

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

BETWEEN:

BRADLEY HARRISON

Appellant
(Appellant)

-and-

HER MAJESTY THE QUEEN
in right of Canada

Respondent
(Respondent)

FACTUM
HER MAJESTY THE QUEEN, RESPONDENT
(Rules 36(2) and 42)

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RESPONDENT'S FACTUM

PART I – Statement of Facts

(i) Overview of the Respondent's Position

1. This is an appeal as of right challenging the determination of a trial judge's decision to admit 77 pounds of cocaine, worth millions of dollars, into evidence, even though the evidence was discovered as a result of an 'extremely serious' breach of the *Charter*. At its core, this case asks whether the seriousness of the breach must *always* trump the seriousness of the offence, or any other factor, in the s. 24(2) analysis. Such a finding would undermine the purpose and wording of s. 24(2) and eliminate the nature of the offence as a consideration in any case where the breach is characterized as serious. Additionally, the Appellant challenges this Court's direction that considerable deference is afforded to a trial judge's decision under s. 24(2) even where this Court may have decided differently.

2. The wording of s. 24(2) supports the principle that there is no automatic exclusionary rule, as previously confirmed by this Court. Therefore, in the context of an inquiry where unlawfully obtained evidence is *prima facie* admissible, it is most likely that evidence will be admitted in cases where the allegations are very serious, where admission of the evidence will not impact

on fair trial interests and where there are features of the *Charter* breach that attenuate the overall serious nature of the breach. This is such a case.

10 3. The s. 24(2) admissibility inquiry is a highly nuanced process. Each inquiry is individualized. This is because not all *Charter* breaches develop along the same dynamics, and because not all criminal allegations can be weighted equally in all circumstances for s. 24(2) *Charter* purposes. The inquiry calls for a fair appreciation of the nature of the particular breach, which is arrived at by examining not only the nature of the police conduct but such things as the degree of the expectation of privacy over the area searched or the thing seized and the obtrusiveness of the search. Similarly, the inquiry calls for a fair appreciation of the seriousness of the offence. In that regard, while most criminal offences can be broadly characterized as serious, just as most *Charter* breaches can be broadly characterized as serious, there can be meaningful differences, for s.24(2) *Charter* purposes, between the possession of an ounce of marihuana for personal use and the possession of 77 pounds of cocaine for the purpose of trafficking. The principles surrounding the admissibility inquiry allow for trial judges to apply common sense, experience and community perspectives to reasonably and meaningfully distinguish the impact on the reputation of the administration of justice occasioned in a host of varying circumstances.

20 4. A majority of the Court of Appeal for Ontario properly affirmed the conclusion of the trial judge that, in all of the circumstances surrounding a relatively brief roadside detention of a rented motor vehicle whose unlicensed driver was transporting, inter-provincially, 77 pounds of cocaine, excluding that quantity of cocaine from evidence on the basis of the nature of the *Charter* breaches would more negatively impact the reputation of the administration of justice than would admitting the evidence.

30 5. Neither the majority of the Court of Appeal nor the trial judge misunderstood or misapplied the balancing test under s. 24(2) of the *Charter*, established and explained by this Court over the last 20 years. The trial judge fully and correctly appreciated the nature of the *Charter* interests at play, and the significance of the breaches in the context of his ultimate decision on whether to admit or exclude the evidence. Notwithstanding that the circumstances of this case

provided a basis upon which some trial or appellate judges may have decided, and most likely only with great reluctance, to exclude the evidence, the trial judge's evaluation and assessment of the potential disrepute on the administration of justice in this case, which led to his ultimate decision not to exclude the evidence, was faithful to the proper legal analysis. Even accepting that this was a "close case," his decision was inherently reasonable. In these circumstances, the majority of the Court of Appeal was correct in invoking and applying this Court's well established principle of deference in relation to a trial judge's decision to exclude or admit evidence under s.24(2) of the *Charter*.

10 **(ii) Summary of Facts**

6. While the Respondent accepts as substantially correct the statement of facts as contained in paragraphs 5-30 of the Appellant's factum, for completeness, the Respondent considers the following facts relevant.

7. On October 24, 2004, Constable Bertoncello of the Kirkland Lake Detachment of the Ontario Provincial Police was performing general law enforcement duties in a marked police cruiser on Highway 11 in Grenfell Township. At 4:15 p.m., and while parked in his vehicle, he noticed a red sports-utility vehicle travelling on the highway without a front licence plate. Bertoncello's initial thought was that this constituted a *Highway Traffic Act* violation. He
20 immediately activated his emergency lights and pursued the vehicle. Once behind the vehicle, Bertoncello conducted a vehicle check and learned that the vehicle, which carried an Alberta licence plate, was registered to the Alamo car rental company out of Vancouver International Airport in Vancouver, British Columbia.¹

8. The vehicle was driving exactly at the speed limit of 90 kilometres per hour, something that made Bertoncello a bit suspicious because in his experience it was very rare that someone would be driving that stretch of highway exactly at the speed limit. He proceeded to stop the vehicle because it had no front plate and to check for a proper driver's licence, insurance and registration. The vehicle was stopped at 4:17 p.m. In cross-examination, Bertoncello
30 acknowledged that he was aware that it was not an offence to not have a front licence plate on

¹ *Testimony of Brian Bertoncello, Appellant's Record, Volume II, pp.105-108.*

an Alberta vehicle. He also explained that he knew that drug traffickers and organized crime members commonly used rented vehicles to commit offences because they know that proceeds of crime legislation can be used to seize vehicles. This added to Bertoncello's general suspicions.²

9. In response to the trial judge's question following the completion of Bertoncello's cross-examination, Bertoncello explained why he followed through on stopping the vehicle after he determined that the operator was not actually committing an offence, in this manner:

10 Ah, continuation of the, ah, the traffic stop. I had my emergency lights already going, um, the, ah, the vehicles behind me. I had been pulling over. Um, my integrity was, ah, was there, the integrity for police, and also now to check up on, to make sure that this person is eligible to drive in the Province of Ontario.

As Bertoncello further explained to the trial judge, "... the rental vehicle may be rented on another person's name, and, um, or a third party, and the person driving it may not be a licenced driver."³

20 10. The Appellant was driving the vehicle. Sean Friesen was a passenger seated in the front passenger area. There was a bench seat in the next row of seats, and behind that row was an open cargo area. The trunk door of the vehicle was a hatch-back style door. Bertoncello advised the Appellant that he had stopped him because there was no front licence plate on the vehicle. He asked the Appellant to produce his driver's licence as well as the vehicle insurance, registration and rental agreement.⁴

11. The Appellant was unable to produce his licence. He spent some time searching his pockets and some areas of the vehicle, and advised Bertoncello that he must have left his licence in his friend's bag back in Vancouver, where he had recently been. The Appellant, on his own, stepped out of the vehicle to try and locate his licence, and he himself opened the rear side door to look in the second row of seats.⁵

² *Testimony of Brian Bertoncello, Appellant's Record, Volume II*, pp.129-131.

³ *Testimony of Brian Bertoncello, Appellant's Record, Volume II*, p.170.

⁴ *Testimony of Brian Bertoncello, Appellant's Record, Volume II*, pp.108-109.

⁵ *Testimony of Brian Bertoncello, Appellant's Record, Volume II*, pp.108-110.

12. During this process, Bertoncello observed that the vehicle had a messy "lived in" look, with empty fast food and coffee cup containers strewn about, as well as bags of clothing. From this Bertoncello inferred that the Appellant and Friesen had been only stopping long enough to grab something to eat.⁶

13. The Appellant had identified himself verbally to Bertoncello, and produced the Alamo rental agreement, which showed that Friesen had rented the vehicle. Friesen identified himself with a valid Ontario driver's licence. Friesen had a Kingston address, while the Appellant resided in Oshawa. Bertoncello spoke with both individuals. The Appellant told Bertoncello that he had only known Friesen for a few months and met him through a friend in Vancouver. Friesen told Bertoncello that the Appellant's wife was pregnant, that they (Friesen and the Appellant) had gone to Vancouver only three days prior to the stop, and that he had known the Appellant for a year or more. Bertoncello believed he had been given conflicting stories about how the Appellant and Friesen knew each other.⁷

14. Bertoncello ran computer checks on both individuals. Those checks revealed that the Appellant's licence had been suspended indefinitely due to family support obligation problems. The Appellant had been served with the notice of suspension one week before this stop. Bertoncello advised the Appellant of his finding and the Appellant acknowledged that his licence was suspended, and told Bertoncello that he was getting it looked after.⁸

15. At 4:32 p.m., Bertoncello placed the Appellant under arrest under the *Highway Traffic Act* for driving while his licence was suspended. Bertoncello handcuffed the Appellant, conducted a pat-down search of him and escorted him to his police cruiser. He advised the Appellant of his rights, including his right to counsel – the Appellant understood these rights. Bertoncello also advised the Appellant that he would be searching the rented vehicle, incident to arrest, for a driver's licence – the Appellant understood this as well.⁹

⁶ Testimony of Brian Bertoncello, Appellant's Record, Volume II, pp.111, 116 and 133.

⁷ Testimony of Brian Bertoncello, Appellant's Record, Volume II, pp.111-113.

⁸ Testimony of Brian Bertoncello, Appellant's Record, Volume II, p.113.

⁹ Testimony of Brian Bertoncello, Appellant's Record, Volume II, pp.113-115.

16. Bertoncello did not necessarily believe that the Appellant did not in fact have his licence. On that basis he was concerned that the Appellant would afterwards continue to drive while he was in possession of his driver's licence. Accordingly, he wanted to take the licence away. Bertoncello thought that the licence could be contained within areas of the vehicle that the Appellant had not himself searched.¹⁰

17. As the Appellant's trial counsel pointed out to Bertoncello during cross-examination, a continued detention under the *Provincial Offences Act* was justified if Bertoncello had reasonable grounds to believe that it was necessary to do so to establish identity, secure or preserve evidence or prevent the continuation or repetition of an offence or commission of another offence. Bertoncello believed the continued detention was justified on all three bases. The Appellant remained by the police cruiser while Bertoncello went back to the rented vehicle and spoke to Friesen and later searched the vehicle.¹¹

18. Friesen had been escorted out of the vehicle at this point by another officer, Constable Thibault, who arrived on scene shortly after the vehicle was stopped. Both the Appellant and Friesen had been asked if there were any drugs or weapons in the vehicle. Both said there were not. Bertoncello had received drug interdiction training. From that training he knew that drugs are imported into the port city of Vancouver and that Toronto is a destination where drugs can be distributed from. This, along with the fact that the Appellant and Friesen drove a rented vehicle essentially straight through from Vancouver to Ontario without stopping, provided Bertoncello with some basis for suspecting that there might be a combination of drugs, weapons or cash in the vehicle. Bertoncello's primary reason for wanting to search the vehicle was in relation to the driver's licence. Bertoncello advised both the Appellant and Friesen that the vehicle was going to be searched for the Appellant's driver's licence – both individuals understood this.¹²

19. The Appellant's driver's licence was ultimately located in his wallet, which was in his jacket in the rear row of seats, a location that the Appellant earlier searched but advised did not

¹⁰ Testimony of Brian Bertoncello, Appellant's Record, Volume II, pp.137-139; 146; 150.

¹¹ Testimony of Brian Bertoncello, Appellant's Record, Volume II, pp.139-142; 147.

¹² Testimony of Brian Bertoncello, Appellant's Record, Volume II, pp.115-117; 143-147.

contain his licence. Prior to that discovery, Bertoncello searched in the open rear cargo area of the vehicle in the presence of Friesen. He started his search there. It was the one spot that the Appellant had not checked when he was looking for his licence.¹³

20. The open rear area contained two duffle bags and two cardboard boxes. When Bertoncello asked Friesen if there were any drugs or weapons in the boxes, Friesen advised that they contained dishes and books for his mother. Notwithstanding Friesen's answer, the manner in which the boxes were sealed (among other things, they were taped closed at the handles) did not suggest to Bertoncello that they were being used to transport dishes.

10 Moreover, the boxes were heavy and solid. When they were moved there was no noise that would indicate that there was glassware in the boxes.¹⁴

21. When Bertoncello commented to Friesen that it did not seem to him that there were dishes in the boxes, Friesen did not respond. Bertoncello asked Friesen again if there were any drugs or weapons in the box. Friesen, in a very nervous manner, looked down at the ground, kicked the dirt and said "yeah." He then said he was not sure what was in the boxes. Bertoncello's (and the other officers' – there were three by this point) suspicions were now heightened by the fact that Friesen would not know in these circumstances what was inside the boxes. One box was opened and Bertoncello observed two bricks of a white substance. Friesen was arrested at 4:41 p.m.¹⁵

20

22. The Appellant was also immediately arrested and was read his rights and cautioned. The Appellant stated to Bertoncello that he did not know about the cocaine, that Friesen had offered to give him a ride to Ontario and that the boxes "were there from Mr. Friesen".¹⁶

23. Both boxes were eventually opened and 35 one kilogram bricks of cocaine (77 pounds) were discovered. Also located in the vehicle during the roadside search and at the search back at the police detachment were a large amount of currency, two cell phones, a laptop Toshiba

¹³ *Testimony of Brian Bertoncello, Appellant's Record, Volume II*, pp.124-25; 149-150.

¹⁴ *Testimony of Brian Bertoncello, Appellant's Record, Volume II*, pp.117-119.

¹⁵ *Testimony of Brian Bertoncello, Appellant's Record, Volume II*, pp.119-120; 123.

¹⁶ *Testimony of Brian Bertoncello, Appellant's Record, Volume II*, p.120.

computer and a map of British Columbia and Alberta, hotel and gasoline receipts and the Appellant's wallet, containing his driver's licence, located inside a blue North Base jacket from the rear seat of the vehicle.¹⁷

(iii) Trial Judge's Ruling

24. Numerous appellate authorities, many from this Court, were presented to the trial judge to consider during trial counsel's full submissions on the *voir dire*. The trial judge stated he could not properly resolve the issues in short order. He said:

10 Well, obviously, this is a serious matter and will take some consideration – quite aside from the 40 cases that you have given me to read. I am not quite sure that I can accomplish that by tomorrow in time to start at ten o'clock.¹⁸

The trial judge accordingly reserved his decision and adjourned the matter to the next day. On that date, the trial judge explained to counsel that he did not have a ruling, and adjourned the matter for a further two weeks. He said:

 As I indicated yesterday, I thought I might find it necessary to reserve, and after spending all last evening considering my ruling, I decided to reserve.¹⁹

20 25. The trial judge ultimately delivered his ruling four weeks after hearing the evidence and the submissions. He rejected Bertoncello's evidence for why he stopped the vehicle after he realized that it did not require a front licence plate. The trial judge described Bertoncello's explanations for stopping the vehicle and detaining the two accused as 'contrived and defy credibility'.²⁰ He also concluded that the officer's main and probably only real intention was to look for drugs when he said he was looking for the Appellant's driver's licence. On that basis, he concluded that Bertoncello lacked adequate grounds to lawfully stop the vehicle, detain the occupants and search the vehicle incident to the Appellant's arrest for driving while under

¹⁷ *Testimony of Brian Bertoncello, Appellant's Record, Volume II*, pp.123-125.

¹⁸ *Submissions of Counsel, Appellant's Record, Volume II*, p.225.

¹⁹ *Submissions of Counsel, Appellant's Record, Volume II*, p.227.

²⁰ *Ruling on voir dire, Appellant's Record, Volume I*, p.6.

suspension. He conducted a s. 24(2) *Charter* inquiry on the basis of the ss. 8 and 9 *Charter* breaches.²¹

26. The trial judge referred to this Court's judgment in *Collins*²² and the three well established categories of factors he was to consider. It was common ground that the drugs were non-conscriptive evidence that would not affect the fairness of the trial. In considering the second stage of the *Collins* test, he referred to this Court's judgment in *Buhay*,²³ which outlined the relevant considerations with respect to the seriousness of the *Charter* breaches. He applied the comments made by this Court in *Buhay*, *Wise*²⁴ and *Kokesch*²⁵ to conclude that Bertoncello's actions were conducted in bad faith and to accordingly characterize the breaches in this case as extremely serious. He nonetheless rejected, however, defence submissions that this case constituted the most egregious set of conceivable circumstances. He approached the third part of the *Collins* test noting that the exercise involved a consideration of whether excluding the evidence would have a more serious impact on the repute of the administration of justice than admitting it. He frankly described Bertoncello's conduct as blatant and flagrant, but also candidly observed that the conduct paled in comparison to the criminality involved in the possession for the purposes of distribution of 77 pounds of cocaine. The trial judge admitted the cocaine into evidence.²⁶

(iv) Court of Appeal - Majority Judgment of O'Connor A.C.J.O and MacPherson J.A.

27. A majority of the Court of Appeal concluded that the trial judge properly engaged in the balancing process mandated by *Collins*. It also found that the trial judge's decision to admit the evidence was a reasonable one, concluding that:

Thus, for the reasons stated, we believe that without minimizing the seriousness of the police officer's conduct or in any way condoning it, it was open to the trial judge to find that reasonable members of the community could well conclude that the exclusion of 77 pounds of cocaine, with a street value of several millions of dollars and the potential to cause serious grief and misery to many,

²¹ *Trial Judge's Ruling on voir dire*, Appellant's Record, Volume I, pp.5-13.

²² *R. v. Collins*, [1987] 1 S.C.R. 265.

²³ *R. v. Buhay*, [2003] 1 S.C.R. 631.

²⁴ *R. v. Wise*, [1992] 1 S.C.R. 527.

²⁵ *R. v. Kokesch*, [1990] 3 S.C.R. 3.

²⁶ *Ruling on voir dire*, Appellant's Record, Volume I, pp.13-18.

would bring the administration of justice into greater disrepute than would its admission.²⁷

(v) Court of Appeal - Minority Judgment of Cronk J.A.

28. Cronk J.A. strongly disagreed with the majority's decision stating that they had improperly recast the findings of the trial judge specifically with regard to the seriousness of the breach. She believed that the trial judge's decision did not require deference since he made the following two errors of law in his determination of whether to exclude the evidence seized:

1. by failing to consider whether condoning the constitutional misconduct by admitting the evidence would exact a greater toll on the integrity of the administration of justice than would excluding it, and

2. by improperly focusing on the seriousness of the crime alleged and the significance of the evidence to the Crown's case, to the virtual exclusion of all other relevant considerations.²⁸

With this determination, Cronk J.A. proceeded to determine afresh whether the evidence should be excluded. She determined, because of the seriousness of the breach, that the admission of the cocaine would bring greater disrepute to the administration of justice than its exclusion.

²⁷ *Reasons for Judgment of the Ontario Court of Appeal, Appellant's Record, Volume I*, p.61, para.70.

²⁸ *Dissenting Reasons by the Honourable Madam Justice Cronk, Appellant's Record, Volume I*, p. 65, para. 83.

PART II – Respondent's Position to the Appellant's Questions

29. The Respondent's position to the issues raised by the Appellant is as follows:

(i) Any analysis under s. 24(2) of the *Charter* requires a consideration of all the factors with no single factor being determinative. The seriousness of the offence may justify the admission of unconstitutionally obtained evidence in particular circumstances. This Court, relying on the wording of s. 24(2), has continually accepted that there is no hierarchy of factors within the *Collins* framework and that exclusion of evidence is not automatic even where it has been obtained as a result of a serious *Charter* breach.

(ii) The Appellant's challenge to the trial judge's decision to admit the evidence, reflecting in the dissenting reasons of Cronk J.A., is premised solely on the position that the trial judge should have appreciated that the seriousness of the breach was a more significant consideration than the seriousness of the offence, or any other factor. This position is nothing more than a difference of opinion. It does not make the trial judge's decision reversible. There is no basis to interfere with the trial judge's exercise of discretion to admit the evidence pursuant to his s. 24(2) *Charter* inquiry.

PART III – Argument

A. DEFERENCE IS TO BE AFFORDED TO THE DECISION

(i) Standard of review of s. 24(2) *Charter* rulings

30. Appellate courts are required to show considerable deference to a trial judge's decision respecting the application of s. 24(2) of the *Charter*. The determination of whether to exclude evidence under s. 24(2) of the *Charter* is a question of law.²⁹ However, that decision is not to be overturned unless the trial judge makes an unreasonable finding of fact or a legal error in applying that provision.³⁰ As reiterated by this Court in *Law*:

While a decision to exclude must be a reasonable one, a reviewing court will not interfere with a trial judge's conclusions on s. 24(2) absent an "apparent error as to the applicable principles or rules of law" or an "unreasonable finding" [citations omitted].³¹

31. In particular, deference is to be afforded the trial judge in his or her application of the discretionary elements. The discretionary exercise of evaluating whether the admission or exclusion of evidence would bring the administration of justice into disrepute is a question of mixed fact and law, and is thus subject to a standard of "palpable and overriding error."³² In evaluating the relative factors in the s. 24(2) analysis, a trial judge will weigh the credibility of witnesses, consider the privacy interests at stake and assess the seriousness of both the offence and the breach in the context of all the circumstances. It is because of the myriad of components to this process that the requirement of deference arises.

32. This deferential standard of review has its origins in this Court's early *Charter* jurisprudence³³ and is a fundamental principle of interpretation for s. 24(2) appellate litigation. Accordingly, even assuming that this appeal raises a question of law alone, the threshold for overturning the trial judge's ruling in this case is significant.

²⁹ *R. v. Buhay, supra*, at para. 42.

³⁰ *R. v. Stillman*, [1997] 1 S.C.R. 607, at para. 68; *R. v. Grant*, [1993] 3 S.C.R. 223, at p. 256.

³¹ *R. v. Law*, [2002] 1 S.C.R. 227, at para. 32.

³² *R. v. Buhay, supra*, at para. 45. See also: *R. v. Pech*, 2008 BCCA 61, at para. 33.

³³ *R. v. Duguay*, [1989] 1 S.C.R. 93.

(ii) The s. 24(2) test

33. The three step analysis under s. 24(2) has not been altered since it was first articulated in 1987 by this Court in *Collins*.³⁴ Trial fairness, seriousness of the breach and the effect on the administration of justice, have been the analytical framework applied by the courts of this country since that date and have withstood the test of 20 years of constitutional litigation. Within that framework there have been various shifts towards and away from particular trends, such as the debate over an automatic exclusionary rule for conscriptive evidence. However, the core elements have not changed. Additionally, and importantly for this appeal, this Court has not established a hierarchy of factors that could serve to predetermine the decision to exclude or admit evidence. Any attempt to do so would be a disservice to the flexibility provided for in the *Collins* test and the guidance it affords in the protection of the administration of justice.

34. Within the three constituent categories of the analysis there are various considerations that underlie the assessment of whether the circumstances favour inclusion or exclusion. A trial judge's characterization of these considerations, such as the seriousness of the offence or the seriousness of the breach, are made within the context of the evidence presented, including the determination of the factors that support the final decision to exclude or admit.

(iii) The trial judge correctly approached the admissibility inquiry

35. The majority of the Court of Appeal properly concluded that the trial judge engaged in a full and faithful application of the *Collins* three-part test under s. 24(2) of the *Charter*. A review of the trial judge's reasons easily supports this finding.

36. The test itself is so well established, and so commonly applied by trial judges on a daily basis, that it would be difficult for the Appellant to suggest that the trial judge failed to appreciate the nature of the test. The trial judge referred to the test and expressly outlined the three categories of factors to consider.

37. There continues to be no issue that the Appellant's fair trial interests were not affected by the admission of the 77 pounds of cocaine worth between \$2.5 and \$4.5 million. As the

³⁴ *R. v. Collins, supra.*

majority of the Court of Appeal correctly noted, this consideration is a factor that militates in favour of admission.

38. The trial judge also correctly appreciated the nature of the *Charter* breaches in this case. He candidly described the police conduct in blunt terms and condemned it in unequivocal language. In that regard, the trial judge neither mischaracterized nor minimized the nature of the police conduct associated with the breaches.

10 39. The Appellant has, however, ignored a significant component of the second category of the admissibility inquiry by focusing exclusively on the nature of the police conduct. As this Court stated in *Buhay*, and as the trial judge himself expressly observed,³⁵ a number of factors are engaged under this head of analysis. In addition to the nature of the police conduct, these factors include such things as the obtrusiveness of the search and the scope of the expectation of privacy in issue. Accordingly, the majority of the Court of Appeal correctly highlighted the nature of the detention and the reduced expectation of privacy the Appellant had in the trunk of the vehicle (on the trial record, he actually had no expectation of privacy in the cocaine seized) as relevant factors which must have implicitly animated the trial judge's observation that this case did not fall within the most egregious category of *Charter* breaches. That is not to say, of course, that it would take the most egregious example of a *Charter* breach to justify exclusion
20 of any evidence under s. 24(2) of the *Charter*. Nor can it be said, however, that every serious case of police misconduct justifies exclusion of any evidence.

40. The trial judge fully appreciated the balancing exercise he was required to undertake in coming to this ultimate conclusion regarding the impact on the reputation of the administration of justice that would be occasioned by either admitting or excluding the cocaine in this case. A majority of the Court of Appeal for Ontario affirmed that this exercise of discretion was reasonable in these circumstances. Many trial and appellate judges, even if not most, would similarly agree that the result was reasonable. As Arbour J. stated in *Buhay*:

30 ... it is my view that the trial judge's conclusions were neither unreasonable nor based upon an error or a misapprehension of the applicable law. They are

³⁵ *Ruling on voir dire*, Appellant's Record, Volume I, pp.14-15.

therefore entitled to deference from this Court. Even though my own appreciation of the s. 24(2) factors may have been different than that of the trial judge, I can find no basis to overrule his findings on this regard.³⁶

That alone should be a complete answer to this appeal.

41. Moreover, it seems axiomatic that when a trial judge exercises his discretion reasonably to admit non-conscriptive evidence which does not impact on trial fairness but which was nonetheless obtained as a result of serious *Charter* breaches, that the seriousness of the offence takes on a significant dimension in that particular case. This is entirely consistent with the recurring observations of the Ontario Court of Appeal that the exclusion of reliable evidence essential to the prosecution of a significant criminal offence must, in the long term, have some adverse effect on the administration of justice.³⁷

42. It is not surprising, therefore, that the trial judge in this case broadly juxtaposed the nature of the *Charter* breaches with the seriousness of the offence during his overall assessment of whether admission or exclusion of the evidence would impact more negatively on the repute of the administration of justice. In doing so, however, it does not mean that he failed to appreciate all the recognized considerations in the admissibility inquiry. By analogy to the sentencing process, a sentencing judge does not err in their imposition of sentence just because they find that the principle of general deterrence is a very significant or perhaps even the most significant consideration.

43. The Appellant's fundamental complaint that the trial judge overemphasized the seriousness of the offence in coming to his conclusion is intuitively flawed on this record. It is essentially premised on the following notion: for the trial judge not to have excluded evidence on the basis of the strong findings he made regarding the serious nature of the police conduct animating the *Charter* breaches, he must have overemphasized, to the point of constituting legal error, the seriousness of the offence. The other reasonable and equally plausible explanation, however,

³⁶ *R. v. Buhay*, *supra*, at para. 48.

³⁷ *R. v. Grant* (2006), 209 C.C.C. (3d) 250 (Ont. C.A.), leave to appeal to SCC granted June 21, 2007, decision reserved; *R. v. Harris* (2007), 225 C.C.C. (3d) 193 (Ont. C.A.); *R. v. Lewis* (1998), 122 C.C.C. (3d) 481 (Ont.C.A.).

is that he took into account, as he said he did, all of the circumstances this Court has outlined he should.

44. The trial judge's reasoning and ultimate assessment of the evidence before him was correct, does not reveal an error of law and deserves the deference of this Court.

B. TRIAL FAIRNESS

45. The key consideration under this head of analysis is the "nature of the evidence obtained and the nature of the right violated".³⁸ Evidence obtained in violation of the *Charter* which does not emanate from the accused but rather existed independently of the violation is classified as non-conscriptive evidence. Moreover, violations of s. 9 of the *Charter* rarely yield conscriptive or derivative evidence affecting the fairness of a trial.³⁹ The cocaine and other items seized as a result of the search of the rental vehicle is real evidence which existed irrespective of the *Charter* violation. Throughout the proceedings the Appellant has admitted that such evidence is not conscripted and does not affect trial fairness. The trial judge and both the majority and the minority of the Court of Appeal agreed.

46. This category can be the most important feature in the admissibility inquiry. Accordingly, its relevance in the balancing exercise should not be discounted, nor should the category itself be overlooked once a trial judge moves on to consider the next two categories of the analysis.

C. SERIOUSNESS OF THE BREACH

47. The characterization of the police officer's conduct by the trial judge as 'brazen and flagrant',⁴⁰ is not challenged. Contrary to the dissenting opinion of Cronk J.A., the majority of the Court of Appeal did not recast the trial judge's assessment of the seriousness of the breach. The majority repeated the characterization of the officer's conduct as 'brazen and flagrant' and as 'extremely serious'. They then expressly accepted the trial judge's findings on this issue.⁴¹

³⁸ *R. v. Mann*, [2004] 3 S.C.R. 59, at para.52 (S.C.C.)

³⁹ *R. v. Grant*, *supra*, at para.48 (Ont. C.A.).

⁴⁰ *Ruling on Voir Dire*, *Appellant's Record*, Volume I, p.16.

⁴¹ *Reasons for Judgment of the Ontario Court of Appeal*, *Appellant's Record*, Volume I, p.55, para.39-41.

48. The Appellant's challenge to the majority of the Court of Appeal's discussion on this point is mistaken. The trial judge clearly stated that the breach was not the most egregious. Rather than recasting the finding of fact, the majority assessed the degree of egregiousness by reviewing the evidence which was presented that could support that finding; a duty the Court of Appeal was under. None of the facts that the majority considered relative to the seriousness of the breach are subject to challenge. This was a roadside stop of a car rented by someone other than the Appellant. The Appellant's sole privacy interest must be seen in the context of being an invited but unlicensed co-driver of a vehicle rented by someone else. The Appellant never asserted any connection with the boxes being searched. Bertoncello searched the trunk in the presence of Friesen, the sole renter of the vehicle. The Court of Appeal properly reviewed the trial judge's determination of the scale of the breach and correctly determined that it was not of such a severity that it mandated the exclusion of the seized cocaine.

49. There is a continuum along which this unconstitutional conduct can be compared. The officer's original decision to follow the vehicle for investigative purposes was a legitimate one, notwithstanding that the subsequent detention developed in a manner that the trial judge found was unlawful. The officer then proceeded, with a degree of suspicion that did not amount to reasonable grounds, to search a rented motor vehicle and seize two boxes containing a large amount of cocaine. The search was not a violation of the bodily integrity of the Appellant as in *Stillman*,⁴² nor a pattern of repeated constitutional violations of one's home over a period of time as in *Genest*.⁴³ Neither was it a coloured exercise of a search power incident to arrest for traffic warrants that resulted in an anal cavity search, as occurred in *Greffe*.⁴⁴ In *Burlingham*,⁴⁵ the police denigrated the accused's counsel to the point where they convinced the accused to accept a 'deal' that would limit the accused's charge to *only* second degree murder if the accused confessed. These cases did result in the exclusion of much of the evidence that was obtained as a result of the *Charter* breaches. It is this type of comparison that was carried out by the majority of the Court of Appeal and is also reflected in the trial judge's opinion that he

⁴² *R. v. Stillman*, *supra*.

⁴³ *R. v. Genest*, [1989] 1 S.C.R. 59.

⁴⁴ *R. v. Greffe*, [1990] 1 S.C.R. 755.

⁴⁵ *R. v. Burlingham*, [1995] 2 S.C.R. 206.

could not '... accept [defence] counsel's argument that this constitutes the most egregious set of conceivable circumstances particularly since no violence was involved...'.⁴⁶

10 50. Unconstitutional conduct that could be described as more serious than the case at bar has in other instances not resulted in the exclusion of evidence. In *R. v. Silveira*,⁴⁷ the police entered the home of the accused with firearms drawn and secured the premises for over one hour to await the granting and delivery of a search warrant. Cory J. for the majority of this Court, described the warrantless entry of the police into the dwelling as 'the ultimate invasion of privacy', and noted "[i]t is hard to imagine a more serious infringement of an individual's right to privacy."⁴⁸ However, based on other factors such as the exigent circumstances and lack of bad faith, this Court admitted the evidence seized.

20 51. In *R. v. Calder*⁴⁹ the majority of the Alberta Court of Appeal upheld the admission of evidence seized as a result of an unlawful and bad faith search of the accused and his backpack. The police seized a loaded sawed-off shotgun, cocaine and bear spray. The trial judge stated that the breaches were not committed in good faith as the police officer did not have the requisite reasonable suspicion to believe that a drug transaction occurred, and that the situation was not such that officer safety was at risk. The search was also found not to be minimally intrusive. Although not quoted directly from the trial judge's ruling, the dissenting opinion noted that the police officer's "testimony at trial was not found to be worthy of belief".⁵⁰ The majority agreed with the trial judge's decision that despite the seriousness of the breach, the serious public safety concerns 'tipped the balance' in favour of admission.

52. *R. v. Richard* is a decision erroneously listed by the Appellant⁵¹ in Appendix 'A' to his factum as an example of a case where evidence was excluded as a result of a serious breach. In fact, the evidence was admitted by this Court. The decision to exclude the evidence obtained as a result of a warrantless search of the accused's home was overturned in brief reasons by

⁴⁶ *Ruling on Voir Dire, Appellant's Record, Volume I*, p.17.

⁴⁷ *R. v. Silveira*, [1995] 2 S.C.R. 297.

⁴⁸ *R. v. Silveira, supra*, at para.148.

⁴⁹ *R. v. Calder* (2006), 213 C.C.C. (3d) 342 (Alta. C. A.).

⁵⁰ *R. v. Calder, supra*, at para. 24.

⁵¹ *Appellant's Factum*, Appendix A.

Sopinka J.,⁵² adopting the dissenting opinion of Chipman J.A. in the Nova Scotia Court of Appeal. Similarly in *R. v. Goncalves*,⁵³ also listed erroneously by the Appellant in support of his position, this Court restored the conviction of the accused after the majority of the Alberta Court of Appeal excluded 500 grams of cocaine as a result of a warrantless search of the home. The majority of the Court of Appeal in *Goncalves* had characterized the breach as so serious that the evidence must be excluded. The dissenting opinion characterized the breach in the context of a subsequent clarification in the law⁵⁴ relating to access to material filed in support of a search warrant.⁵⁵

- 10 53. These decisions illustrate that the other constituent elements of the *Collins* principles can be sufficient to support the admission of evidence even where there is a finding that the *Charter* violation was serious. The seriousness of the breach does not always dictate an exclusion of evidence obtained as a result of the *Charter* violation.

(i) Systemic misconduct is not an issue raised by these facts

- 20 54. This case is not about systemic police misconduct. The majority of the Court of Appeal considered this issue only in the context of comparing the relative seriousness of the breach. A finding relating to systemic police conduct is not a pre-requisite for exclusion of evidence under s. 24(2) of the *Charter*, nor is it a determinative factor for admission. Police officers who act in accordance with a police policy may be less responsible for a decision that effectively denies an individual a *Charter* protection. The appropriateness of that policy given the state of the law at the time of the incident will reflect whether the policy is one in which the court should expressly condone or recognize it as an understandable, yet incorrect approach. Similarly, the lone actions of one officer who makes a bad faith decision that results in a breach of a *Charter* right may militate against the seriousness of the breach if the court views the matter as an isolated incident of bad judgment by that officer. In either situation, the effect

⁵² *R. v. Richard*, [1996] 1 S.C.R. 896.

⁵³ *R. v. Goncalves*, [1993] 2 S.C.R. 3.

⁵⁴ The warrant was issued prior to the release of *R. v. Garofoli*, [1990] 2 S.C.R. 1421, and the matter was litigated subsequent to this Court's decision.

⁵⁵ Also listed in error is *R. v. Monney*, [1999] 1 S.C.R. 652. This Court overturned the Court of Appeal decision and determined that there was no violation and therefore did not address the s. 24(2) issue.

on the repute of the administration of justice can be viewed differently in different contexts by different trial judges.

55. Here, the fact that the police officer's conduct was not systemic in nature does not mitigate the seriousness of the officer's actions. It does eliminate any aggravating feature that would have existed had there been a policy encouraging or authorizing such actions. It was again an assessment by the majority of the relative seriousness of a serious breach. In dissent, Cronk J.A. although challenging the majority's consideration of this issue, acknowledged that there is a scale on which the severity of the breach is measured:

10 I do not dispute that the assessment of the seriousness of *Charter* breaches involves gradations of gravity, in the context of all the circumstances.⁵⁶

It was to determine the 'gradations of gravity' that the majority undertook a consideration of any systemic influence in the police officer's improper conduct.

(ii) Expectation of privacy – the area or thing searched matters

20 56. The nature and degree of one's expectation of privacy is a relevant factor to consider in assessing the seriousness of the breach,⁵⁷ which in turn plays a factor in a court's ultimate decision of whether to admit or exclude evidence. There is no denying that there is a lower expectation of privacy in a motor vehicle, let alone a vehicle rented by someone else. While the passenger of a motor vehicle, for example, may have a sufficient expectation of privacy to engage s. 8 of the *Charter*, that expectation of privacy is reduced. The reduced level of an expectation of privacy is essentially irrelevant to an overall s. 8 *Charter* determination once the threshold issue of a reasonable expectation of privacy is satisfied. In the s. 24(2) *Charter* analysis, however, a court must nonetheless consider the degree of interference with privacy interests. In this case, it can be said that the Appellant had a reduced expectation of privacy over the vehicle being searched, and little, if any, reasonable expectation of privacy over the boxes that were opened.⁵⁸

⁵⁶ *Dissenting Reasons by the Honourable Madam Justice Cronk, Appellant's Record, Volume I*, p.77, para. 136.

⁵⁷ *R. v. Buhay, supra*, at paras. 52 and 66; *R. v. Mann, supra*, at para. 53.

⁵⁸ See *R. v. Belnavis*, [1997] 3 S.C.R. 341, at para. 24 and *R. v. Edwards*, [1996] 1 S.C.R. 128, at paras. 41 and 44.

57. This factor has little to do with the nature of the police conduct associated with the breach. Rather, it is meant to provide context to the overall nature of the breach at issue, even recognizing that the police misconduct may be serious. For example, while the police conduct associated with a s. 8 *Charter* breach may be characterized as flagrant in a hypothetical situation involving a search of a trunk of a motor vehicle at the side of a road, and equally so in a different situation involving a strip search of a citizen in public view, the respective expectations of privacy in each of those circumstances provide a justifiable basis for a trial judge conducting a s. 24(2) *Charter* analysis to distinguish the nature of the two breaches. Pursuant to *Belnavis*, it would be required. Of course, evidence will not always be admitted in situations involving motor vehicle searches, where the expectation of privacy is reduced, anymore than evidence will always be excluded in situations involving the search of a home, where the expectation of privacy is high.

58. Accordingly, the fact that the Appellant did not rent the car he was driving, and that he asserted no interest whatsoever in the two boxes containing cocaine in the rear of the motor vehicle, are relevant considerations in assessing the overall seriousness of the breach. The following comments of Cory J. in *Belnavis* are apposite:

40 Turning now to the facts of this case and applying the guidelines in *Edwards*, I would note that *Belnavis* did not own the car and there was no evidence of her historical use of the vehicle. Therefore, not only does she begin with a greatly reduced expectation of privacy because her claim is in relation to a vehicle, that expectation is then further reduced because her relative privacy interest in this particular vehicle is low. This greatly reduced expectation of privacy should have had a significant impact on the trial judge's assessment of the seriousness of the breach, yet it appears that he has not even taken it into consideration. Obviously, the degree of the seriousness of the breach will increase the greater the expectation of privacy. Clearly the converse must also be true.⁵⁹ [emphasis added]

(iii) Section 24(2) of the *Charter* is not a remedy for police misconduct

59. Since *Collins*, this Court has consistently explained that while misconduct on the part of police in the investigatory process necessarily has some effect on the administration of justice,

⁵⁹ *R. v. Belnavis*, *supra*, at para. 40.

s. 24(2) of the *Charter* is not a remedy for such misconduct.⁶⁰ As Lamer J. observed in *Collins*, “[s]ection 24(2) could well have been drafted that way, but it was not.”⁶¹ Nor was it inserted as a transitional provision, to be redrafted after the police had sufficient time to understand the scope of the rights set out in the *Charter*. It was drafted as a permanent feature of the *Constitution* to address all situations involving *Charter* violations.

10 60. While courts should expect law enforcement authorities to respect the exigencies of the *Charter*,⁶² the notion that a court should exclude evidence from a criminal trial simply to demonstrate its disapproval for police misconduct fundamentally ignores the holistic nature of the s. 24(2) *Charter* inquiry. The task of determining when the administration of justice would be brought into disrepute will rarely be decided *solely* by the nature of the police conduct associated with the breach. While the exclusion of evidence in a case where there has been a disregard for a *Charter* right would certainly serve to dissociate the justice system from the nature of the police misconduct, it would not fully address the fundamental issue of whether the repute of the administration of justice, for s. 24(2) *Charter* purposes, has been properly served through the exclusion of the evidence in that particular case.

20 61. This Court’s jurisprudential development of *Charter* rights and values over the last 20 years has positively impacted on the myriad of daily police-citizen encounters that occur across this country, and on the state’s overall appreciation and respect for *Charter* values. All stakeholders in the administration of criminal justice are more enlightened today with respect to *Charter* provisions than they were 20 years ago, notwithstanding that we still experience cases of non-compliance.

62. Accordingly, the fact that a citizen’s *Charter* right is seriously breached by a police officer in a given circumstance is not *prima facie* indicative of a wholesale state of disregard for *Charter* values. In that respect, there is no punitive measure that is necessarily required to ensure a continued respect for the *Charter* on the part of enforcement authorities generally, or perhaps even with respect to that individual officer. In such a case, the exclusion of evidence,

⁶⁰ *R. v. Collins*, *supra*, at p. 281; *R. v. Buhay*, *supra*, at para.70.

⁶¹ *R. v. Collins*, *supra*, at pp. 280-281.

⁶² See *R. v. Buhay* *supra*, at para. 70.

as a function only of judicial condemnation of discreet state conduct, without a full regard for all the s. 24(2) *Charter* considerations, would amount to an erroneous and misguided remedy for an isolated case of police misconduct. Accepting that there must be situations where the admission of evidence in a case involving a serious *Charter* breach does not bring the administration of justice into greater disrepute than through its exclusion, a judicial approach that incorrectly focuses exclusively on the conduct associated with that isolated enforcement situation does little to foster the community's overall respect for the administration of justice.

D. EFFECT ON THE ADMINISTRATION OF JUSTICE

10 63. The final consideration under *Collins* is whether the admission/exclusion of the evidence would adversely affect the administration of justice. The focus of the inquiry under this head of analysis is to balance the interests of truth with the integrity of the justice system.⁶³ In addition to any effect on trial fairness and the seriousness of the *Charter* violation, other relevant considerations include whether the evidence was essential to the prosecution, and the seriousness of the offence itself as well as the circumstances surrounding its commission.⁶⁴ The most difficult determination under s. 24(2) may be where the offence alleged is serious and the nature of the breach is also serious.

(i) This is an extremely serious offence

20 64. The truth finding function of the criminal justice system is not to be relegated to an afterthought in the s. 24(2) equation. Nor should a prosecutor or a court of law apologize for emphasizing its importance in appropriate cases. It is a fundamental criteria and one of the primary reasons why s. 24(2) of the *Charter* provides the presumptive capacity to admit evidence where an accused's rights are violated.

65. This crime consisted of the inter-provincial transportation of between \$2.4 and \$4.5 million worth of cocaine. It is not a case of a street level trafficker or a large marihuana grow operation. It is the commercial trafficking of 77 pounds of a dangerous drug. The trial judge was correct to give serious effect to this specific circumstance in the admissibility inquiry. The

⁶³ *R. v. Mann, supra*, at para. 57.

⁶⁴ *R. v. Law, supra*.

majority of the Court of Appeal was also correct when it noted this Court's position on the serious social evils associated with trafficking in a hard drug like cocaine, and on the need for lengthy penal sentences for those who are involved, for lucre, in the drug trade.⁶⁵ The seriousness of this type of offence can also be seen in this Court's observations, albeit in relation to bail, about the unique context in which the large scale trafficking of hard drugs occurs:

Most offences are not committed systematically. By contrast, trafficking in narcotics occurs systematically, usually within a highly sophisticated commercial setting. It is often a business and a way of life. It is highly lucrative....⁶⁶

66. Cocaine is not native to Canada. It is imported into the country and moved within it for territorial distribution. The Appellant, whether an importer, trafficker or courier, was a direct and conscious link in the transportation and distribution of a massive amount of cocaine into society and, accordingly, "...responsible for the gradual but inexorable degeneration of many of [his] fellow human beings as a result of their becoming drug addicts."⁶⁷ The comments of Doherty J.A. in a sentence appeal involving a "dry" conspiracy to traffic in a much more modest 4 kilograms of cocaine are, by analogy, apposite in highlighting the seriousness of a drug offence involving large amounts of a hard drug:

These respondents were prepared to supply a massive amount of cocaine to a person they believed to be a drug trafficker. Their agreement contemplated a large-scale commercial transaction in a deadly substance. While ultimately no profit was made, there can be no doubt that profit was the motive. These respondents were prepared to do significant damage to others so that they could make money.

Conspiracies that contemplate the sale of large amounts of a drug like cocaine clearly pose a much more significant danger to the community than do agreements to supply small amounts to others for purely personal use. The amount the respondents agreed to sell to Destefano indicates that they were ready and willing to participate in the drug trade at a very high level. The trial judge

⁶⁵ *Reasons for Judgment of the Court of Appeal, Appellant's Record, Volume I*, at p.60.

⁶⁶ *R. v. Pearson*, [1992] 3 S.C.R. 665, at p. 695.

⁶⁷ *R. v. Smith*, [1987] 1 S.C.R. 1045, at p.1053.

erred in principle in giving no weight to the magnitude of the crime contemplated by the agreement made by the respondents.⁶⁸

(ii) Trial Fairness is also an important consideration at the third stage

67. Trial fairness is an important element both in isolation and in the consideration of the third prong of the *Collins* test. When balancing the effect of the admission of the evidence on the reputation of the administration of justice, the nature of the evidence can also 'tip the balance' towards exclusion or admission. Any analysis of community values on the reputation of justice must include the nature of the evidence seized and how it was obtained. Obviously if self-incriminatory evidence was created by an accused through the improper use of physical force by the state, then the trial fairness consideration would tend to militate towards exclusion because of the negative effect on the reputé of the administration of justice if the evidence was admitted.

68. In many instances where serious *Charter* breaches were found, the exclusion of the evidence was as a result of the combined effect of the finding of bad faith by the police and the self-incriminatory nature of the evidence obtained.⁶⁹ Conscriptive evidence can go to the heart of trial fairness because an accused may be denied the protections enshrined in the *Constitution* and the result is that their words or conduct are used to create evidence not already in existence. In a case where both the *Charter* breach and the offence are 'serious', trial fairness criteria can serve to tip the scale towards the admission or exclusion of the evidence dependant on the manner in which the trial fairness issue is characterized. In this instance the evidence seized existed irrespective of the *Charter* breach and accordingly militated in favour of admission.

(iii) The *Puskas* effect – the proper balancing was done

⁶⁸ *R. v. Russo* (1998), 130 C.C.C. (3d) 339 (Ont.C.A.), at paras. 14-15.

⁶⁹ See *R. v. Stillman*, *supra*, and *R. v. Burlingham*, *supra*.

69. Much was made by Cronk J. A. of the trial judge's reference to the Court of Appeal for Ontario's decision in *R. v. Puskas*.⁷⁰ In his decision, the trial judge adopted the following statement from the decision:

To exclude the evidence under these circumstances, where the guilt 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.⁷¹

10 Cronk J.A. inferred from the incorporation of this statement that the trial judge committed two errors. One, that he by analogy compared the facts and outcome in *Puskas* to this case, and two, that the quote illustrated that the trial judge failed to consider the effect of judicial condonation of police misconduct, which she considered an error in the balancing process.

70. First, there is nothing in the trial judge's decision that even hints at the acceptance of the facts in *Puskas* as being similar to this case and would thereby suggest a similar result. All that can be properly determined from the citation is that the trial judge incorporated the phrase into his decision as being an applicable statement for his reasons for judgment, nothing more. Indeed, although this issue is a dominant concern of Cronk J.A., it is not referred to in any manner by the Appellant.

20

71. Second, a trial judge is not required to set out every element in his or her reasons that may support the final determination of a legal issue. The reasons must be capable of illuminating why the trial judge came to the conclusion he did. Although the trial judge did not specifically state in his decision that he considered the issue of condoning the police conduct by admitting the evidence, as noted by this Court recently in *R. v. R.E.M.*, in relation to reasons underlying a conviction, this is not a requirement that would constitute an error of law.

30 These purposes [for which reasons are required] are fulfilled if the reasons, read in context, show why the judge decided as he or she did. The object is not to show *how* the judge arrived at his or her conclusion, in a "watch me think" fashion. It is rather to show *why* the judge made that decision.⁷²

⁷⁰ *R. v. Puskas* (1997), 120 C.C.C. (3d) 548 (Ont. C.A.).

⁷¹ *Ruling on voir dire*, Appellant's Record, Volume I, p.18.

⁷² *R. v. R.E.M.*, 2008 SCC 51, at para. 17.

The trial judge had been provided 40 cases to consider, including the most authoritative decisions of this Court, and specifically *Buhay*, which discusses at length the concern over judicial condonation of unacceptable police conduct. Indeed, even in *Buhay* the trial judge did not expand greatly on the factors considered under the third branch of the *Collins* test, but this Court accepted the early reference by the trial judge to the three branches of *Collins* as sufficient and upheld the decision to exclude the evidence as reasonable.⁷³

(iv) The community standard

10 72. The community's perspectives were properly considered in the majority's assessment of how reasonable members of the community would view exclusion of the evidence in these circumstances. The Appellant contends that their approach failed to appreciate how admission of the evidence would have truly undermined the community's sense of respect for the administration of justice.⁷⁴

73. Respectfully, the Appellant's complaint is an unwarranted criticism of the majority's comments in this regard. This is what was initially said by the majority of the Court of Appeal:

20 Because the application of s. 24(2) focuses on the reputation of the administration of justice, the views of the community at large are relevant. That is not to say that courts should always rely on the actual views of the community. Such a populist approach would risk subjecting the *Charter* to the volatile ebb and flow of majority sentiment and would thus arguably run counter to the very idea of constitutionally entrenched rights. That said, the question of disrepute is not to be analyzed solely from the perspective of judges or the legal community. The standard is that of the reasonable person, and according to Lamer J, in *Collins* at p. 18, "[t]he reasonable person is usually the average person in the community, but only when that community's current mood is reasonable." The reasonable person standard, wrote Lamer J. at p. 18 of *Collins* "serves as a reminder to each individual judge that his discretion is grounded in community values."⁷⁵

30 74. These comments are grounded in the language of this Court's judgment in *Collins*. It is difficult to accept that the majority of the Court of Appeal erred in correctly referring to a factor articulated by this Court.

⁷³ *R. v. Buhay*, *supra*, at paras. 69-73.

⁷⁴ Appellant's Factum, at para. 68.

⁷⁵ *Reasons for Judgment of the Court of Appeal for Ontario*, Appellant's Record, Volume I, p.53.

75. When the majority of the Court of Appeal reiterated that the perspective of a reasonable member of the community should be considered,⁷⁶ they merely referred to this feature of the inquiry as a factor that had to be properly satisfied in order that a decision to admit or exclude evidence could be seen as correctly reflecting whether the administration of justice would be brought into disrepute. In particular, it is unfair to suggest that the majority oversimplified its consideration of the community perspective by selectively framing its question in a way that compelled an answer that justified admission of the evidence.⁷⁷ Respectfully, the majority was not asking itself whether a reasonable member of the community would be offended by the exclusion of this type of evidence in *any* circumstance; it was considering the issue in the context of the circumstances that present themselves in this case.

76. In the end, the Appellant's complaint in this regard is subject to the same tautological weakness as the argument about how the trial judge overemphasized the seriousness of the offence in his ultimate decision to admit the evidence, i.e. the majority of the Court of Appeal must have erred in interpreting the community's perspectives because a truly reasonable member of the community would have concluded that the evidence should have been excluded in these circumstances. It fails to fairly acknowledge that reasonable members of the community could actually be offended, in all the circumstances, if the evidence were excluded in this case.

(v) Police officers will not want to emulate this conduct

77. No police officer wants to see their name associated to the type of condemnation that was directed at Bertoncello by the trial judge in this case. It would be fanciful to suggest that other police officers in the future would subject themselves to similar criticism by using Bertoncello's approach as a template for their policing conduct in routine scenarios and expect that more relatively insignificant seized contraband in those cases would be admitted under s. 24(2) of the *Charter*. Not only was Bertoncello's discovery of such a massive quantity of cocaine completely fortuitous, it was highly anomalous. It would be unreasonable to think that officers conducting a routine *Highway Traffic Act* stop would be, post-*Harrison*, acting on the

⁷⁶ *Reasons for Judgment of the Court of Appeal for Ontario, Appellant's Record, Volume I*, p.56.

⁷⁷ Appellant's Factum, at para. 70.

basis that they might conceivably find huge amounts of drugs or dangerous weapons in the trunk of the car, secure in the knowledge that the evidence would be admitted regardless of any *Charter* breaches occasioned by their conduct.

78. There is significant deterrent in the publicity of unlawful police conduct and the related stain on a police officer's reputation throughout the criminal justice community and the community at large. Even with the proper admission of the evidence, there is still a deleterious effect on the repute of any police officer whose conduct is censured in the manner that occurred here. The police officer, from a small community, has now been branded by a finding of a superior court judge that he blatantly violated the *Charter* rights of a suspect and that his evidence defied credibility. This is a significant blemish on his reputation and a result not envied by any other police officer.

79. In *Buhay*, this Court noted that one of the trial judge's stated concerns in excluding the evidence in that case was that admission of the evidence could encourage other police officers to act in the same way in the future.⁷⁸ That concern is certainly in line with the purpose of the *Collins* test, and does demonstrate how the routine admission of evidence could, in the long term, negatively impact the repute of the administration of justice. It is significant, however, that the trial judge in this case did not express such a concern, and that such a concern does not arise in these circumstances.

(vi) The sky is not falling

80. The Appellant grossly exaggerates the negative effects of this decision on the repute of the administration of justice. This Court has clearly signalled its concern for the harmful impact that serious *Charter* violations can have on the long term reputation of justice and, as noted above,⁷⁹ in most cases evidence obtained through these violations has been excluded. In 'close calls', however, there may be instances where the seriousness of the breach is not the overriding consideration and will yield to the seriousness of the offence. The *Collins* criteria and s. 24(2) allow for such a result.

⁷⁸ *R. v. Buhay, supra*, at para. 70.

⁷⁹ Discussed above herein, at para. 49.

81. The Respondent does not suggest, however, that there should be some mathematical proportion of 'serious breach v. serious offence' cases where the evidence should be excluded. The majority of such cases may be decided in favour of inclusion, but that ratio is not dependant on any presumption towards exclusion or admission, rather it is merely a function of the nature of the circumstances that arise in each case over time.

82. The Appellant cites a number of cases, at paragraph 74 of his factum, asserting that this decision has somehow dramatically changed the law in relation to the third factor of *Collins*. In the factum the Appellant asserts:

74. ... 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.⁸⁰

83. The '*Harrison* test' as described by the Appellant is presumably from paragraph 49 of the majority of the Court of Appeal decision, which states:

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. Kitaitchik* (2002), 166 C.C.C. (3d) 14 at para. 47 (Ont. C.A.).⁸¹

84. In fact, the majority of the Court of Appeal was simply rephrasing this Court's previous statements, including this paragraph by Arbour J. in *Buhay*:

67. The third question from *Collins* is whether excluding the evidence would have a more serious impact on the repute of the administration of justice than admitting it. This factor is generally related to the seriousness of the offence and the

⁸⁰ Appellant's Factum, p. 33, para. 74.

⁸¹ *Reasons for Judgment of the Ontario Court of Appeal, Appellant's Record, Volume I*, pp. 56-57, para. 49.

importance of the evidence to the case for the Crown. In *Law, supra*, at para. 39, the Court summarized this inquiry as follows: "*In general, this turns on whether the unconstitutionally obtained evidence forms a crucial part of the Crown's case and, where trial fairness is not affected, the seriousness of the underlying charge.*"⁸² [emphasis added]

Rather than a new test, the majority of the Court of Appeal was merely outlining factors to be considered in the third prong *as directed by this Court*. Contrary to the Appellant's assertions,⁸³ these were not the *only* factors considered by them in the third stage of the analysis. The majority of the Court of Appeal addressed the balancing of the seriousness of the offence with the seriousness of the breach,⁸⁴ including the consideration of condoning police misconduct.⁸⁵

85. There is no 'chilling effect' on trial judges, as a result of this decision, forcing them to disregard all the relevant factors in coming to their conclusions on how the reputation of the administration of justice is best preserved. A review of post-*Harrison* cases demonstrates the usual careful application of relevant factors to the circumstances at hand. In some cases, the application of those factors leads to admission of evidence, and in others it leads to exclusion.

86. For example, in one of the recently reported judgments citing *Harrison*, Pomerance J. of the Ontario Superior Court of Justice excluded evidence of a prohibited weapon discovered in a duffle bag within a taxi cab, following her finding of an unlawful detention and search.⁸⁶

87. Similarly, in *R. v. White*, Wein J. excluded street level amounts of cocaine seized from a motor vehicle following an unlawful arrest based on an informant's tip. The trial judge's final analysis demonstrates how *Harrison* has not impacted on the flexibility available to trial judges to balance all relevant factors and exclude evidence where appropriate:

With respect to the question of whether or not the administration of justice would be brought into disrepute from the exclusion of the evidence, it cannot be said that this was a major "drug bust". The quantities found are indicative of mid-level street trafficking, but

⁸² *R. v. Buhay, supra*, para. 67.

⁸³ Appellant's Factum, p. 22, para. 52.

⁸⁴ *Reasons for Judgment of the Ontario Court of Appeal, Appellant's Record, Volume I*, pp.57-61, paras. 53-70.

⁸⁵ *Reasons for Judgment of the Ontario Court of Appeal, Appellant's Record, Volume I*, pp. 58-59, para. 58.

⁸⁶ *R. v. Bassett*, [2008] O.J. No.3456 (Sup.Ct.).

not higher level distribution. Balanced against this the Court must consider that the stop was effected in a public area with legitimate activity going on, including the visiting of restaurants and convenience stores.⁸⁷

88. Finally, of the 5 'alarming' cases cited by the Appellant as indicative of the decline of *Charter* protection, the majority of the Court of Appeal for Ontario in *Tiffin*⁸⁸ did not find a *Charter* violation and there was no violation found in *Kelsy*.⁸⁹ In *Brown* the trial judge, in excluding statements made to the police and admitting a loaded firearm and drugs, characterized the officers' conduct as being in 'good faith' and, though the breaches were not 'insignificant', these 'breaches were by no means egregious or extremely serious'.⁹⁰ In *Jackson*⁹¹ and *Kenyon*⁹² the evidence was admitted. However, the breaches in both instances were not conducted in bad faith and were described in *Kenyon*⁹³ as 'moderately serious' and in *Jackson*⁹⁴ as 'a minor one'. There is no new '*Harrison* test' and there is no 'alarming pattern'. The sky is still intact.

E. CONCLUSION

89. Although the Appellant seeks a balanced approach to the analysis under s. 24(2), the arguments presented consistently seek to eliminate selected factors from consideration, resulting in only one determinant – the seriousness of the breach. In order to make a proper assessment, all circumstances must be considered, including factors that the Appellant would wish to diminish, such as the reduced expectation of privacy, the absence of systemic indicators of unconstitutional violations or community values. Any 'holistic' approach is by definition considerate of all the factors set out in *Collins* and applied in this Court's subsequent jurisprudence. 'Balancing' is the direction that this Court has given with respect to the factors in the s. 24(2) analysis, but the balancing of factors will always result in at least one factor

⁸⁷ *R. v. White*, [2008] O.J. No.3577 (Sup.Ct.).

⁸⁸ *R. v. Tiffin*, [2008] O.J. No. 1525 (Ont.C.A.), notice of appeal, as of right, quashed by SCC on October 6, 2008. Only LaForme J.A. found a violation of s. 8 of the *Charter*. MacPherson J.A. stated that if there was a violation, he would have excluded the evidence as well, based primarily on deference to the trial judge's decision.

⁸⁹ *R. v. Kelsy*, [2008] O.J. No.2407 (Sup.Ct.). The trial judge did proceed to determine that if a violation occurred the evidence should not be excluded.

⁹⁰ *R. v. Brown*, [2008] O.J. No. 1763 (Sup.Ct.), at para. 136-138.

⁹¹ *R. v. Jackson*, [2008] O.J. No.2484 (Sup.Ct.).

⁹² *R. v. Kenyon*, [2008] O.J. No.1636 (Sup.Ct.).

⁹³ *R. v. Kenyon*, *supra*, at para. 101.

⁹⁴ *R. v. Jackson*, *supra*, at para. 55.

being considered determinative in a particular set of circumstances. If all the factors are equally balanced then no decision under s. 24(2) could ever be achieved in a given case. The resulting argument by the Appellant is that rather than using the seriousness of the offence as the determinative factor in the analysis in this case, the determinative factor should have been the seriousness of the breach.

10 90. The wording of s. 24(2) admits of instances where the truth seeking function of the criminal justice system would outweigh the seriousness of the breach in a given case. If the intention of the provision was to create a 'trump' consideration, the section could have reflected that philosophy. It does not. Indeed the *prima facie* presumption is that
 20 unconstitutionally obtained evidence is admissible. Therefore, the weighing of s. 24(2) allows for, even demands, that in certain cases there may be a situation where, despite the seriousness of the breach, the reputé of the administration of justice – by comparison – would be brought into further disrepute through exclusion of the evidence. Any suggestion that the protections afforded by the *Charter* are somehow eviscerated in such instances is pure hyperbole. This Court has been clear that serious breaches can, and most often will, result in exclusion of the evidence. But not *always*. Even in the more controversial area of conscriptive evidence, reasons from this Court have signalled that any fixed result based on a single factor may do more harm than good to the reputé of the administration of justice.⁹⁵ The determination of the
 20 admission or exclusion of evidence in many criminal prosecutions will be something on which reasonable people may disagree; that is the effect and the advantage of the broad range of components in the s. 24(2) determination.

91. The trial judge's decision is complete, in full accord with the evidence and constitutes the proper application of the law. It contains no reversible error. In her dissenting reasons, Cronk J.A. identifies two errors in the trial judge's decision which she states justifies a re-evaluation of the s. 24(2) issue. Respectfully there are no errors, only differences of opinion. The trial judge determined, as he was entitled to, that the reputé of the administration of justice would be brought into greater disrepute in these circumstances by the exclusion of the evidence.

⁹⁵ *R. v. Orbanski; R. v. Elias*, [2005] 2 S.C.R. 3, *per* LeBel J., concurring in *Orbanski*, in dissent in *Elias*, at paras. 93–98.

92. The trial judge completely condemned the conduct of the officer but proceeded to properly consider the three stages of the *Collins* test. By describing the seriousness of the breaches as he did, he implicitly understood that such conduct was totally unacceptable and he expressly criticized it. Equally, he did not err when considering the seriousness of the offence, nor did he fail to consider the effects of the breach on the administration of justice. The majority of the Court of Appeal recognized this and upheld his decision. This Court should do so also.

PART IV - Costs

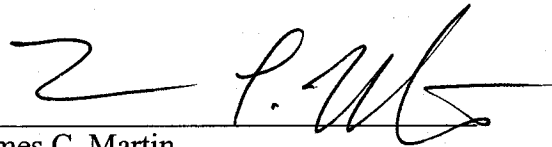
93. The Respondent makes no submission as to costs.

PART V – Nature of Order Sought

94. This appeal should be dismissed and the decision of the Court of Appeal affirmed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 9th day of October, 2008.

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James C. Martin
Counsel for the Respondent



for

Rick Visca
Counsel for the Respondent

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PART VI - Table of Authorities

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PART VII - Statutes**Section 24(2) of the *Canadian Charter of Rights and Freedoms***

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

(2) 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.

24. (1) Toute personne, victime de violation ou de négation des droits ou libertés qui lui sont garantis par la présente charte, peut s'adresser à un tribunal compétent pour obtenir la réparation que le tribunal estime convenable et juste eu égard aux circonstances.

(2) Lorsque, dans une instance visée au paragraphe (1), le tribunal a conclu que des éléments de preuve ont été obtenus dans des conditions qui portent atteinte aux droits ou libertés garantis par la présente charte, ces éléments de preuve sont écartés s'il est établi, eu égard aux circonstances, que leur utilisation est susceptible de déconsidérer l'administration de la justice.