

**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 (Appellant)

10

– and –

HER MAJESTY THE QUEEN

Respondent (Respondent)

– and –

**ATTORNEY GENERAL FOR ONTARIO
CANADIAN CIVIL LIBERTIES ASSOCIATION
CRIMINAL LAWYERS’ ASSOCIATION (ONTARIO)**

20

Interveners

**FACTUM OF THE INTERVENER
CANADIAN CIVIL LIBERTIES ASSOCIATION**

[*Rules of the Supreme Court of Canada, Rule 37*]

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PART I: STATEMENT OF FACTS

1. The Appellant Bradley Harrison is appealing to this Court as of right from the February 11, 2008 majority decision of the Court of Appeal for Ontario dismissing his conviction appeal (*per* O'Connor A.C.J.O. and MacPherson J.A.; Cronk J.A. dissenting). On October 10, 2008, Mr. Justice Rothstein granted Intervener status to the Canadian Civil Liberties Association [“the CCLA”], along with permission to file a 10-page factum.

Order of Rothstein J., dated October 10, 2008

2. The CCLA accepts the facts as set out in the Appellant and Respondents’ facta.

PART II: THE CCLA’S POSITION ON THE QUESTIONS IN ISSUE

10 3. The central issue in this appeal is the correct interpretation and application of the exclusionary remedy found in s. 24(2) of the *Charter*. The Court is to some extent being invited to revisit and re-examine the core principles underlying s. 24(2). The six questions posed in Part II of the Appellant’s factum set out some of the main subsidiary issues: however, these questions are not amenable to simple, point-form answers. The CCLA’s position on the issues raised by this appeal is set out below, along with some more general submissions about the role of s. 24(2) in the broader *Charter* context.

Appellant’s Factum, Part II

20 4. The CCLA’s overriding concern is that s. 24(2) must remain an *effective* means of addressing *Charter* breaches. This is especially important where the *Charter* breaches involve flagrant police disregard for the constitutional limits on their powers. Rights are an empty vision if they cannot be enforced.

PART III: STATEMENT OF ARGUMENT

A. The Judgments on Appeal

5. One important area of disagreement between the Ontario Court of Appeal majority (O’Connor A.C.J.O. and MacPherson J.A.) and the dissent (Cronk J.A.) was the basis on which the trial judge decided to admit the evidence in this case under s. 24(2). The CCLA agrees with Cronk J.A.’s interpretation of the trial judge’s reasons, which are brief and speak for themselves. The trial judge:

- concluded that the *Charter* breaches in the case at bar were “extremely serious”;
- found that the arresting officer had not acted in “error or ignorance”, but had known that he lacked sufficient grounds to stop and search the Appellant’s vehicle, and had thus acted in “bad faith”;
- described the officer’s misconduct as “blatant”, “brazen” and “flagrant”, and found his attempts in his *voir dire* testimony justify his actions to be “contrived and defy[ing] credibility”.

Despite these findings, the trial judge admitted the evidence, essentially on the basis that the serious *Charter* breaches and police misconduct in this case were trumped by the seriousness of the Appellant’s offence. He stated (at p. 18):

As blatant as the arresting officer’s behaviour was in conducting the detention and the search and as brazen as his explanation for his actions in this court, they pale in comparison to the criminality involved in the possession for the purposes of distribution of 77 pounds of cocaine ...

In her dissenting reasons in the Court of Appeal, Cronk J.A. concluded (at para. 141) that “[t]he central basis for the trial judge’s decision to admit the evidence of the cocaine was the seriousness of the offence charged, given the nature and quantity of the drug seized”.

Trial Judge’s Ruling on *Voir Dire*, *Appellant’s Record*, Vol. I, pp. 6-18
Reasons for Judgment (Ontario Court of Appeal), *Appellant’s Record*, Vol. I, ¶ 141 (*per* Cronk J.A., dissenting)

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6. The CCLA also agrees with and adopts Cronk J.A.’s analysis of the reasons given by the Court of Appeal majority. Although the majority justices present their decision as a matter of “deferring” to the trial judge, the CCLA agrees with Cronk J.A. that this does not accurately characterize the majority’s approach. Instead, the majority’s analysis consists largely of attempts to *justify the trial judge’s decision* on the basis of considerations that played no part in his reasoning, and which are often *inconsistent* with his express findings of fact and conclusions. The trial judge accepted that the *Charter* violations and the police misconduct were very serious, but admitted the evidence anyway on the grounds that the Appellant’s offence was even more serious. In contrast, the Court of Appeal majority seeks to reach the same result by downplaying the importance of the relevant *Charter* rights and the gravity of the police misconduct.

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Trial Judge’s Ruling on *Voir Dire*, *Appellant’s Record*, Vol. I, pp. 6-18
Reasons for Judgment (Ontario Court of Appeal), *Appellant’s Record*, Vol. I, ¶ 28-70 (*per* O’Connor A.C.J.O. and MacPherson J.A.); ¶ 82, 99-101, 117-38 (*per* Cronk J.A.)

R. v. Chaisson, [2006] 1 S.C.R. 415 at ¶ 7

7. The CCLA is concerned about the implications for future s. 24(2) cases of both the trial judge's and the Court of Appeal majority's analyses. The CCLA agrees with Cronk J.A. that it is an error in principle to simply weigh the seriousness of a *Charter* violation against the gravity of the defendant's alleged offence, as the trial judge appears to have done. If this Court were to be seen as endorsing such an approach, this would significantly undermine the real-world utility of the s. 24(2) exclusionary remedy and its vital role in protecting the reputation of the administration of justice. At the same time, having regard to the trial judge's factual findings, the CCLA has significant concerns about the Court of Appeal majority's attempts to minimize the seriousness of the *Charter* breaches in this case. The CCLA's position is that knowing and intentional violations of the *Charter* by the police must be viewed as extremely serious, particularly when the original breaches are compounded by police attempts to mislead the court.

B. The Exclusionary Remedy's Place in the Broader *Charter* Framework

1) Taking *Charter* Rights Seriously

8. Rights are not free. The police would catch more criminals if they did not have to obey the law and respect the *Charter*. It is one of the inevitable consequence of entrenching rights in the constitution and taking them seriously that some criminals will escape justice who might otherwise be caught and punished. Canadians, through their democratic institutions, decided that this price is worth paying because it is outweighed by the benefits of living in a society where rights and the rule of law are respected. The *Charter* strikes a balance between individual privacy and liberty, on the one hand, and the public interest in criminal law enforcement, on the other. The *Charter* was meant to be effective, and the police are supposed to respect this balance even though doing so means some criminals will go free. In the ideal world envisioned by the *Charter*, Cst. Bertoncello would have let the Appellant's vehicle carry on its way, and the Appellant's crime might well have remained undetected. The *Charter* necessarily implies that the social cost of not catching and punishing the Appellant, and others like him, is worth paying in exchange for the benefits of living in a free society. It is *Charter* rights, not criminal laws or drug laws, that were made "the supreme law of Canada".

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Constitution Act, 1982, s. 52
R. v. Kokesch, [1990] 3 S.C.R. 3 at p. 29

R. v. Feeney, [1997] 2 S.C.R. 13 at ¶ 81-83

9. Critics of the exclusionary remedy frequently lose sight of this point. Writing in dissent in *U.S. v. Leon*, *infra*, US Supreme Court Justice William Brennan responded to those who have “frequently bewailed the ‘cost’ of excluding reliable evidence” by observing:

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In large part, this criticism rests upon a refusal to acknowledge the function of the Fourth Amendment itself. If nothing else, the Amendment plainly operates to disable the government from gathering information and securing evidence in certain ways. In practical terms, of course, this restriction of official power means that some incriminating evidence inevitably will go undetected if the government obeys these constitutional restraints. It is the loss of that evidence that is the “price” our society pays for enjoying the freedom and privacy safeguarded by the Fourth Amendment. Thus, some criminals will go free not, in Justice (then Judge) Cardozo's misleading epigram, “because the constable has blundered,” ... but rather because official compliance with Fourth Amendment requirements makes it more difficult to catch criminals. Understood in this way, the Amendment directly contemplates that some reliable and incriminating evidence will be lost to the government; therefore, it is not the exclusionary rule, but the Amendment itself that has imposed this cost. [Citation omitted]

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There is a corresponding link between the principle of corrective justice and the exclusionary remedy: excluding unconstitutionally obtained evidence restores the individual and the state to a position approximating that they would have occupied if the *Charter* had been respected.¹ In many cases the protection of public faith in the administration of justice requires nothing less.

United States v. Leon, 468 U.S. 897 (1984) at pp. 940-42, *per* Brennan J., *dissenting*
Weeks v. United States, 232 U.S. 383 (1914)
 K. Roach, *Constitutional Remedies in Canada*, loose-leaf ed., ¶10.30-10.60

2) Rights Without Remedies are Meaningless

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10. It is a basic legal truism that rights must be enforceable to be meaningful. In *Nelles v. Ontario*, *infra*, Lamer J. (as he then was) described courts’ remedial jurisdiction as their “most meaningful function under the *Charter*”, and stated:

To create a right without a remedy is antithetical to one of the purposes of the *Charter* which surely is to allow courts to fashion remedies when constitutional infringements occur. ... When a person can demonstrate that one of his *Charter* rights has been infringed, access to a court of competent jurisdiction to seek a remedy is essential for the vindication of a constitutional wrong.

Nelles v. Ontario, [1989] 2 S.C.R. 170 at p. 196

¹ The position is only approximate, because in many cases the state retains the benefit of having removed contraband items from circulation. Even if excluding evidence results in an acquittal, the defendant still loses the contraband (in the case at bar, worth several million dollars).

11. Section 24(2)'s pivotal role in criminal *Charter* cases cannot be exaggerated. Most *Charter* claimants who are denied the s. 24(2) exclusionary remedy have no other means to enforce their *Charter* rights. In *R. v. Collins, infra*, Lamer J. (as he then was) stated that the *availability* of alternative remedies had no bearing on the s. 24(2) exclusion analysis, stating (at p. 286):

[A] factor which, in my view, is irrelevant is the availability of other remedies. Once it has been decided that the administration of justice would be brought into disrepute by the admission of the evidence, the disrepute will not be lessened by the existence of some ancillary remedy.

10 However, the practical *unavailability* of alternative remedies in criminal cases cannot be ignored when considering the appropriate framework for deciding s. 24(2) cases. If the bar is set so high that exclusion becomes rare and admission routine, even in the face of very serious *Charter* violations, the negative impact on the repute of the administration of justice would be severe. The practical implication of this would be that most *Charter* breaches, including very serious infringements, would attract no judicial response. This would effectively turn ss. 8 and 9 of the *Charter* into dead letters.

R. v. Collins, [1987] 1 S.C.R. 265 at p. 286

3) The Purposes of s. 24(2)

12. Section 24(2) of the *Charter* is a compromise provision. It does not give full effect to the
 20 corrective justice principle, and sometimes lets the state use the fruits of constitutional violations as evidence to obtain a conviction. Section 24(2) shifts the balance between state and individual interests by letting some rights violations go without sanction. However, s. 24(2) was not intended to negate the rights-conferring sections of the *Charter* nor fundamentally change their underlying philosophy. The lesson taught by many of this Court's leading cases is that the balance of competing interests under s. 24(2) must always be struck purposively, in accordance with these core *Charter* values and principles.

R. v. Feeney, supra at ¶ 83

R. v. Buhay, [2003] 1 S.C.R. 631 at ¶. 41-73

R. v. Cook, [1998] 2 S.C.R. 597 at ¶60-63, 72

30 *R. v. Mann*, [2004] 3 S.C.R. 59 at ¶ 57

13. This Court has recognized that the question of whether admitting unconstitutionally obtained evidence “would bring the administration of justice into disrepute” requires weight to be given to a number of different factors and legal theories. Professor Kent Roach has observed

that there are three main theoretical rationales for excluding evidence as a constitutional remedy: corrective justice, deterrence of future police misconduct, and “balancing of interests”. The analytic framework set out in this Court’s s. 24(2) jurisprudence recognizes and blends together all three rationales. As Professor Roach explains (at paras. 10.150, 10.410):

[T]he approach taken by Canadian courts under s. 24(2) of the *Charter* is not easily captured by any one of [these rationales]. It can be seen as a Canadian compromise which embraces elements of all three and adds some distinctive concerns.

...

10 The Supreme Court of Canada has not committed itself unequivocally to corrective, regulatory or balancing of interests approaches to the exclusion of evidence. Rather they have embraced all of these rationales to develop a contextual and purposive approach to determining when evidence should be excluded under s. 24(2).

Roach, *Constitutional Remedies*, *supra* at ¶10.20-10.150, 10.410
W. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment*, 4th ed., Vol. 1, §1.1(f)

14. In *Collins*, *supra*, Lamer J. stated that s. 24(2) “is not a remedy for police misconduct”. At the same time, he recognized that police misconduct “often has some effect on the repute of the administration of justice”, and that “further disrepute” to the administration of justice will result “from judicial condonation of unacceptable conduct by the investigatory and prosecutorial agencies”. He also emphasized that s. 24(2) required consideration of the “long-term
20 consequences” of admitting or excluding evidence in particular circumstances. These points have been reiterated in this Court’s subsequent s. 24(2) judgments, which recognize that s. 24(2) decisions play a role in influencing future police conduct and, in doing so, bear on the repute of the administration of justice. As noted by Iacobucci J. in *R. v. Burlingham*, *infra*, and reiterated by Arbour J. in *R. v. Buhay*, *supra*, the *Collins* test meant to “oblige law enforcement authorities to respect the exigencies of the *Charter*.” When such respect is lacking, the reputation of the administration of justice requires that courts must not appear indifferent or tolerant of police
misconduct.

30 *R. v. Collins*, [1987] 1 S.C.R. 265 at pp. 280-81
R. v. Genest, [1989] 1 S.C.R. 59 at p. 91
R. v. Kokesch, *supra* at p. 29, 35
R. v. Burlingham, [1995] 2 S.C.R. 206 at p. 231
R. v. Buhay, *supra*, at ¶ 70

15. The reasons courts give for admitting or excluding evidence under s. 24(2) are just as important as the end result. *Charter* judgments have an educative function: they teach the public and the police about the important principles and ideals that underlie *Charter* rights. It may not

significantly undermine these core *Charter* values to admit evidence obtained in the wake of a slight, inadvertent or unpreventable *Charter* violation, where the police have acted in good faith and demonstrated an overall respect for the *Charter*. However, it is highly corrosive of *Charter* values for courts to justify admitting unconstitutionally obtained evidence by trivializing the importance of the infringed rights, or by suggesting that the importance of prosecuting criminals trumps even a “brazen” and “flagrant” disregard for the *Charter* by the police. The damage to *Charter* values is even greater if the courts are seen to condone police attempts to evade judicial oversight of their actions. The lesson this teaches the police and the public is that *Charter* rights are less important than punishing criminals. This undermines the primacy and effectiveness of the *Charter* and, over time, the consequent double standards could create public cynicism. As the British Columbia Court of Appeal recently observed in *R. v. Dreyer, infra* (at para. 27), intentional police disregard for the *Charter*:

... cannot be shrugged off as merely trivial; it must be condemned by a decision to exclude the evidence, so that the *Charter* will be seen to matter in actual cases and not just in theory. The reputation of justice will be harmed by allowing this improperly obtained evidence to lead to a conviction.

R. v. Dreyer (2008), 229 C.C.C. (3d) 281 at ¶ 27 (B.C.C.A.)

C. Errors in the Trial Judge’s Analytical Approach

16. As Cronk J.A. explained in her dissenting reasons in the Court of Appeal, the trial judge asked the wrong question by framing the issue as whether the misconduct of the police in the case at bar was more serious than Harrison’s criminal activity. Since most criminal and drug crimes can be included within the elastic concept of “serious offences”, this approach would effectively restrict the s. 24(2) exclusionary remedy to minor offences. It would treat the underlying *Charter* rights as luxuries that are only worth protecting when the stakes are low. If the courts admit unconstitutionally obtained evidence on the grounds that the public interest in detecting and prosecuting “serious” crimes is more important than upholding the *Charter*, this sends a message to the police that the higher good can be served if they also ignore the *Charter*. If courts tolerate such conduct, the reputation of the administration of justice will suffer significant damage.

30 Reasons for Judgment (Ontario Court of Appeal), *Appellant’s Record*, Vol. I, ¶ 139-45 (*per* Cronk J.A., dissenting)

17. As Cronk J.A. stated in her dissenting reasons (at para. 144):

[T]he relevant question is not that posed by the trial judge, namely, whether the established Charter violation “pales” in comparison to the criminality involved. Rather, it is whether condoning the constitutional misconduct by admitting evidence obtained in violation of important Charter rights would do more harm to the integrity of the justice system than would excluding evidence that is essential to the Crown’s case against an accused charged with a serious crime.

An important and often overlooked point is that even when the exclusion of unconstitutionally seized drugs or weapons prevents the Crown from obtaining a conviction, the state invariably retains the significant benefit of having removed the contraband off the street. In these cases, the crime immediately at issue has already been prevented, and what remains at issue under s. 24(2) is the balance to be struck between the state’s further interest in *punishing* the defendant (including the potential deterrent effect punishment might have on future crimes), weighed against the further disrepute to the administration of justice that would result from the courts condoning the *Charter* breach (including the long-term consequences of admission on the rights of future innocent people).

Reasons for Judgment (Ontario Court of Appeal), *Appellant’s Record*, Vol. I, ¶ 144 (*per* Cronk J.A., dissenting)

D. The Court of Appeal Majority’s Attempts to Minimize the Seriousness of the Charter Breaches

18. As Cronk J.A. explained in her dissenting reasons, the Court of Appeal majority “‘read down’ the seriousness of the Charter breaches as found by the trial judge by injecting their own findings about the police misconduct into the factual matrix of this case”, and:

... attempt[ed] to minimize [the trial judge’s findings] by holding that the breaches “did not have a serious effect on the appellant’s *Charter* rights” and that the effects of the breaches on the appellant’s rights were “relatively minor”.

The CCLA adopts Cronk J.A.’s analysis on these issues, and makes further brief submissions on two specific points: (i) the extent of expectation of privacy in a vehicle, and (ii) the majority’s suggestion that the police misconduct in the case at bar was less serious because it was not “systemic”.

Reasons for Judgment (Ontario Court of Appeal), *Appellant’s Record*, Vol. I, ¶ 117-65 (*per* Cronk J.A., dissenting)

19. On the first point, it is well-established that there are varying degrees of privacy, and that “the expectation of privacy in automobile travel ... is markedly decreased relative to the expectation of privacy in one’s home or office” (*R. v. Wise, infra* at p. 534). However, it does

not follow that this privacy interest is trivial or negligible. Canadians' expectation of privacy in their homes and offices and in their persons is extremely high. Their expectation of privacy in a vehicle is "reduced" principally because it is subject to a variety of *lawful* intrusions by the state (e.g., random highway traffic safety stops and visual inspections).² When the police stop and search a vehicle *unlawfully* (as the trial judge found happened here), the courts should not turn a blind eye to this misconduct by dismissing the *Charter* violation as insignificant. A *Charter* violation does not have to be the worst imaginable to be considered sufficiently "serious" to warrant sanction.

R. v. Wise, [1992] 1 S.C.R. 527 at pp. 533-34

10 20. On the second point, Contrary to the Court of Appeal majority's suggestion, no hard and fast distinction can or should be drawn between "ordinary" *Charter* violations and violations with a "systemic" aspect. Police forces are responsible for ensuring that their officers know the limits on their powers and understand and respect citizens' *Charter* rights. Any infringement of the *Charter* by a police officer can thus be seen as reflecting a "systemic" failure. If a police force were to actively encourage its officers to violate the *Charter*, this would obviously raise a very grave "systemic" concern. However, systemic concerns also arise when police forces fail to train their members properly or condone investigative misconduct after the fact. Accordingly, while evidence that a police force has taken active steps to prevent similar *Charter* violations from occurring again (including taking disciplinary action against the officers responsible for the original *Charter* breach) might in some cases tend to mitigate the seriousness of the *Charter* breach, the defence should not have to establish the worst imaginable type of "systemic" police failure to obtain the exclusionary remedy. Indeed, this Court has recently discouraged *Charter* litigants from attempting to probe the underlying causes of police misconduct, in order to prevent *Charter voir dire*s from becoming "a protracted pedagogical review of marginal relevance to whether the police conduct itself represented a breach of sufficient severity to warrant excluding the evidence": (*R. v. Clayton, infra* para. 51). Further, contrary to the Respondent's suggestion in its factum², there is no evidence to support the claim that judicial criticism alone has any significant influence on police behaviour. It would be bad policy to give credence to what is little more than the Crown's wishful thinking.

² See *R. v. Wise, supra* at pp. 533-34.

² Respondent's Factum, para. 77-79.

R. v. Clayton, 2007 SCC 32 at ¶51

PART IV: SUBMISSIONS ON COSTS

21. The CCLA does not seek costs and asks that none be awarded against it.

PART V: NATURE OF THE ORDER REQUESTED

22. The CCLA seeks leave to make oral submissions of not longer than 20 minutes. The CLA takes no position on the disposition of this appeal, which turns on an assessment of the particular facts of this case.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 7th DAY OF NOVEMBER, 2008.

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PART VI: AUTHORITIES TO BE CITED

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