paraphernalia which could only be associated with intended distribution of the product	Excluded

Newfoundland

Case Name	Jurisdiction	Facts	Item/Amount	Decision
<i>R. v. Traverse</i> , [2003] 175 CCC 537	Newfoundland Court of Appeal	Finding that info to obtain seriously deficient – warrant invalid, search unreasonable – serious Charter breach – admission of evidence would bring the administration of justice into disrepute	Marihuana grow up	Excluded
<i>R. v. Power</i> , [2001] N.J. No. 267	Newfoundland Court of Appeal	Finding that there were on circumstances that would have made the search of the respondent justifiable or reasonable. Finding that the police stated reason for search was a ruse to search for narcotics. To allow such police action would remove any reason for a police officer to obtain a warrant. The courts should not sanction or condone such police	Packet of marihuana and a set of scales	Excluded

		conduct.		
<i>R. v. Croucher</i> , [1996] N.J. No. 295	Newfoundland Court of Appeal	Facts which elevated the seriousness of the breach include the fact that it was a search of a home and that the accused was not the target of the search, but rather became the target by accident.	Significant quantity of hashish and other unnamed narcotics	Excluded

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Quebec

Case Name	Jurisdiction	Facts	Item/Amount	Decision
<i>R. v. Vigneault</i> , [2003] 182 CCC 422	Quebec Court of Appeal	no grounds for arrest from surveillance – search of vehicle unreasonable - no basis to justify warrant to search A's room. Qty of marihuana small and violations of charter serious	Marihuana	Excluded

Manitoba

Case Name	Jurisdiction	Facts	Item/Amount	Decision
<i>R. v. Damianakos</i> , [1997] 121 CCC 293	Manitoba Court of Appeal	Breach of rights so serious as to adversely impact on the long-term reputation of administration of justice – police announcing inaccurately that they had a search warrant – no exigent circumstances	Narcotics and two firearms	Excluded
<i>R. v. Gray</i> , [1993] M.J. No. 248	Manitoba Court of Appeal	Defects in process of issuing warrants is fundamental – resulted in the breakdown of the system designed to provide expectation of privacy – therefore serious breach	Large quantity of narcotics and drug paraphernalia, including 6 separately packaged bricks of cannabis resin	Excluded
<i>R. v. Lamy</i> , [1993] M.J. No. 179	Manitoba Court of Appeal	Motive of police is irrelevant where the police have a policy in place that is inappropriate because of its long-term consequences on the reputation of the justice system. The policy, in this case, resulted in sloppy police work – exacerbating the breach	20 pounds of marijuana	Excluded
<i>R. v. Duncan</i> , [2004] M.J. No. 303	Manitoba Court of Appeal	“The finding that the police failed to make a full and complete disclosure, let alone the trial judge's further finding that the police conduct was wilfully blind, if not deliberate, wilful and flagrant, is fatal to the Crown's position... The breach was serious; the conduct of the police was totally	Cocaine, cocaine trafficking paraphernalia and \$53,000 Cdn	Excluded

		unacceptable. To do anything but dismiss this ground of appeal would bring the administration of justice into disrepute.”		
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Prince Edward Island

Case Name	Jurisdiction	Facts	Item/Amount	Decision
<i>R. v. MacDonald</i> , [1988] 44 CCC 134	Prince Edward Island Court of Appeal	Finding that actions of police flagrant and serious violation of A’s Charter rights	Marihuana	Excluded

Nova Scotia

Case Name	Jurisdiction	Facts	Item/Amount	Decision
<i>R. v. Richard</i> , [1995] N.S.J. No. 218	Nova Scotia Court of Appeal	Invasion of a dwelling house is a very serious matter – the police could have obtained the evidence without violation of a Charter right. They did not provide to the Justice of the Peace enough information to warrant a search – therefore, the search was warrantless	Cash, scales and a significant quantity of cannabis resin	Excluded

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