

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

- and -

THE CRIMINAL LAWYERS' ASSOCIATION (ONTARIO)

Intervener

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Court File No. 32487

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INTERVENER'S FACTUM

PART I: STATEMENT OF THE FACTS

1. By Order dated October 10, 2008, Rothstein J. granted the Criminal Lawyers' Association (Ontario) (the "CLA") leave to intervene. The Order entitled the CLA to file a factum and deferred the CLA's request to make oral submissions. Accordingly, the CLA makes the following respectful written submissions for the assistance of the Court.

2. The CLA takes no position on the outcome of the appeal and accepts the facts as they are set out in the factums of the Appellant and the Respondent.

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PART II: POINTS IN ISSUE

3. The CLA takes the positions set out below on the following questions of law which are raised by the arguments of the Appellant and the Respondent:

10 **A. What factors in section 24(2) analysis are relevant to the seriousness of the breach?**

The factors relevant to the seriousness of the breach have been consistently established in a long line of cases decided by this Honourable Court from *Collins*¹ to, most recently,
15 *Kang-Brown* and *A.M.*²

B. What is the significance in section 24(2) analysis if the breach was committed with disregard for the limits of police conduct set out in prior decisions of this Court?

20 If the underlying breach was committed in the face of a clear pronouncement of this Court pertaining to the constitutional or legal limits of police conduct, then the breach should be considered extremely serious and militate strongly in favour of exclusion of the evidence.

25 **C. What is the significance in section 24(2) analysis if a police officer provides misleading testimony under oath regarding the police conduct that is found to constitute a *Charter* breach?**

30 If a police officer misleads the court by offering a contrived explanation for the investigative actions that are determined to constitute a serious breach of *Charter* rights, such testimonial misconduct by the officer should constitute an aggravating stand-alone factor militating toward the exclusion of the evidence.

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¹ *R. v. Collins*, [1987] 1 S.C.R. 265

² *R. v. Kang-Brown*, [2008] 1 S.C.R. 456; *R. v. A.M.*, [2008] 1 S.C.R. 569

PART III: ARGUMENT**A. What factors in section 24(2) analysis are relevant to the seriousness of the breach?****i. The Test Under Section 24(2)**

4. The proper approach for the determination of the admissibility of evidence following a breach of the *Charter* was established in *Collins*³. As summarized in *Jacoy*:⁴

First, the court must consider whether the admission of evidence will affect the fairness of the trial. If this inquiry is answered affirmatively, "the admission of evidence would tend to bring the administration of justice into disrepute and, subject to a consideration of other factors, the evidence generally should be excluded" (p. 284). One of the factors relevant to this determination is the nature of the evidence; if the evidence is real evidence that existed irrespective of the *Charter* violation, its admission will rarely render the trial unfair.

The second set of factors concerns the seriousness of the violation. Relevant to this group is whether the violation was committed in good faith, whether it was inadvertent or of a merely technical nature, whether it was motivated by urgency or to prevent the loss of evidence, and whether the evidence could have been obtained without a *Charter* violation.

Finally, the court must look at factors relating to the effect of excluding the evidence. The administration of justice may be brought into disrepute by excluding evidence essential to substantiate the charge where the breach of the *Charter* was trivial. While this consideration is particularly important where the offence is serious, if the admission of the evidence would result in an unfair trial, the seriousness of the offence would not render the evidence admissible.

5. The purpose of an order of exclusion under section 24(2) is not to punish the police. However, an order of exclusion of evidence should act as a deterrent to like-minded law enforcement officers tempted to engage in similar forms of unconstitutional behavior. Unless the exclusionary rule provides a disincentive for unconstitutional behavior, the "lax elements among our police can only be encouraged to assume that *Charter* guarantees are mere platitudes that both they and the courts will ignore when convenient".⁵ The remedy of exclusion is also necessary to express the disapprobation of the court of police practices that involve serious violations of the rights enshrined under

³ *R. v. Collins*, *supra*, at p. 285 *per* Lamer J. (as he then was)

⁴ *R. v. Jacoy*, [1988] 2 S.C.R. 548 at pp. 558-59 *per* Lamer J. [Emphasis added.]

⁵ *R. v. Silveira*, [1995] 2 S.C.R. 297 at para. 91 *per* La Forest J. dissenting

5 the *Charter*.⁶ The courts must not be seen to condone deliberate unlawful conduct
“designed to subvert both the legal and constitutional limits of police power to intrude on
individual privacy”.⁷

6. A decision to exclude evidence under section 24(2) raises a question of law.⁸
10 Absent legal error or an unreasonable finding of fact, the trial judge’s decision to exclude
evidence should be accorded some deference. This is especially true regarding the
assessment of the seriousness of the breach, which usually depends heavily on findings of
fact established through testimony on factors such as: the existence or absence of good
faith; whether the breach was deliberate, willful or flagrant; whether the police were
15 acting pursuant a reasonable understanding of their powers; and whether or not the
breach occurred in a situation of necessity or urgency.⁹ A trial judge’s assessment,
however, of the seriousness of the offence, which is rarely based on testimonial factors,
should be accorded less deference. An appellate court is in as good a position as a trial
court to make such an assessment.

20

7. The proper analysis under s. 24(2) demands a consideration of “all of the
circumstances” bearing on whether the evidence should be excluded and requires a
careful balancing of all three groups of factors identified in *Collins*.¹⁰ No one factor can
“trump” another. The seriousness of the breach should not be contrasted with the
25 seriousness of the offence to assess whether one pales in comparison to the other. The
primary focus of the court in conducting s. 24(2) analysis should be on the long-term
consequences for the administration of justice that would be occasioned by the decision
to admit or exclude the evidence. As stated in *Greffe*:¹¹

30 The first set of factors are those relevant to the fairness of the trial. The second set of factors
concerns the seriousness of the *Charter* violations as defined by the conduct of the law

⁶ *R. v. Collins*, *supra*, at p. 281 *per* Lamer J.; *R. v. Lamy* (1993), 80 C.C.C. (3d) 558 (Man. C.A.) at p. 568-569 *per* Scott C.J.M.

⁷ *R. v. Kokesh*, [1990] 3 S.C.R. 3 at para. 58 *per* Sopinka J

⁸ *R. v. Collins*, *supra*, at p. 275 *per* Lamer J.

⁹ *R. v. Buhay*, [2003] 1 S.C.R. 631 at para. 47 *per* Arbour J; *R. v. Law*, [2002], 1 S.C.R. 227 at paras. 38-41 *per* Arbour J; *R. v. Silveira*, *supra*

¹⁰ *R. v. Collins*, *supra*; *R. v. Law*, *supra*, at para. 33; *R. v. Buhay*, *supra*, at para. 41

¹¹ *R. v. Greffe*, [1990] 1 S.C.R. 755 at para. 32 *per* Lamer J. [Emphasis added.]

5 enforcement authorities. The third set of factors recognizes the possibility that the
administration of justice could be brought into disrepute by excluding the evidence despite
the fact that it was obtained in a manner that infringed the *Charter*. **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**
10 ***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 evidence, it is the long-term consequences of**
15 **regular admission or exclusion of the evidence on the repute of the administration of
justice that must be considered.** In other words, while I, and surely most people, would
like to see the appellant convicted and punished severely for the offences 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.
20 24(2) will only be used to exclude evidence when less serious crimes are involved.

ii. Seriousness of the Breach

8. As highlighted in *Jacoy*, several factors are relevant to the assessment of the
25 seriousness of the breach. As Arbour J. summarized in *Buhay*:¹²

The seriousness of the police's conduct depends on "whether it was committed in
good faith, or was inadvertent or of a merely technical nature, or whether it was
deliberate, wilful or flagrant" (*Therens, supra*, at p. 652). It is also relevant to
consider whether the violation was motivated by a situation of urgency or necessity:
30 *Therens*, at p. 652; *R. v. Silveira*, [1995] 2 S.C.R. 297, at p. 367; *Law, supra*, at para. 37.
Also pertinent is whether the police officer could have obtained the evidence by
other means, thus rendering her or his disregard for the *Charter* gratuitous and
blatant: *Collins, supra*, at p. 285; *Law*, at para. 37. The court may also look at some
or all of the following factors: the obtrusiveness of the search, the individual's
35 expectation of privacy in the area searched and the existence of reasonable and
probable grounds (*R. v. Caslake*, [1998] 1 S.C.R. 51, at para. 34)...

9. Given the myriad of circumstances that may inform the seriousness of the breach
in any given case, a court's assessment of the relevant factors will fall upon a spectrum.
40 At the less serious end will be breaches that are inadvertent or merely technical. In a
similar vein, where the police were acting in exigent circumstances¹³ or following an
understanding of their powers that was reasonable at the time of their exercise, the police

¹² *R. v. Buhay, supra*, at para. 52 [Emphasis added.]

¹³ *R. v. Silveira, supra*

5 may be found to have acted in “good faith”¹⁴. These factors may militate against a finding that the breach was serious. As stated by La Forest J. in *Wong*:¹⁵

10 ...it can in fairness be said that the police, in conducting themselves as they did, acted in accordance with what they had good reason to believe was the law, and before they had had a reasonable opportunity to assess the consequences of the *Charter* on their established practices.

15 10. At the other end of the spectrum, if the *Charter* violation is committed because of a police officer's unreasonable error or ignorance as to the scope of his authority, a finding of good faith is not available.¹⁶ In a worst case scenario, the unconstitutional actions of the police may be determined to be “deliberate, willful or flagrant”.¹⁷ If the police engaged in a pattern of disregard for the rights protected under the *Charter*, the breach will be considered more serious¹⁸. The greater the seriousness of the breach, the more likely the evidence should be excluded to prevent the administration of justice from being brought into disrepute.

20

11. Where the police have nothing but suspicion and no legal way to obtain evidence of alleged criminality, the police “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.**”¹⁹

25 As classically stated by Iacobucci J. in *Burlingham*:²⁰

30 ...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).**

¹⁴ *R. v. Kokesch*, *supra*, at para. 54.; *R. v. Wong*, [1990] 3 S.C.R. 36 at para. 40 *per* La Forest J.; *R. v. Evans*, [1996] 1 S.C.R. 8 at para. 23 *per* Sopinka J.

¹⁵ *R. v. Wong*, *supra*, at para. 40 *per* La Forest J.

¹⁶ *R. v. Kokesch*, *supra*, at paras. 52-54 *per* Sopinka J.; *R. v. Buhay*, *supra*, at para. 59; J. Sopinka, S.N. Lederman and A. W. Bryant, *The Law of Evidence in Canada* (2nd ed. 1999), at p. 450; *R. v. Mann*, [2004], 3 S.C.R. 59 at para. 55 *per* Iacobucci J.

¹⁷ *R. v. Silveira*, *supra*.

¹⁸ *R. v. Greffe*, *supra*

¹⁹ *R. v. Kokesch*, *supra*, at p. 29 [Emphasis in original]; quoted in *R. v. Buhay*, *supra*, at para. 60

²⁰ *R. v. Burlingham*, [1995] 2 S.C.R. 206 at para. 50 *per* Iacobucci J. [Emphasis added.]

- 5 **B. What is the significance in section 24(2) analysis if the breach was committed with intentional disregard for the legal limits of police conduct as set out in prior rulings of this Court?**

12. Where this Court has considered the constitutionality of a particular police
10 practice and ruled regarding the legal and constitutional limits of that practice, the failure
of the police to respect the decisions of this Court, by knowingly engaging in
constitutionally prohibited conduct, must give rise to extremely serious breaches of the
Charter. Conversely, if the decisions of this Court could be flouted by the police, and the
evidence derived thereby were routinely admitted into evidence, the decisions of this
15 Court would become meaningless platitudes that the police could ignore with impunity.

13. In a trilogy of cases decided more than 15 years ago, this Court held that random
traffic check stops cannot be abused by the police as pretexts for groundless criminal
investigations of the traveling public.²¹ As stated in *Ladouceur*:²²
20 Officers can stop persons only for legal reasons, in this case reasons related to driving a car
such as checking the driver's licence and insurance, the sobriety of the driver and the
mechanical fitness of the vehicle. Once stopped the only questions that may justifiably be
asked are those related to driving offences. **Any further, more intrusive procedures could
only be undertaken based upon reasonable and probable grounds. Where a stop is
25 found to be unlawful, the evidence from the stop could well be excluded under s. 24(2)
of the *Charter*.**

14. In *Mellenthin*, this Court drew the brightest line, holding that the search of a
person who is stopped at a check stop, without any reasonable and probable grounds,
30 “goes far beyond the purpose and aim of those stops and **constitutes a very serious
Charter breach**”.²³ As explained by Cory J. in emphatic language:²⁴

35 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**.

²¹ *R. v. Husky*, [1988] 1 S.C.R. 621; *R. v. Ladouceur*, [1990] 1 S.C.R. 1257; *R. v. Mellenthin*, [1992] 3 S.C.R. 615

²² *R. v. Ladouceur*, *supra*, at para. 60 *per* Cory J.

²³ *R. v. Mellenthin*, *supra*, at para. 26 *per* Cory J. [Emphasis added.]

²⁴ *R. v. Mellenthin*, *supra*, at para. 27 [Emphasis added.]

5 15. Because the Court's decision in *Ladouceur* had not been released at the time of unconstitutional check stop search in *Mellenthin*, no finding of bad faith was made against the officer. Nonetheless, the Court held that any attempt to extend a random check stop to include a generalized right to search without a warrant or reasonable grounds constituted a "serious *Charter* violation" warranting exclusion of the evidence.²⁵

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16. Following the Court's definitive ruling in *Mellenthin* that random traffic check stops cannot be used as pretexts for groundless searches of vehicles or their occupants for evidence of criminal offences, **there could be no room for any ambiguity in the police community about the limits of police powers in conducting roadside check stops.**

15 Thus, the CLA respectfully submits that any random check stop undertaken by the police in disregard for the rules established in *Mellenthin* **must invariably give rise to findings of bad faith on the part of the police and serious *Charter* breaches militating strongly in favour of exclusion of the evidence.** In cases involving deliberate, blatant or willful disregard by the police for the limits of police powers established by this Court, the admission of the evidence thereby discovered would bring the administration of justice into disrepute by **rewarding intentional disrespect** by the police for the important decisions of this Court regarding the fundamental rights and freedoms enshrined in the *Charter*.²⁶

20 17. In *Kokesch*, the failure of the police to conduct themselves in accordance with well established legal decisions was determined to severely aggravate the seriousness of the *Charter* breach. In that case, the police ignored the clear pronouncements of this Court regarding the law of trespass. Sopinka J. stated:²⁷

²⁵ *R. v. Mellenthin*, *supra*, at para. 31

²⁶ *R. v. Mellenthin*, *supra*, at para. 27 [Emphasis added.]; See also: *R. v. Mann*, *supra*, at paras. 51-57; *R. v. Mitchell* (2006), 204 C.C.C. (3d) 289 (N.B.C.A.) at paras. 25-32 *per* Robertson J.A.; *R. v. Calderon and Stalas* (2004), 188 C.C.C. (3d) 481 (Ont. C.A.) at para. 93 *per* Laskin J.A.; *R. v. [Michael] Ladouceur* (2002), 165 C.C.C. (3d) 321 (Sask. C.A.) at paras. 28-29 *per* Jackson J.A.: "**This is a reality that *Mellentin* said should not exist.**" and at paras. 61-64 *per* Bayda C.J.S.; *R. v. Rutten* (2006), 205 C.C.C. (3d) 504 (Sask. C.A.) at para. 29 *per* Smith J.A.: "**The courts have, on a number of occasions, made it clear that an investigation [...] into possible contraband is not permissible as part of general inquiries in vehicle stops, absent other grounds for the inquiry**"; and at para. 531: "**...the police disregarded well settled law in relation to the limits of a legal search...**" [All emphasis added.]

²⁷ *R. v. Kokesch*, *supra*, at para. 54 [Emphasis added.]

5 The question of the length of time after a judgment that ought to be permitted to pass before
knowledge of its content is attributed to the police for the purposes of assessing good faith is
an interesting one, but it does not arise on these facts. **The police here had the benefit of**
10 **slightly more than twelve years to study *Eccles*, slightly less than six years to consider**
***Colet*, and slightly more than two years to digest the constitutional warrant**
requirement set out in *Hunter*. Any doubt they may have had about their ability to
trespass in the absence of specific statutory authority to do so was manifestly
unreasonable, and cannot, as a matter of law, be relied upon as good faith for the
purposes of s. 24(2).

[...]

15 ...Where, however, police powers are already constrained by statute or judicial
decisions, it is not open to a police officer to test the limits by ignoring the constraint
and claiming later to have been "in the execution of my duties".

20 **C. What is the significance in section 24(2) analysis if a police officer provides**
misleading testimony under oath regarding police conduct that is found to constitute
a *Charter* breach?

18. Apart from other factors on the spectrum of seriousness in s. 24(2) analysis, if a
police officer is found to have misled the court in sworn testimony regarding the basis for
25 the exercise of his powers, such conduct must be considered an aggravating factor
strongly militating in favour of exclusion of the evidence. The obligation of a police
officer to offer complete and honest disclosure of his investigative practices while under
oath during a *Charter* motion goes to the heart of the administration of justice.

30 19. In the context of search warrant law, this Court has held that the affiant of an
information to obtain a search warrant has a duty to offer "**full and frank disclosure of**
material facts" during the *ex parte* application to obtain a search warrant.²⁸ In instances
of materially misleading disclosures by police in a search warrant information, a
reviewing court may determine that the conduct of the police was "so subversive of the
35 [authorization] process that the resulting warrant must be set aside to protect the
process".²⁹

²⁸ *R. v. Araujo*, [2000] 2 S.C.R. 992 at para. 46 *per* Lebel J. [Emphasis in original.]; *Re Church of Scientology and the Queen (No. 6)* (1987), 31 C.C.C. (3d) 449 (Ont. C.A.) at p. 528; *United States of America v. Friedland*, [1996] O.J. No. 4399 (Ont. C.A.) at paras. 26-29 *per* Sharpe J.A.

²⁹ *R. v. Morris* (1998), 134 C.C.C. (3d) 539 (N.S.C.A.) at p. 553 *per* Cromwell J.A. quoted with approval in *Araujo*, *supra*, at para. 54

5 20. The CLA submits that similar principles should apply where a police officer
testifies under oath as to the steps taken during a detention, arrest or search that is alleged
to be in violation of the *Charter*. Just as materially misleading testimony is intolerable in
the context of search warrant applications, misleading testimony offered by a police
officer as a justification for an investigative practice should, in the context of s. 24(2),
10 severely exacerbate the seriousness of the underlying *Charter* breach. In *Burlingham*,
this Court held 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)”.³⁰

15 21. In closing, the following words from Rosenberg J.A. in *Hosie* regarding search
warrant informations should apply equally to the misleading testimony of a police officer
given on a *Charter voir dire*.³¹

20 The courts should not be seen as condoning the use of language [...] which masks the
true state of affairs and deprives a judicial officer of the opportunity to fairly assess
whether the state’s interest in detecting crime outweighs the individual’s privacy
interest...”

PART IV: COSTS

22. The CLA makes no submissions as to costs.

PART V: ORDERS SOUGHT

23. The CLA takes no position on the disposition of this appeal.

ALL OF WHICH IS respectfully submitted by:

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³⁰ *R. v. Burlingham*, *supra*, at para. 50

³¹ *R. v. Hosie* (1996), 107 C.C.C. (3d) 385 (Ont. C.A.) at para. 34 *per* Rosenberg J.A.; see also *R. v. Donaldson* (1990), 58 C.C.C. (3d) 294 (B.C.C.A.); *R. v. Kesselring* (2000), 145 C.C.C. (3d) 119 (Ont. C.A.) at paras. 31-33 *per curiam*

PART VI

TABLE OF AUTHORITIES

	<u>Paras.</u>
<i>Cases</i>	
<i>R. v. Collins</i> , [1987] 1 S.C.R. 265	3(A), 4, 5, 6, 7
<i>R. v. Kang-Brown</i> , [2008] 1 S.C.R. 456	3(A)
<i>R. v. A.M.</i> , [2008] 1 S.C.R. 569	3(A)
<i>R. v. Jacoy</i> , [1988] 2 S.C.R. 548	4
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<i>R. v. Buhay</i> , [2003] 1 S.C.R. 631	6, 7, 8, 10
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<i>R. v. Araujo</i> , [2000] 2 S.C.R. 992	19
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BETWEEN:

Court File No. 32487

BRADLEY HARRISON
Appellant

- and -

**HER MAJESTY THE
QUEEN**
Respondent

- and -

**THE CRIMINAL LAWYERS'
ASSOCIATION**
Intervener

***IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF
APPEAL FOR ONTARIO)***

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