



SUPREME COURT OF CANADA

CITATION: R. v. Grant, 2009 SCC 32, [2009] 2 S.C.R. 353

DATE: 20090717

DOCKET: 31892

BETWEEN:

Donnohue Grant
Appellant
and
Her Majesty The Queen
Respondent
- and -

**Director of Public Prosecutions of Canada, Attorney General of British Columbia,
Canadian Civil Liberties Association and Criminal Lawyers' Association (Ontario)**
Intervenors

OFFICIAL ENGLISH TRANSLATION: Reasons of Deschamps J.

CORAM: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ.

JOINT REASONS FOR JUDGMENT: McLachlin C.J. and Charron J. (LeBel, Fish and Abella JJ.
(paras. 1 to 149) concurring)

PARTIALLY CONCURRING Binnie J.
REASONS:
(paras. 150 to 184)

PARTIALLY CONCURRING Deschamps J.
REASONS:
(paras. 185 to 230)

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Donnohue Grant

Appellant

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Indexed as: R. v. Grant

Neutral citation: 2009 SCC 32.

File No.: 31892.

2008: April 24; 2009: July 17.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ.

Constitutional law — Charter of Rights — Arbitrary detention — Right to counsel — Encounter between accused and police going from general neighbourhood policing to situation where police effectively took control over accused and attempted to elicit incriminating information — Whether police conduct would cause a reasonable person in accused’s position to conclude that he or she was not free to go and had to comply with police demand — Whether accused arbitrarily detained — Whether accused’s right to counsel infringed — Meaning of “detention” in ss. 9 and 10 of Canadian Charter of Rights and Freedoms.

Constitutional law — Charter of Rights — Enforcement — Exclusion of evidence — Firearm discovered as result of accused’s statements taken in breach of his right against arbitrary detention and right to counsel — Firearm admitted into evidence at trial and accused convicted of five firearms offences — Whether admission of firearm bringing administration of justice into disrepute — Revised framework for determining whether evidence obtained in breach of constitutional rights must be excluded — Canadian Charter of Rights and Freedoms, s. 24(2).

Criminal law — Firearms — Possession of firearm for purposes of weapons trafficking — Whether simple movement of firearm from one place to another without changing hands amounts to weapons trafficking — Meaning of “transfer” of weapon for purposes of ss. 84, 99 and 100 of Criminal Code, R.S.C. 1985, c. C-46.

Three police officers were on patrol for the purposes of monitoring an area near schools

with a history of student assaults, robberies, and drug offences. W and F were dressed in plainclothes and driving an unmarked car. G was in uniform and driving a marked police car. The accused, a young black man, was walking down a sidewalk when he came to the attention of W and F. As the two officers drove past, the accused stared at them, while at the same time fidgeting with his coat and pants in a way that aroused their suspicions. W and F suggested to G that he have a chat with the approaching accused to determine if there was any need for concern. G initiated an exchange with the accused, while standing on the sidewalk directly in his intended path. He asked him what was going on, and requested his name and address. At one point, the accused, behaving nervously, adjusted his jacket, which prompted the officer to ask him to keep his hands in front of him. After a brief period observing the exchange from their car, W and F approached the pair on the sidewalk, identified themselves to the accused as police officers by flashing their badges, and took up positions behind G, obstructing the way forward. G then asked the accused whether he had anything he should not have, to which he answered that he had “a small bag of weed” and a firearm. At this point, the officers arrested and searched the accused, seizing the marijuana and a loaded revolver. They advised him of his right to counsel and took him to the police station.

At trial, the accused alleged violations of his rights under ss. 8, 9 and 10(b) of the *Canadian Charter of Rights and Freedoms*. The trial judge found no *Charter* breach and admitted the firearm. The accused was convicted of five firearms offences. The Court of Appeal upheld the convictions for different reasons. It concluded that a detention had crystallized during the conversation with G, before the accused made his incriminating statements, and that the detention was arbitrary and in breach of s. 9 of the *Charter*. However, it held that the gun should be admitted into evidence under s. 24(2) of the *Charter*. The court agreed with the trial judge that the accused’s

act of moving the gun from one place to another fell within the definition of “transfer” in the *Criminal Code*, and that this justified the conviction for possession of a firearm for the purposes of weapons trafficking.

Held : The appeal should be allowed on the trafficking charge and an acquittal entered. The appeal should be dismissed on all other counts.

Per McLachlin C.J. and LeBel, Fish, Abella and Charron JJ.: Existing jurisprudence on the issues of detention and exclusion of evidence is difficult to apply and may lead to unsatisfactory results. It is the duty of the Court, without undermining the principles that animate the jurisprudence to date, to take a fresh look at the frameworks that have been developed for the resolution of these two issues. [3]

Detention under ss. 9 and 10 of the *Charter* refers to a suspension of the individual’s liberty interest by a significant physical or psychological restraint. Psychological detention is established either where the individual has a legal obligation to comply with a restrictive request or demand, or a reasonable person would conclude by reason of the state conduct that he or she had no choice but to comply. In cases where there is no physical restraint or legal obligation, it may not be clear whether a person has been detained. To determine whether the reasonable person in the individual’s circumstances would conclude that he or she had been deprived by the state of the liberty of choice, the court may consider, *inter alia*, the following factors: (a) the circumstances giving rise to the encounter as they would reasonably be perceived by the individual; (b) the nature of the police conduct; and (c) the particular characteristics or circumstances of the individual where

relevant. To answer the question whether there is a detention involves a realistic appraisal of the entire interaction as it developed, not a minute parsing of words and movements. In those situations where the police may be uncertain whether their conduct is having a coercive effect on the individual, it is open to them to inform the subject in unambiguous terms that he or she is under no obligation to answer questions and is free to go. It is for the trial judge, applying the proper legal principles to the particular facts of the case, to determine whether the line has been crossed between police conduct that respects liberty and the individual's right to choose, and conduct that does not. Deference is owed to the trial judge's findings of fact, although application of the law to the facts is a question of law. [32] [43-44]

In this case, the accused was detained within the meaning of ss. 9 and 10 of the *Charter* before being asked the questions that led him to disclose his possession of the firearm. The encounter began with G approaching the accused and making general inquiries. Such preliminary questioning is a legitimate exercise of police powers. G then told the accused to keep his hands in front of him. While this act, in isolation, might be insufficient to indicate detention, consideration of the entire context of what transpired from that point forward leads to the conclusion that the accused was detained. Two other officers approached, flashed their badges and took tactical adversarial positions behind G, who began to engage in questioning driven by, and indicative of, focussed suspicion of the accused. The sustained and restrictive tenor of the conduct after the direction to the accused to keep his hands in front of him reasonably supports the conclusion that the officers were putting him under their control and depriving him of his choice as to how to respond. At this point, the accused's liberty was clearly constrained and he was in need of the *Charter* protections associated with detention. The encounter took on the character of an

interrogation, going from general neighbourhood policing to a situation where the police had effectively taken control over the accused and were attempting to elicit incriminating information. Although G's questioning was respectful, the encounter was inherently intimidating. The power imbalance was obviously exacerbated by the accused's youth and inexperience. Because the test is an objective one, the fact that the accused did not testify as to his perceptions of the interaction is not fatal to his argument that there was a detention. The evidence supports his contention that a reasonable person in his position would conclude that his or her right to choose how to act had been removed by the police, given their conduct. [45] [47-52]

The evidence of the firearm was obtained in a manner that breached the accused's rights under ss. 9 and 10(b) of the *Charter*. An unlawful detention is necessarily arbitrary, in violation of s. 9. The officers acknowledged at trial that they did not have legal grounds or a reasonable suspicion to detain the accused prior to his incriminating statements. Therefore, the detention was arbitrary. The police also failed to advise the accused of his right to speak to a lawyer before the questioning that led to the discovery of the firearm. The right to counsel arises immediately upon detention, whether or not the detention is solely for investigative purposes. [11] [55] [57-58]

The criteria relevant to determining when, in "all the circumstances", admission of evidence obtained by a *Charter* breach "would bring the administration of justice into disrepute" must be clarified. The purpose of s. 24(2), as indicated by its wording, is to maintain the good repute of the administration of justice. Viewed broadly, the term "administration of justice" embraces maintaining the rule of law and upholding *Charter* rights in the justice system as a whole. The phrase "bring the administration of justice into disrepute" must be understood in the long-term

sense of maintaining the integrity of, and public confidence in, the justice system. While exclusion of evidence resulting in an acquittal may provoke immediate criticism, s. 24(2) does not focus on immediate reaction to the individual case. Rather, it looks to whether the overall repute of the justice system, viewed in the long term, will be adversely affected by admission of the evidence. The inquiry is objective. It asks whether a reasonable person, informed of all relevant circumstances and the values underlying the *Charter*, would conclude that the admission of the evidence would bring the administration of justice into disrepute. Section 24(2)'s focus is not only long-term, but prospective. The fact of the *Charter* breach means damage has already been done to the administration of justice. Section 24(2) starts from that proposition and seeks to ensure that evidence obtained through that breach does not do further damage to the repute of the justice system. Section 24(2)'s focus is also societal. Section 24(2) is not aimed at punishing the police or providing compensation to the accused, but rather at systemic concerns. [66-70]

When faced with an application for exclusion under s. 24(2), a court must assess and balance the effect of admitting the evidence on society's confidence in the justice system having regard to: (1) the seriousness of the *Charter*-infringing state conduct, (2) the impact of the breach on the *Charter*-protected interests of the accused, and (3) society's interest in the adjudication of the case on its merits. At the first stage, the court considers the nature of the police conduct that infringed the *Charter* and led to the discovery of the evidence. The more severe or deliberate the state conduct that led to the *Charter* violation, the greater the need for the courts to dissociate themselves from that conduct, by excluding evidence linked to that conduct, in order to preserve public confidence in and ensure state adherence to the rule of law. The second stage of the inquiry calls for an evaluation of the extent to which the breach actually undermined the interests protected

by the infringed right. The more serious the incursion on these interests, the greater the risk that admission of the evidence would bring the administration of justice into disrepute. At the third stage, a court asks whether the truth-seeking function of the criminal trial process would be better served by admission of the evidence or by its exclusion. Factors such as the reliability of the evidence and its importance to the Crown's case should be considered at this stage. The weighing process and the balancing of these concerns is a matter for the trial judge in each case. Where the trial judge has considered the proper factors, appellate courts should accord considerable deference to his or her ultimate determination. [71-72] [76-77] [79] [86] [127]

Here, the gun was discovered as a result of the accused's statements taken in breach of the *Charter*. When the three-stage inquiry is applied to the facts of this case, a balancing of the factors favours the admission of the derivative evidence. The *Charter*-infringing police conduct was neither deliberate nor egregious and there was no suggestion that the accused was the target of racial profiling or other discriminatory police practices. The officers went too far in detaining the accused and asking him questions, but the point at which an encounter becomes a detention is not always clear and the officers' mistake in this case was an understandable one. Although the impact of the *Charter* breach on the accused's protected interests was significant, it was not at the most serious end of the scale. Finally, the gun was highly reliable evidence and was essential to a determination on the merits. The balancing mandated by s. 24(2) is qualitative in nature and therefore not capable of mathematical precision. However, when all these concerns are weighed, the courts below did not err in concluding that the admission of the gun into evidence would not, on balance, bring the administration of justice into disrepute. The significant impact of the breach on the accused's *Charter*-protected rights weighs strongly in favour of excluding the gun, while the public interest

in the adjudication of the case on its merits weighs strongly in favour of its admission. However, the police officers were operating in circumstances of considerable legal uncertainty, and this tips the balance in favour of admission. [132-133] [139-140]

The accused's conviction for possession of a firearm for the purposes of weapons trafficking under s. 100(1) of the *Criminal Code* should be quashed on the ground that he did not "transfer" the firearm within the meaning of that section. A contextual reading of s. 100 and the related provisions reveals that Parliament intended to reserve the stiffest penalties for transfers that amount to weapons trafficking, not for the mere movement of a firearm from place to place. Since the trial judge did not find that the accused was in possession of the gun for the purpose of transferring it to another person, the s. 100(1) conviction cannot stand. [141] [143]

Per Binnie J.: The majority's approach to the definition of "detention" in ss. 9 and 10 of the *Charter* lays too much emphasis on the claimant's perception of psychological pressure, albeit as filtered through the eyes of the hypothetical reasonable person in the claimant's situation. The objective facts of such encounters as well as the perception of the police in initiating the encounter, and whatever information the police possess at the time or acquire as the encounter proceeds, all of which may or may not be known to the person stopped, should be factored into a more comprehensive analysis of when a "detention" occurs for *Charter* purposes. [150] [180]

The Court's embrace of a wholly claimant-centred approach may lead to the impression that it is more important to enquire whether the hypothetical reasonable person "in the individual's circumstances" would think himself or herself to be detained than whether he or she is detained.

The perspective of the person stopped is important and it is true that there can be no detention unless the liberty of the person stopped is (or is reasonably perceived by that person to be) significantly constrained, but this does not exhaust the relevant considerations. [151]

It is important to be able to determine at what moment an interaction between the police and a member of the public is converted into a detention of that individual, thereby triggering the rights subsidiary to detention including the right to involve his or her lawyer. Re-examining the concept of “psychological detention” with a view to broadening the perspectives from which the encounter is viewed is one way to ease the “obvious tension” between the requirement to inform detained persons of their right to counsel and the proper and effective use of brief investigative detentions. The police know, but the claimant may not know, the point at which he or she graduates from being a person of interest to a person around whom suspicion is starting to focus, and becomes a person whose legal rights are seriously in issue. [153] [160] [165] [177]

There are a number of problems with the Court’s continuing endorsement of the *Therens* approach for the purpose of determining when a simple interaction crystallizes into a detention. Insistence that the claimant’s circumstances be viewed from the more detached perspective of a “reasonable person” in some cases exaggerates the ability of ordinary people to stand up to police assertion of authority, and may compel the conclusion that the claimant had the choice to walk away whereas in reality no such choice existed. On the other hand, if the concept of the reasonable person is intended to describe average cooperative members of the public, the Canadian reality is that such people will almost always regard a direction from a police officer as a demand that must be complied with. Viewed in this way, police instructions or demands readily constrain a claimant’s

choice to leave and, therefore, even the less intrusive encounters between the police and citizens ought frequently to be declared detentions under the claimant-centred approach adopted by the majority. [166] [170]

A further problem in calibrating the “reasonable person” is to define exactly what information this fictional person possesses and what experience he or she brings to the assessment of the encounter. This is of particular relevance to visible minorities who may, because of their background and experience, feel especially unable to disregard police directions, and feel that assertion of their right to walk away will itself be taken as evasive and subsequently argued by the police to be sufficient grounds of suspicion to justify a *Mann* detention. The police perspective on such encounters, whether or not conveyed to the person stopped, is relevant. In the absence of explicit criteria various judges will tend to read into the “reasonable person” their own projections of the moment at which, in their view, the person stopped ought to be able to call a lawyer. This may encourage a results-oriented analysis. [169] [172-174]

The *Therens* approach does not take into account adequately what the police know and when they knew it except insofar as this information is conveyed to the person stopped, but the police may not consider it to be in their interest to convey the information. Apparent general inquiries by the police may be designed, unknown to the person stopped, to elicit the missing piece by way of self-incrimination. Possession of such knowledge may in fact place the police in an adversarial relationship with the person approached whether that person is aware of the jeopardy or not. It is the adversarial relationship together with the “stop” that generates the need for counsel. On the other hand, a more benign police purpose may deprive even an unambiguous police

command of the legal effect of a detention, and thereby enure to the benefit of the prosecution.
[167] [178-179]

A finding of detention requires a police command or direction as well as compliance by the person claiming a s. 9 detention in the reasonable belief that there was no other choice. However, police words and conduct should be interpreted in light of the purpose of the encounter from the police perspective, whether disclosed to the person from whom cooperation was requested or not. Moreover, when considering the perception of the person stopped, serious weight should be given to the values and experience of the person actually stopped, including the experience of visible minorities. [176-177]

On the facts of this case, the conclusion of the majority that the accused was arbitrarily detained is agreed with. The purpose of the police officers was to investigate crime, whether actual or anticipated. The police had no information whatsoever that the accused may have been implicated in criminal activity or even whether a crime had been committed. The police order to the accused to “keep his hands in front of him” crystallized the detention. However, the finding of a detention is properly the product not only of the accused’s perception (filtered through the hypothetical reasonable person) but also of the objective facts of why the encounter was initiated (crime detection) and the perception of the police, who at the outset lacked any information on which to base such aggressive tactics. The majority’s analysis under s. 24(2) and the consequent disposition of the appeal are also agreed with. [181-184]

Per Deschamps J.: The facts of this case, considered as a whole, support the conclusion

that the accused was detained. The detention came to a head when the officers asked him certain direct questions that, viewed objectively, might have caused a reasonable person to feel singled out, cornered and, therefore, detained. Owing to the nature of the questions asked by G, the line between prevention and suppression was crossed. G asked the accused if he had committed a crime. Once such a question had been asked of a person who had known he was being watched from the time he had crossed paths with W and F — who had since arrived on the scene — the encounter could no longer be described simply as an interaction between a police officer and a member of the public. The exchange was no longer an impromptu conversation that the accused would think he could walk away from as he pleased. [191]

Regarding the factors to consider in deciding whether to admit or exclude evidence obtained in violation of a *Charter* right, the new test proposed by the majority is inconsistent with the purpose of s. 24(2) of the *Charter*, which is to maintain public confidence in the administration of justice. The statement that s. 24(2) has a long-term societal purpose is of great significance for the identification of the factors to be considered in the analysis. The proposed test, by focussing the analysis on the conduct of the police in the first branch and on the interest of the accused in the second, and by attaching less importance to the seriousness of the offence in the third, does not give sufficient consideration to the long-term societal interest that must guide the judge in reaching a decision. In determining whether the maintenance of confidence in the administration of justice would be better served by admitting the evidence or by excluding it, the judge must instead strike a fair balance between two societal interests: the public interest in protecting *Charter* rights and the public interest in an adjudication on the merits. On the first branch, any facts that help show the effect of the violation on the protected rights must be considered, including the state conduct that

gave rise to the violation. The impact of a violation on protected interests will vary with the circumstances, and the judge must therefore consider all the facts that will enable him or her to assess the long-term impact of his or her decision on the reputation of the administration of justice, that is, not on the rights of the accused being tried, but rather on those of every individual whose rights might be violated in a similar way. As for the second branch, whether the evidence is reliable and whether it is essential or peripheral are factors that are crucial to the maintenance of public confidence, as is the seriousness of the offence. [185] [195] [198] [202] [223-226]

In this case, to admit the weapon in evidence would have a positive effect on the reputation of the administration of justice. According to the trial judge's findings of fact, the exchange lasted only a few minutes, the officers were polite to the accused, and they were motivated by a desire to take a proactive approach in patrolling an area near schools with serious problems related to youth crime and safety. On the protection of the public, it should be noted that the charge is firearms-related, that it would be impossible to establish guilt without the evidence and that the evidence is eminently reliable. When balanced against each other, the limited impact of the violation on the protected interests and the great importance of the evidence for the purposes of the trial favour admitting the physical evidence. [228-229]

There is agreement with the majority on the charge of possession of a firearm for the purposes of trafficking. [229]

Cases Cited

By McLachlin C.J. and Charron J.

Not followed: *R. v. Collins*, [1987] 1 S.C.R. 265; *R. v. Stillman*, [1997] 1 S.C.R. 607; **applied:** *R. v. Therens*, [1985] 1 S.C.R. 613; **referred to:** *R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 59; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3; *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307; *R. v. Esposito* (1985), 24 C.C.C. (3d) 88; *Dedman v. The Queen*, [1985] 2 S.C.R. 2; *Application under s. 83.28 of the Criminal Code (Re)*, 2004 SCC 42, [2004] 2 S.C.R. 248; *R. v. Hebert*, [1990] 2 S.C.R. 151; *R. v. Grafe* (1987), 36 C.C.C. (3d) 267; *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350; *R. v. Duguay* (1985), 18 C.C.C. (3d) 289; *R. v. Hufsky*, [1988] 1 S.C.R. 621; *R. v. Ladouceur*, [1990] 1 S.C.R. 1257; *R. v. Suberu*, 2009 SCC 33, [2009] 2 S.C.R. 460; *R. v. Brydges*, [1990] 1 S.C.R. 190; *R. v. Burlingham*, [1995] 2 S.C.R. 206; *R. v. Orbanski*, 2005 SCC 37, [2005] 2 S.C.R. 3; *R. v. Harrer*, [1995] 3 S.C.R. 562; *R. v. Silveira*, [1995] 2 S.C.R. 297; *R. v. Genest*, [1989] 1 S.C.R. 59; *R. v. Kokesch*, [1990] 3 S.C.R. 3; *R. v. Buhay*, 2003 SCC 30, [2003] 1 S.C.R. 631; *R. v. White*, [1999] 2 S.C.R. 417; *R. v. Askov*, [1990] 2 S.C.R. 1199; *R. v. Wray*, [1971] S.C.R. 272; *R. v. Kitaitchik* (2002), 166 C.C.C. (3d) 14; *R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609; *R. v. Harper*, [1994] 3 S.C.R. 343; *R. v. Schedel* (2003), 175 C.C.C. (3d) 193; *R. v. Richfield* (2003), 178 C.C.C. (3d) 23; *R. v. Dolynchuk* (2004), 184 C.C.C. (3d) 214; *R. v. Banman*, 2008 MBCA 103, 236 C.C.C. (3d) 547; *R. v. S.A.B.*, 2003 SCC 60, [2003] 2 S.C.R. 678; *R. v. Shepherd*, 2007 SKCA 29, 218 C.C.C. (3d) 113, *aff'd* 2009 SCC 35, [2009] 2 S.C.R. 527; *R. v. Padavattan* (2007), 223 C.C.C. (3d)

221; *R. v. Simmons*, [1988] 2 S.C.R. 495; *R. v. Golden*, 2001 SCC 83, [2001] 3 S.C.R. 679; *R. v. St. Lawrence*, [1949] O.R. 215; *R. v. Feeney*, [1997] 2 S.C.R. 13; *R. v. Grant*, [1993] 3 S.C.R. 223; *R. v. Harris*, 2007 ONCA 574, 225 C.C.C. (3d) 193; *R. v. Strachan*, [1988] 2 S.C.R. 980; *R. v. Goldhart*, [1996] 2 S.C.R. 463; *R. v. Harrison*, 2009 SCC 34, [2009] 2 S.C.R. 494; *McDiarmid Lumber Ltd. v. God's Lake First Nation*, 2006 SCC 58, [2006] 2 S.C.R. 846; *R. v. Davis*, [1999] 3 S.C.R. 759.

By Binnie J.

Not followed: *R. v. Therens*, [1985] 1 S.C.R. 613; **referred to:** *R. v. Golden*, 2001 SCC 83, [2001] 3 S.C.R. 679; *United States v. Mendenhall*, 446 U.S. 544 (1980); *Florida v. Royer*, 460 U.S. 491 (1983); *California v. Beheler*, 463 U.S. 1121 (1983); *Oregon v. Mathiason*, 429 U.S. 492 (1977); *Escobedo v. Illinois*, 378 U.S. 478 (1964); *Miranda v. Arizona*, 384 U.S. 436 (1966); *Thompson v. Keohane*, 516 U.S. 99 (1995); *Stansbury v. California*, 511 U.S. 318 (1994); *R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 59; *R. v. Suberu*, 2009 SCC 33, [2009] 2 S.C.R. 460, aff'g 2007 ONCA 60, 85 O.R. (3d) 127; *R. v. Moran* (1987), 36 C.C.C. (3d) 225, leave to appeal refused, [1988] 1 S.C.R. xi; *R. v. Grafe* (1987), 36 C.C.C. (3d) 267; *Practice Note (Judges' Rules)*, [1964] 1 W.L.R. 152.

By Deschamps J.

Not followed: *R. v. Collins*, [1987] 1 S.C.R. 265; **referred to:** *R. v. Orellana*, [1999] O.J. No. 5746 (QL); *R. v. Suberu*, 2009 SCC 33, [2009] 2 S.C.R. 460; *R. v. Kang-Brown*, 2008 SCC

18, [2008] 1 S.C.R. 456; *R. v. Conway*, [1989] 1 S.C.R. 1659; *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297; *R. v. Greffe*, [1990] 1 S.C.R. 755; *R. v. Stillman*, [1997] 1 S.C.R. 607; *R. v. Burlingham*, [1995] 2 S.C.R. 206; *R. v. Strachan* (1986), 25 D.L.R. (4th) 567; *Herring v. United States*, 555 U.S. 1 (2009); *R. v. Duguay*, [1989] 1 S.C.R. 93; *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391; *R. v. Taillefer*, 2003 SCC 70, [2003] 3 S.C.R. 307; *R. v. O'Connor*, [1995] 4 S.C.R. 411; *R. v. Harrison*, 2009 SCC 34, [2009] 2 S.C.R. 494.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 1, 7, 8, 9, 10, 11(c), 13, 24.

Criminal Code, R.S.C. 1985, c. C-46, ss. 84 “transfer”, 86(2), 99, 100.

Firearms Act, S.C. 1995, c. 39, s. 21 “transfer”.

Model Code of Pre-Arrest Procedure (ALI 1975), s. 110.1(2).

Authors Cited

Butterfoss, Edwin J. “Bright Line Seizures: The Need for Clarity in Determining When Fourth Amendment Activity Begins” (1988-1989), 79 *J. Crim. L. & Criminology* 437.

Canada. Law Reform Commission. Working Paper 10. *Evidence — The Exclusion of Illegally Obtained Evidence*. Ottawa: The Commission, 1974.

Hogg, Peter W. *Constitutional Law of Canada*, 5th ed. Supp., vol. 2. Scarborough, Ont.: Thomson/Carswell, 2007 (updated 2007, release 1).

LaFave, Wayne R. *Search and Seizure: A Treatise on the Fourth Amendment*, 4th ed., vol. 1. St. Paul, Minn.: Thomson/West, 2004.

Mahoney, Richard. “Problems with the Current Approach to s. 24(2) of the Charter: An Inevitable Discovery” (1999), 42 *Crim. L.Q.* 443.

- McLellan, A. Anne, and Bruce P. Elman. "The Enforcement of the Canadian Charter of Rights and Freedoms: An Analysis of Section 24" (1983), 21 *Alta. L. Rev.* 205.
- Mirfield, Peter. "The Early Jurisprudence of Judicial Disrepute" (1987-88), 30 *Crim. L.Q.* 434.
- Ontario. Commission on Systemic Racism in the Ontario Criminal Justice System. *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System*. Toronto: The Commission, 1995.
- Ontario. Ontario Human Rights Commission. Inquiry Report. *Paying the Price: The Human Cost of Racial Profiling*. Toronto: The Commission, 2003 (online: www.ohrc.on.ca/en).
- Paciocco, David M. "*Stillman*, Disproportion and the Fair Trial Dichotomy under Section 24(2)" (1997), 2 *Can. Crim. L.R.* 163.
- Paciocco, David M. "The Judicial Repeal of s. 24(2) and the Development of the Canadian Exclusionary Rule" (1989-90), 32 *Crim. L.Q.* 326.
- Penney, Steven. "Taking Deterrence Seriously: Excluding Unconstitutionally Obtained Evidence Under Section 24(2) of the *Charter*" (2004), 49 *McGill L.J.* 105.
- Perrin, L. Timothy, et al. "If It's Broken, Fix It: Moving Beyond the Exclusionary Rule — A New and Extensive Empirical Study of the Exclusionary Rule and a Call for a Civil Administrative Remedy to Partially Replace the Rule" (1998), 83 *Iowa L. Rev.* 669.
- Roach, Kent. "Constitutionalizing Disrepute: Exclusion of Evidence after *Therens*" (1986), 44 *U.T. Fac. L. Rev.* 209.
- Shearing, Clifford D., and Philip C. Stenning assisted by David Denberg. *Police Training in Ontario: An Evaluation of Recruit and Supervisory Courses*. Working Paper. Toronto: Centre of Criminology, University of Toronto, 1980.
- Stuart, Don. *Charter Justice in Canadian Criminal Law*, 4th ed. Toronto, Ont.: Thomson/Carswell, 2005.
- Stuart, Don. "Questioning the Discoverability Doctrine in Section 24(2) Rulings" (1996), 48 C.R. (4th) 351.
- Stuesser, Lee. "*R. v. S.A.B.*: Putting 'Self-Incrimination' in Context" (2004), 42 *Alta. L. Rev.* 543.
- Sullivan, Ruth. *Driedger on the Construction of Statutes*, 3rd ed. Toronto: Butterworths, 1994.
- Sullivan, Ruth. *Sullivan on the Construction of Statutes*, 5th ed. Markham, Ont.: LexisNexis, 2008.
- Tanovich, David M. "Using the Charter to Stop Racial Profiling: The Development of an

Equality-Based Conception of Arbitrary Detention” (2002), 40 *Osgoode Hall L.J.* 145.

Young, Alan. “All Along the Watchtower: Arbitrary Detention and the Police Function” (1991), 29 *Osgoode Hall L.J.* 329.

APPEAL from a judgment of the Ontario Court of Appeal (McMurtry C.J.O. and Laskin and Lang JJ.A.) (2006), 81 O.R. (3d) 1, 213 O.A.C. 127, 209 C.C.C. (3d) 250, 38 C.R. (6th) 58, 143 C.R.R. (2d) 223, 2006 CarswellOnt 3352, [2006] O.J. No. 2179 (QL), affirming the accused’s conviction entered by M. H. Harris J., 2004 CarswellOnt 8783. Appeal allowed in part.

Jonathan Dawe and Frank R. Addario, for the appellant.

Michal Fairburn and John Corelli, for the respondent.

James C. Martin and Paul Adams, for the intervener the Director of Public Prosecutions of Canada.

Michael Brundrett and Margaret A. Mereigh, for the intervener the Attorney General of British Columbia.

Don Stuart and Graeme Norton, for the intervener the Canadian Civil Liberties Association.

Marlys A. Edwardh and Jessica R. Orkin, for the intervener the Criminal Lawyers’ Association (Ontario).

The judgment of McLachlin C.J. and LeBel, Fish, Abella and Charron JJ. was delivered by

THE CHIEF JUSTICE AND CHARRON J. —

I. Overview

[1] Mr. Grant appeals his convictions on a series of firearms offences, relating to a gun seized by police during an encounter on a Toronto sidewalk. The gun was entered as evidence against Mr. Grant and formed the basis of his convictions. The question on this appeal is whether that evidence was obtained in breach of Mr. Grant’s *Charter* rights, and if so, whether the evidence should have been excluded under s. 24(2) of the *Canadian Charter of Rights and Freedoms*.

[2] Resolving these questions requires us to revisit two important and contentious areas of criminal law *Charter* jurisprudence. The first is the definition of “detention” under ss. 9 and 10 of the *Charter*. The second is the test for exclusion of evidence obtained in violation of the *Charter* pursuant to s. 24(2).

[3] The submissions before us reveal that existing jurisprudence on the issues of detention and exclusion of evidence is difficult to apply and may lead to unsatisfactory results. Without undermining the principles that animate the jurisprudence to date, we find it our duty, given the difficulties that have been pointed out to us, to take a fresh look at the frameworks that have been developed for the resolution of these two issues. We will also consider the subsidiary issue that

arises in this case: the meaning of “transfer” of a weapon for the purposes of ss. 84, 99 and 100 of the *Criminal Code*, R.S.C. 1985, c. C-46.

II. Facts

[4] The encounter at the centre of this appeal occurred at mid-day on November 17, 2003, in the Greenwood and Danforth area of Toronto. With four schools in the area and a history of student assaults, robberies, and drug offences occurring over the lunch hour, the three officers involved in the encounter were on patrol for the purposes of monitoring the area and maintaining a safe student environment. Two of the officers, Constables Worrell and Forde, were dressed in plainclothes and driving an unmarked car. Although on patrol, their primary task was to visit the various schools to determine if there were persons on school property who should not have been there — either non-students or students from another school. The third officer, Constable Gomes, was in uniform and driving a marked police car. On “directed patrol”, he had been tasked with maintaining a visible police presence in the area in order to provide student reassurance and to deter crime during the high school lunch period.

[5] Mr. Grant, a young black man, was walking northbound on Greenwood Avenue when he came to the attention of Constables Worrell and Forde. As the two officers drove past, Cst. Worrell testified that the appellant “stared” at them in an unusually intense manner and continued to do so as they proceeded down the street, while at the same time “fidgeting” with his coat and pants in a way that aroused their suspicions. Given their purpose for being in the area and based on what he had just seen, Cst. Worrell decided that “maybe we should have a chat with this guy and

see what's up with him". Cst. Worrell wanted to know whether Mr. Grant was a student at one of the schools they were assigned to monitor, and, if he was not, whether he was headed to one of the schools anyway. Noticing Cst. Gomes parked on the street ahead of Mr. Grant, and in light of his uniformed attire, the two plainclothes officers suggested to Cst. Gomes that he "have a chat" with the approaching appellant to determine if there was any need for concern.

[6] Cst. Gomes then got out of his car and initiated an exchange with Mr. Grant, while standing on the sidewalk directly in his intended path. The officer asked the appellant "what was going on", and requested his name and address. In response, the appellant provided a provincial health card. At one point, the appellant, behaving nervously, adjusted his jacket, prompting the officer to ask him to "keep his hands in front of him". By this point, the two other officers had returned and parked on the side of the street.

[7] Cst. Worrell testified on cross-examination that he and Cst. Forde pulled up because he got a funny feeling based on Mr. Grant's way of looking over at them, looking around "all over the place", and adjusting himself. On direct examination he said that "[h]e still seemed to be, I don't know, looking a bit nervous the way he was looking around, looking at us, looking around when speaking to Officer Gomes. And at this time, I suggested to my partner, you know, I don't think it would hurt if we just go up to Officer Gomes and just stand by, just to make sure everything was okay." Thus, after a brief period observing the exchange from their car, the two officers approached the pair on the sidewalk, identified themselves to the appellant as police officers by flashing their badges, and took up positions behind Cst. Gomes, obstructing the way forward. The exchange between Cst. Gomes and Mr. Grant subsequent to the arrival of the two officers was as follows:

Q. Have you ever been arrested before?

A. I got into some trouble about three years ago.

Q. Do you have anything on you that you shouldn't?

A. No. Well, I got a small bag of weed.

Q. Where is it?

A. It's in my pocket.

Q. Is that it?

A. (Male puts his head down.) Yeah. Well, no.

Q. Do you have other drugs on you?

A. No, I just have the weed, that's it.

Q. Well, what is it that you have?

A. I have a firearm.

[8] At this point, the officers arrested and searched the appellant, seizing the marijuana and a loaded revolver. They then advised Mr. Grant of his right to counsel and took him to the police station.

III. Judgments Below

[9] At trial, Mr. Grant alleged violations of his rights under ss. 8, 9 and 10(b) of the *Charter*. The trial judge held that the officers' inquiries did not amount to a search within the meaning of s. 8. He further concluded that Mr. Grant was not detained prior to his arrest or, if he was detained,

he waived his rights by cooperating with the officers' requests. Having found no *Charter* breach, he had no difficulty admitting the firearm: 2004 CarswellOnt 8779. Mr. Grant was convicted of five firearms offences, including possession of a restricted firearm for the purpose of transferring it without lawful authority (s. 100(1) of the *Criminal Code*).

[10] In the Ontario Court of Appeal, Laskin J.A. held that the trial judge's conclusion on the question of detention was undermined by several mischaracterizations as to what had occurred, thereby entitling the court to revisit the issue. He concluded that a detention had crystallized during the conversation with Cst. Gomes, before the appellant made his incriminating statements. Because the officers had no reasonable grounds to detain the appellant, the detention was arbitrary and a breach of s. 9 was established. Laskin J.A. did not deal with s. 10(b) and found no breach of s. 8. On the question of exclusion under s. 24(2), Laskin J.A. determined that the firearm was "derivative" evidence emanating from a self-incriminatory statement and would very often be excluded on that basis alone. However, after a review of recent developments in the s. 24(2) jurisprudence, Laskin J.A. concluded that the admission of the gun would not unduly undermine trial fairness. He held that the reputé of the administration of justice would be damaged more by the exclusion of the gun than by its admission. He therefore held that the gun was properly admitted into evidence. On the firearms issue, Laskin J.A. held that Mr. Grant's act of moving the gun from one place to another fell within the definition of "transfer" in s. 84 of the *Code*, justifying the conviction under s. 100(1). He therefore dismissed the appeal: (2006), 81 O.R. (3d) 1.

IV. Analysis

A. *Breach of the Charter*

[11] The first issue in this case is whether the evidence of the gun was obtained in a manner that breached Mr. Grant's rights under the *Charter*. Mr. Grant argues that the police breached his *Charter* rights by arbitrarily detaining him contrary to s. 9 and by failing to advise him of his right to speak to a lawyer contrary to s. 10(b), before the questioning that led to the discovery of the firearm that is the subject of these charges. Alternatively, if the Court finds he was not detained, Mr. Grant argues that the Court of Appeal erred in finding that there was no violation of s. 8's protection against unreasonable search and seizure.

[12] The threshold question is whether the appellant was detained before he produced the firearm and was arrested. If he was detained, the detention was arbitrary; all parties are agreed that the police lacked legal grounds to detain the appellant. Further, if detained, Mr. Grant was entitled to be advised of the right to counsel at that point, which would establish breach of s. 10(b) of the *Charter*.

1. The Meaning of "Detention" Under the *Charter*

(a) *The Positions of the Parties*

[13] Mr. Grant argues that he was detained before he made his inculpatory statements and revealed the gun. He contends that his liberty to choose to remain or leave was taken away by the conduct of the police officers in blocking his path, and that this detention was arbitrary because at

this point the officers lacked reasonable grounds to detain him under the standard for investigative detention elaborated in *R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 59. Because he was detained, he argues, the police were required to advise him under s. 10(b) that he had the right to speak to a lawyer.

[14] The Crown argues that Mr. Grant was not detained until the police arrested him after he disclosed his firearm, at which point they advised him of his right to talk to a lawyer. It says that the officers' prior conduct was not directed at curtailing the appellant's liberty, but rather at protecting their own safety while asking him some questions. The Crown says that the officers were engaging in community policing, which involves a dynamic interaction between the police and the citizens they serve. The Crown contends that preliminary, non-coercive questioning pursuant to police policy is a legitimate exercise of investigative police powers, is essential to the effective fulfilment of the police's duty to enforce the law, and does not amount to detention triggering the right to counsel.

(b) *Interpretative Principles*

[15] As for any constitutional provision, the starting point must be the language of the section. Where questions of interpretation arise, a generous, purposive and contextual approach should be applied.

[16] Constitutional guarantees such as ss. 9 and 10 should be interpreted in a "generous rather than . . . legalistic [way], aimed at fulfilling the purpose of the guarantee and securing for individuals

the full benefit of the *Charter*'s protection" (*R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344). Unduly narrow, technical approaches to *Charter* interpretation must be avoided, given their potential to "subvert the goal of ensuring that right holders enjoy the full benefit and protection of the *Charter*" (*Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3, at para. 23).

[17] While the twin principles of purposive and generous interpretation are related and sometimes conflated, they are not the same. The purpose of a right must always be the dominant concern in its interpretation; generosity of interpretation is subordinate to and constrained by that purpose (P. W. Hogg, *Constitutional Law of Canada* (5th ed. Supp.), vol. 2, at pp. 36-30 and 36-31). While a narrow approach risks impoverishing a *Charter* right, an overly generous approach risks expanding its protection beyond its intended purposes. In brief, we must construe the language of ss. 9 and 10 in a generous way that furthers, without overshooting, its purpose: *Big M Drug Mart*, at p. 344.

[18] To interpret "detention" in ss. 9 and 10 generously, yet purposively, we must consider the context in which it is embedded — in other words, the role it plays in conjunction with related protections in the *Charter*.

(c) *The Purpose of the Rights Linked to Detention*

[19] Detention represents a limit on the broad right to liberty enjoyed by everyone in Canada at common law and by virtue of s. 7 of the *Charter*, which guarantees that liberty will only be

curtailed in accordance with the principles of fundamental justice. Section 9 of the *Charter* establishes that “[e]veryone has the right not to be arbitrarily detained or imprisoned”. Section 10 accords certain rights to people who are arrested or detained, including the right to retain and instruct counsel.

[20] The purpose of s. 9, broadly put, is to protect individual liberty from unjustified state interference. As recognized by this Court in *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307, “liberty”, for *Charter* purposes, is not “restricted to mere freedom from physical restraint”, but encompasses a broader entitlement “to make decisions of fundamental importance free from state interference” (para. 49). Thus, s. 9 guards not only against unjustified state intrusions upon physical liberty, but also against incursions on mental liberty by prohibiting the coercive pressures of detention and imprisonment from being applied to people without adequate justification. The detainee’s interest in being able to make an informed choice whether to walk away or speak to the police is unaffected by the manner in which the detention is brought about.

[21] More specifically, an individual confronted by state authority ordinarily has the option to choose simply to walk away: *R. v. Esposito* (1985), 24 C.C.C. (3d) 88 (Ont. C.A.), at p. 94; *Dedman v. The Queen*, [1985] 2 S.C.R. 2, at p. 11, citing Martin J.A. in the Ontario Court of Appeal ((1981), 32 O.R. (2d) 641, at p. 653):

Although a police officer may approach a person on the street and ask him questions, if the person refuses to answer the police officer must allow him to proceed on his way, unless . . . [he] arrests him

See also *Application under s. 83.28 of the Criminal Code (Re)*, 2004 SCC 42, [2004] 2 S.C.R. 248, at para. 131. Where this choice has been removed — whether by physical or psychological compulsion — the individual is detained. Section 9 guarantees that the state’s ability to interfere with personal autonomy will not be exercised arbitrarily. Once detained, the individual’s choice whether to speak to the authorities remains, and is protected by the s. 10 informational requirements and the s. 7 right to silence.

[22] “Detention” also identifies the point at which rights subsidiary to detention, such as the right to counsel, are triggered. These rights are engaged by the vulnerable position of the person who has been taken into the effective control of the state authorities. They are principally concerned with addressing the imbalance of power between the state and the person under its control. More specifically, they are designed to ensure that the person whose liberty has been curtailed retains an informed and effective *choice* whether to speak to state authorities, consistent with the overarching principle against self-incrimination. They also ensure that the person who is under the control of the state be afforded the opportunity to seek legal advice in order to assist in regaining his or her liberty. As this Court observed in *R. v. Hebert*, [1990] 2 S.C.R. 151:

In a broad sense, the purpose of ss. 7 to 14 is two-fold to preserve the rights of the detained individual, and to maintain the repute and integrity of our system of justice. More particularly, it is to the control of the superior power of the state *vis-à-vis* the individual who has been detained by the state, and thus placed in its power, that s. 7 and the related provisions that follow are primarily directed. The state has the power to intrude on the individual’s physical freedom by detaining him or her. The individual cannot walk away. This physical intrusion on the individual’s mental liberty in turn may enable the state to infringe the individual’s mental liberty by techniques made possible by its superior resources and power. [Emphasis added; pp. 179-80.]

[23] By setting limits on the power of the state and imposing obligations with regard to the detained person through the concept of detention, the *Charter* seeks to effect a balance between the interests of the detained individual and those of the state. The power of the state to curtail an individual's liberty by way of detention cannot be exercised arbitrarily and attracts a reciprocal obligation to accord the individual legal protection against the state's superior power.

(d) *Defining Detention*

[24] The word "detention" admits of many meanings. Read narrowly, "detention" can be seen as indicating situations where the police take explicit control over the person and command obedience. Read expansively, "detention" can be read as extending to even a fleeting interference or delay. Neither of these extremes offers an acceptable definition of "detention" as used in ss. 9 and 10 of the *Charter*.

[25] The first extreme was rejected by this Court in *R. v. Therens*, [1985] 1 S.C.R. 613, which held that detention for *Charter* purposes occurs when a state agent, by way of physical or psychological restraint, takes away an individual's choice simply to walk away. This encompasses not only explicit interference with the subject's liberty by way of physical interference or express command, but any form of "compulsory restraint". A person is detained where he or she "submits or acquiesces in the deprivation of liberty and reasonably believes that the choice to do otherwise does not exist" (*Therens*, at p. 644). It is clear that a person may reasonably believe he or she has no choice in circumstances where there has been no formal assertion of police control. Thus the first interpretation must be rejected. This comports with the principle that a generous rather than

legalistic approach must be applied to the interpretation of *Charter* principles and avoids cramping the purpose of the protections conferred by ss. 9 and 10 of the *Charter*.

[26] The second interpretation of “detention”, reducing it to any interference, however slight, must also be rejected. As held in *Mann*, at para. 19, *per* Iacobucci J.:

. . . the police cannot be said to “detain”, within the meaning of ss. 9 and 10 of the *Charter*, every suspect they stop for purposes of identification, or even interview. The person who is stopped will in all cases be “detained” in the sense of “delayed”, or “kept waiting”. But the constitutional rights recognized by ss. 9 and 10 of the *Charter* are not engaged by delays that involve no significant physical or psychological restraint.

It is clear that, while the forms of interference s. 9 guards against are broadly defined to include interferences with both physical and mental liberty, not every trivial or insignificant interference with this liberty attracts *Charter* scrutiny. To interpret detention this broadly would trivialize the applicable *Charter* rights and overshoot their purpose. Only the individual whose liberty is meaningfully constrained has genuine need of the additional rights accorded by the *Charter* to people in that situation.

[27] Having rejected the extreme positions advanced, the question is where between them the line that marks detention under ss. 9 and 10 is to be traced. This is a question that is not easily answered in the abstract; as in so many areas of the law, the most useful guidance derives from the decided cases. In what follows, we set out the general principle of choice that underlies the determination. We then discuss situations which illustrate where the line should be drawn.

[28] The general principle that determines detention for *Charter* purposes was set out in *Therens*: a person is detained where he or she “submits or acquiesces in the deprivation of liberty and reasonably believes that the choice to do otherwise does not exist” (*per* Le Dain J., at p. 644). This principle is consistent with the notion of choice that underlies our conception of liberty and, as such, shapes our interpretation of ss. 9 and 10 of the *Charter*. When detention removes the “choice to do otherwise” but comply with a police direction, s. 10(b) serves an indispensable purpose. It protects, among other interests, the detainee’s ability to choose whether to cooperate with the investigation by giving a statement. The ambit of detention for constitutional purposes is informed by the need to safeguard this choice without impairing effective law enforcement. This explains why the extremes of formally asserted control on the one hand and a passing encounter on the other have been rejected; the former restricts detention in a way that denies the accused rights he or she needs and should have, while the latter would confer rights where they are neither necessary or appropriate.

[29] The language of ss. 9 and 10 is consistent with this purpose-based approach to detention. The pairing of “detained” and “imprisoned” in s. 9 provides textual guidance for determining where the constitutional line between justifiable and unjustifiable interference should be drawn. “Imprisonment” connotes total or near-total loss of liberty. The juxtaposition of “imprisoned” with “detained” suggests that a “detention” requires significant deprivation of liberty. Similarly, the words “arrest or detention” in s. 10 suggest that a “detention” exists when the deprivation of liberty may have legal consequences. This linguistic context requires exclusion of police stops where the subject’s rights are not seriously in issue.

[30] Moving on from the fundamental principle of the right to choose, we find that psychological constraint amounting to detention has been recognized in two situations. The first is where the subject is legally required to comply with a direction or demand, as in the case of a roadside breath sample. The second is where there is no legal obligation to comply with a restrictive or coercive demand, but a reasonable person in the subject's position would feel so obligated. The rationale for this second form of psychological detention was explained by Le Dain J. in *Therens* as follows:

In my opinion, it is not realistic, as a general rule, to regard compliance with a demand or direction by a police officer as truly voluntary, in the sense that the citizen feels that he or she has the choice to obey or not, even where there is in fact a lack of statutory or common law authority for the demand or direction and therefore an absence of criminal liability for failure to comply with it. Most citizens are not aware of the precise legal limits of police authority. Rather than risk the application of physical force or prosecution for wilful obstruction, the reasonable person is likely to err on the side of caution, assume lawful authority and comply with the demand. The element of psychological compulsion, in the form of a reasonable perception of suspension of freedom of choice, is enough to make the restraint of liberty involuntary. Detention may be effected without the application or threat of application of physical restraint if the person concerned submits or acquiesces in the deprivation of liberty and reasonably believes that the choice to do otherwise does not exist. [Emphasis added; p. 644.]

[31] This second form of psychological detention — where no legal compulsion exists — has proven difficult to define consistently. The question is whether the police conduct would cause a reasonable person to conclude that he or she was not free to go and had to comply with the police direction or demand. As held in *Therens*, this must be determined objectively, having regard to all the circumstances of the particular situation, including the conduct of the police. As discussed in more detail below and summarized at para. 44, the focus must be on the state conduct in the context of the surrounding legal and

factual situation, and how that conduct would be perceived by a reasonable person in the situation as it develops.

[32] The objective nature of this inquiry recognizes that the police must be able to know when a detention occurs, in order to allow them to fulfill their attendant obligations under the *Charter* and afford the individual its added protections. However, the subjective intentions of the police are not determinative. (Questions such as police “good faith” may become relevant when the test for exclusion of evidence under s. 24(2) is applied, in cases where a *Charter* breach is found.) While the test is objective, the individual’s particular circumstances and perceptions at the time may be relevant in assessing the reasonableness of any perceived power imbalance between the individual and the police, and thus the reasonableness of any perception that he or she had no choice but to comply with the police directive. To answer the question whether there is a detention involves a realistic appraisal of the entire interaction as it developed, not a minute parsing of words and movements. In those situations where the police may be uncertain whether their conduct is having a coercive effect on the individual, it is open to them to inform the subject in unambiguous terms that he or she is under no obligation to answer questions and is free to go. It is for the trial judge, applying the proper legal principles to the particular facts of the case, to determine whether the line has been crossed between police conduct that respects liberty and the individual’s right to choose, and conduct that does not.

[33] In most cases, it will be readily apparent whether or not an encounter between the police and an individual results in a detention. Making the task easier is the fact that what

would reasonably be understood by all concerned is often informed by generally understood legal rights and duties, as a few examples illustrate.

[34] At one end of the spectrum of possibilities, detention overlaps with arrest or imprisonment and the *Charter* will clearly apply. Similarly, a legal obligation to comply with a police demand or direction, such as a breath sample demand at the roadside, clearly denotes s. 9 detention. As Le Dain J. observed in *Therens*, “[i]t is not realistic to speak of a person who is liable to arrest and prosecution for refusal to comply with a demand which a peace officer is empowered by statute to make as being free to refuse to comply” (p. 643).

[35] At the other end of the spectrum lie encounters between individual and police where it would be clear to a reasonable person that the individual is not being deprived of a meaningful choice whether or not to cooperate with a police demand or directive and hence not detained.

[36] We may rule out at the outset situations where the police are acting in a non-adversarial role and assisting members of the public in circumstances commonly accepted as lacking the essential character of a detention. In many common situations, reasonable people understand that the police are not constraining individual choices, but rather helping people or gathering information. For instance, the reasonable person would understand that a police officer who attends at a medical emergency on a 911 call is not detaining the individuals he or she encounters. This is so even if the police, in taking control of the situation, effectively interfere with an individual’s freedom of movement. Such deprivations

of liberty will not be significant enough to attract *Charter* scrutiny because they do not attract legal consequences for the concerned individuals.

[37] Another often-discussed situation is when police officers approach bystanders in the wake of an accident or crime, to determine if they witnessed the event and obtain information that may assist in their investigation. While many people may be happy to assist the police, the law is clear that, subject to specific provisions that may exceptionally govern, the citizen is free to walk away: *R. v. Grafe* (1987), 36 C.C.C. (3d) 267 (Ont. C.A.). Given the existence of such a generally understood right in such circumstances, a reasonable person would not conclude that his or her right to choose whether to cooperate with them has been taken away. This conclusion holds true even if the person may feel compelled to cooperate with the police out of a sense of moral or civic duty. The Ontario Court of Appeal adverted to this concept in *Grafe*, where Krever J.A. wrote, at p. 271:

The law has long recognized that although there is no legal duty there is a moral or social duty on the part of every citizen to answer questions put to him or her by the police and, in that way to assist the police: see, for example, *Rice v. Connolly*, [1966] 2 All E.R. 649 at p. 652, *per* Lord Parker C.J. Implicit in that moral or social duty is the right of a police officer to ask questions even, in my opinion, when he or she has no belief that an offence has been committed. To be asked questions, in these circumstances, cannot be said to be a deprivation of liberty or security.

[38] In the context of investigating an accident or a crime, the police, unbeknownst to them at that point in time, may find themselves asking questions of a person who is implicated in the occurrence and, consequently, is at risk of self-incrimination. This does not preclude the police from continuing to question the person in the pursuit of their

investigation. Section 9 of the *Charter* does not require that police abstain from interacting with members of the public until they have specific grounds to connect the individual to the commission of a crime. Nor does s. 10 require that the police advise everyone at the outset of any encounter that they have no obligation to speak to them and are entitled to legal counsel.

[39] Effective law enforcement is highly dependent on the cooperation of members of the public. The police must be able to act in a manner that fosters this cooperation, not discourage it. However, police investigative powers are not without limits. The notion of psychological detention recognizes the reality that police tactics, even in the absence of exercising actual physical restraint, may be coercive enough to effectively remove the individual's choice to walk away from the police. This creates the risk that the person may reasonably feel compelled to incriminate himself or herself. Where that is the case, the police are no longer entitled simply to expect cooperation from an individual. Unless, as stated earlier, the police inform the person that he or she is under no obligation to answer questions and is free to go, a detention may well crystallize and, when it does, the police must provide the subject with his or her s. 10(b) rights. That the obligation arises only on detention represents part of the balance between, on the one hand, the individual rights protected by ss. 9 and 10 and enjoyed by all members of society, and on the other, the collective interest of all members of society in the ability of the police to act on their behalf to investigate and prevent crime.

[40] A more complex situation may arise in the context of neighbourhood policing

where the police are not responding to any specific occurrence, but where the non-coercive police role of assisting in meeting needs or maintaining basic order can subtly merge with the potentially coercive police role of investigating crime and arresting suspects so that they may be brought to justice. This is the situation that arises in this case.

[41] As discussed earlier, general inquiries by a patrolling officer present no threat to freedom of choice. On the other hand, such inquiries can escalate into situations where the focus shifts from general community-oriented concern to suspicion of a particular individual. Focussed suspicion, in and of itself, does not turn the encounter in a detention. What matters is how the police, based on that suspicion, interacted with the subject. The language of the *Charter* does not confine detention to situations where a person is in potential jeopardy of arrest. However, this is a factor that may help to determine whether, in a particular circumstance, a reasonable person would conclude he or she had no choice but to comply with a police officer's request. The police must be mindful that, depending on how they act and what they say, the point may be reached where a reasonable person, in the position of that individual, would conclude he or she is not free to choose to walk away or decline to answer questions.

[42] The length of the encounter said to give rise to the detention may be a relevant consideration. Consider the act of a police officer placing his or her hand on an individual's arm. If sustained, it might well lead a reasonable person to conclude that his or her freedom to choose whether to cooperate or not has been removed. On the other hand, a fleeting touch may not, depending on the circumstances, give rise to a reasonable conclusion that one's

liberty has been curtailed. At the same time, it must be remembered that situations can move quickly, and a single forceful act or word may be enough to cause a reasonable person to conclude that his or her right to choose how to respond has been removed.

[43] Whether the individual has been deprived of the right to choose simply to walk away will depend, to reiterate, on all the circumstances of the case. It will be for the trial judge to determine on all the evidence. Deference is owed to the trial judge's findings of fact, although application of the law to the facts is a question of law.

[44] In summary, we conclude as follows:

1. Detention under ss. 9 and 10 of the *Charter* refers to a suspension of the individual's liberty interest by a significant physical or psychological restraint. Psychological detention is established either where the individual has a legal obligation to comply with the restrictive request or demand, or a reasonable person would conclude by reason of the state conduct that he or she had no choice but to comply.
2. In cases where there is no physical restraint or legal obligation, it may not be clear whether a person has been detained. To determine whether the reasonable person in the individual's circumstances would conclude that he or she had been deprived by the state of the liberty of choice, the court may consider, *inter alia*, the following factors:

- (a) The circumstances giving rise to the encounter as they would reasonably be perceived by the individual: whether the police were providing general assistance; maintaining general order; making general inquiries regarding a particular occurrence; or, singling out the individual for focussed investigation.
- (b) The nature of the police conduct, including the language used; the use of physical contact; the place where the interaction occurred; the presence of others; and the duration of the encounter.
- (c) The particular characteristics or circumstances of the individual where relevant, including age; physical stature; minority status; level of sophistication.

2. Was the Appellant Detained Prior to Incriminating Himself?

[45] Against this background, we return to the question at hand: Was Mr. Grant detained within the meaning of ss. 9 and 10 of the *Charter* before the questions that led him to disclose his firearm? The trial judge held that he was not. An appellate court must approach a trial judge's decision on this issue with appropriate deference. However, we agree with Laskin J.A. that the trial judge's conclusion on the question of detention is undermined by certain key findings of fact that cannot reasonably be supported by the evidence. In the circumstances, it is necessary to revisit the issue.

[46] This is not a clear case of physical restraint or compulsion by operation of law. Accordingly, we must consider all relevant circumstances to determine if a reasonable person in Mr. Grant's position would have concluded that his or her right to choose how to interact with the police (i.e. whether to leave or comply) had been removed.

[47] The encounter began with Cst. Gomes approaching Mr. Grant (stepping in his path) and making general inquiries. Such preliminary questioning is a legitimate exercise of police powers. At this stage, a reasonable person would not have concluded he or she was being deprived of the right to choose how to act, and for that reason there was no detention.

[48] Cst. Gomes then told the appellant to "keep his hands in front of him". This act, viewed in isolation, might be insufficient to indicate detention, on the ground that it was simply a precautionary directive. However, consideration of the entire context of what transpired from this point forward leads to the conclusion that Mr. Grant was detained.

[49] Two other officers approached, flashing their badges and taking tactical adversarial positions behind Cst. Gomes. The encounter developed into one where Mr. Grant was singled out as the object of particularized suspicion, as evidenced by the conduct of the officers. The nature of the questioning changed from ascertaining the appellant's identity to determining whether he "had anything that he should not". At this point the encounter took on the character of an interrogation, going from general neighbourhood policing to a situation where the police had effectively taken control over the appellant and were

attempting to elicit incriminating information.

[50] Although Cst. Gomes was respectful in his questioning, the encounter was inherently intimidating. The power imbalance was obviously exacerbated by Mr. Grant's youth and inexperience. Mr. Grant did not testify, so we do not know what his perceptions of the interaction actually were. However, because the test is an objective one, this is not fatal to his argument that there was a detention. We agree with Laskin J.A.'s conclusion that Mr. Grant was detained. In our view, the evidence supports Mr. Grant's contention that a reasonable person in his position (18 years old, alone, faced by three physically larger policemen in adversarial positions) would conclude that his or her right to choose how to act had been removed by the police, given their conduct.

[51] The police conduct that gave rise to an impression of control was not fleeting. The direction to Mr. Grant to keep his hands in front, in itself inconclusive, was followed by the appearance of two other officers flashing their badges and by questioning driven by focussed suspicion of Mr. Grant. The sustained and restrictive tenor of the conduct after the direction to Mr. Grant to keep his hands in front of him reasonably supports the conclusion that the officers were putting him under their control and depriving him of his choice as to how to respond.

[52] We conclude that Mr. Grant was detained when Cst. Gomes told him to keep his hands in front of him, the other two officers moved into position behind Cst. Gomes, and Cst. Gomes embarked on a pointed line of questioning. At this point, Mr. Grant's liberty

was clearly constrained and he was in need of the *Charter* protections associated with detention.

3. Was the Detention Arbitrary Under Section 9?

[53] We have determined that the appellant was detained prior to his arrest. The question at this point is whether the detention was “arbitrary” within the meaning of s. 9.

[54] The s. 9 guarantee against arbitrary detention is a manifestation of the general principle, enunciated in s. 7, that a person’s liberty is not to be curtailed except in accordance with the principles of fundamental justice. As this Court has stated: “This guarantee expresses one of the most fundamental norms of the rule of law. The state may not detain arbitrarily, but only in accordance with the law” (*Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350, at para. 88). Section 9 serves to protect individual liberty against unlawful state interference. A lawful detention is not arbitrary within the meaning of s. 9 (*Mann*, at para. 20), unless the law authorizing the detention is itself arbitrary. Conversely, a detention not authorized by law is arbitrary and violates s. 9.

[55] Earlier suggestions that an unlawful detention was not necessarily arbitrary (see *R. v. Duguay* (1985), 18 C.C.C. (3d) 289 (Ont. C.A.)) have been overtaken by *Mann*, in which this Court confirmed the existence of a common law police power of investigative detention. The concern in the earlier cases was that an arrest made on grounds falling just short of the “reasonable and probable grounds” required for arrest should not automatically

be considered arbitrary in the sense of being baseless or capricious. *Mann*, in confirming that a brief investigative detention based on “reasonable suspicion” was lawful, implicitly held that a detention in the absence of at least reasonable suspicion is unlawful and therefore arbitrary within s. 9.

[56] This approach mirrors the framework developed for assessing unreasonable searches and seizures under s. 8 of the *Charter*. Under *R. v. Collins*, [1987] 1 S.C.R. 265, and subsequent cases dealing with s. 8, a search must be authorized by law to be reasonable; the authorizing law must itself be reasonable; and the search must be carried out in a reasonable manner. Similarly, it should now be understood that for a detention to be non-arbitrary, it must be authorized by a law which is itself non-arbitrary. We add that, as with other rights, the s. 9 prohibition of arbitrary detention may be limited under s. 1 by such measures “prescribed by law as can be demonstrably justified in a free and democratic society”: see *R. v. Hufsky*, [1988] 1 S.C.R. 621, and *R. v. Ladouceur*, [1990] 1 S.C.R. 1257.

[57] Here, the officers acknowledged at trial that they did not have legal grounds or reasonable suspicion to detain the accused prior to his incriminating statements. No issue was taken with this concession on appeal. We therefore conclude that the detention was arbitrary and in breach of s. 9.

4. Was the Appellant’s Section 10(b) Right to Counsel Infringed?

[58] In *R. v. Suberu*, 2009 SCC 33, [2009] 2 S.C.R. 460, we conclude that the s. 10(b)

right to counsel arises immediately upon detention, whether or not the detention is solely for investigative purposes. That being the case, s. 10(b) of the *Charter* required the police to advise Mr. Grant that he had the right to speak to a lawyer, and to give him a reasonable opportunity to obtain legal advice if he so chose, before proceeding to elicit incriminating information from him. Because he now faced significant legal jeopardy and had passed into the effective control of the police, the appellant was “in immediate need of legal advice”: *R. v. Brydges*, [1990] 1 S.C.R. 190, at p. 206. Because the officers did not believe they had detained the appellant, they did not comply with their obligations under s. 10(b). The breach of s. 10(b) is established.

B. *Exclusion of the Evidence*

1. Background

[59] When must evidence obtained in violation of a person’s *Charter* rights be excluded? Section 24(2) of the *Charter* provides the following answer:

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.

[60] The test set out in s. 24(2) — what would bring the administration of justice into disrepute having regard to all the circumstances — is broad and imprecise. The question is

what considerations enter into making this determination. In *Collins* and in *R. v. Stillman*, [1997] 1 S.C.R. 607, this Court endeavoured to answer this question. The *Collins/Stillman* framework, as interpreted and applied in subsequent decisions, has brought a measure of certainty to the s. 24(2) inquiry. Yet the analytical method it imposes and the results it sometimes produces have been criticized as inconsistent with the language and objectives of s. 24(2). In order to understand these criticisms, it is necessary to briefly review the holdings in *Collins* and *Stillman*.

[61] In *Collins*, the Court (*per* Lamer J., as he then was) proceeded by grouping the factors to be considered under s. 24(2) into three categories: (1) whether the evidence will undermine the fairness of the trial by effectively conscripting the accused against himself or herself; (2) the seriousness of the *Charter* breach; and (3) the effect of excluding the evidence on the long-term reputé of the administration of justice. While Lamer J. acknowledged that these categories were merely a “matter of personal preference” (p. 284), they quickly became formalized as the governing test for s. 24(2).

[62] *Collins* shed important light on the factors relevant to determining admissibility of *Charter*-violative evidence under s. 24(2). However, the concepts of trial fairness and conscription under the first branch of *Collins* introduced new problems of their own. Moreover, questions arose about what work (if any) remained to be done under the second and third categories, once conscription leading to trial unfairness had been found. Finally, issues arose as to how to measure the seriousness of the breach under the second branch and what weight, if any, should be put on the seriousness of the offence charged in deciding

whether to admit evidence.

[63] The admission of physical or “real” evidence obtained from the body of the accused in breach of his or her *Charter* rights proved particularly problematic. Ten years after *Collins*, the Court revisited this question in *Stillman*. The majority held that evidence obtained in breach of the *Charter* should, at the outset of the s. 24(2) inquiry, be classified as either “conscriptive” or “non-conscriptive”. Evidence would be classified as conscriptive where “an accused, in violation of his *Charter* rights, is compelled to incriminate himself at the behest of the state by means of a statement, the use of the body or the production of bodily samples”: *Stillman*, at para. 80, *per* Cory J. The category of conscriptive evidence was also held to include real evidence discovered as a result of an unlawfully conscripted statement. This is known as derivative evidence.

[64] *Stillman* held that conscriptive evidence is generally inadmissible — because of its presumed impact on trial fairness — unless if it would have been independently discovered. Despite reminders that “all the circumstances” must always be considered under s. 24(2) (see *R. v. Burlingham*, [1995] 2 S.C.R. 206, *per* Sopinka J., *R. v. Orbanski*, 2005 SCC 37, [2005] 2 S.C.R. 3, *per* LeBel J.), *Stillman* has generally been read as creating an all-but-automatic exclusionary rule for non-discoverable conscriptive evidence, broadening the category of conscriptive evidence and increasing its importance to the ultimate decision on admissibility.

[65] This general rule of inadmissibility of all non-discoverable conscriptive

evidence, whether intended by *Stillman* or not, seems to go against the requirement of s. 24(2) that the court determining admissibility must consider “all the circumstances”. The underlying assumption that the use of conscriptive evidence always, or almost always, renders the trial unfair is also open to challenge. In other contexts, this Court has recognized that a fair trial “is one which satisfies the public interest in getting at the truth, while preserving basic procedural fairness to the accused”: *R. v. Harrer*, [1995] 3 S.C.R. 562, at para. 45. It is difficult to reconcile trial fairness as a multifaceted and contextual concept with a near-automatic presumption that admission of a broad class of evidence will render a trial unfair, regardless of the circumstances in which it was obtained. In our view, trial fairness is better conceived as an overarching systemic goal than as a distinct stage of the s. 24(2) analysis.

[66] This brief review of the impact of *Collins* and *Stillman* brings us to the heart of our inquiry on this appeal: clarification of the criteria relevant to determining when, in “all the circumstances”, admission of evidence obtained by a *Charter* breach “would bring the administration of justice into disrepute”.

2. Overview of a Revised Approach to Section 24(2)

[67] The words of s. 24(2) capture its purpose: to maintain the good repute of the administration of justice. The term “administration of justice” is often used to indicate the processes by which those who break the law are investigated, charged and tried. More broadly, however, the term embraces maintaining the rule of law and upholding *Charter*

rights in the justice system as a whole.

[68] The phrase “bring the administration of justice into disrepute” must be understood in the long-term sense of maintaining the integrity of, and public confidence in, the justice system. Exclusion of evidence resulting in an acquittal may provoke immediate criticism. But s. 24(2) does not focus on immediate reaction to the individual case. Rather, it looks to whether the overall repute of the justice system, viewed in the long term, will be adversely affected by admission of the evidence. The inquiry is objective. It asks whether a reasonable person, informed of all relevant circumstances and the values underlying the *Charter*, would conclude that the admission of the evidence would bring the administration of justice into disrepute.

[69] Section 24(2)’s focus is not only long-term, but prospective. The fact of the *Charter* breach means damage has already been done to the administration of justice. Section 24(2) starts from that proposition and seeks to ensure that evidence obtained through that breach does not do further damage to the repute of the justice system.

[70] Finally, s. 24(2)’s focus is societal. Section 24(2) is not aimed at punishing the police or providing compensation to the accused, but rather at systemic concerns. The s. 24(2) focus is on the broad impact of admission of the evidence on the long-term repute of the justice system.

[71] A review of the authorities suggests that whether the admission of evidence

obtained in breach of the *Charter* would bring the administration of justice into disrepute engages three avenues of inquiry, each rooted in the public interests engaged by s. 24(2), viewed in a long-term, forward-looking and societal perspective. When faced with an application for exclusion under s. 24(2), a court must assess and balance the effect of admitting the evidence on society's confidence in the justice system having regard to: (1) the seriousness of the *Charter*-infringing state conduct (admission may send the message the justice system condones serious state misconduct), (2) the impact of the breach on the *Charter*-protected interests of the accused (admission may send the message that individual rights count for little), and (3) society's interest in the adjudication of the case on its merits. The court's role on a s. 24(2) application is to balance the assessments under each of these lines of inquiry to determine whether, considering all the circumstances, admission of the evidence would bring the administration of justice into disrepute. These concerns, while not precisely tracking the categories of considerations set out in *Collins*, capture the factors relevant to the s. 24(2) determination as enunciated in *Collins* and subsequent jurisprudence.

(a) *Seriousness of the Charter-Infringing State Conduct*

[72] The first line of inquiry relevant to the s. 24(2) analysis requires a court to assess whether the admission of the evidence would bring the administration of justice into disrepute by sending a message to the public that the courts, as institutions responsible for the administration of justice, effectively condone state deviation from the rule of law by failing to dissociate themselves from the fruits of that unlawful conduct. The more severe or deliberate the state conduct that led to the *Charter* violation, the greater the need for the

courts to dissociate themselves from that conduct, by excluding evidence linked to that conduct, in order to preserve public confidence in and ensure state adherence to the rule of law.

[73] This inquiry therefore necessitates an evaluation of the seriousness of the state conduct that led to the breach. The concern of this inquiry is not to punish the police or to deter *Charter* breaches, although deterrence of *Charter* breaches may be a happy consequence. The main concern is to preserve public confidence in the rule of law and its processes. In order to determine the effect of admission of the evidence on public confidence in the justice system, the court on a s. 24(2) application must consider the seriousness of the violation, viewed in terms of the gravity of the offending conduct by state authorities whom the rule of law requires to uphold the rights guaranteed by the *Charter*.

[74] State conduct resulting in *Charter* violations varies in seriousness. At one end of the spectrum, admission of evidence obtained through inadvertent or minor violations of the *Charter* may minimally undermine public confidence in the rule of law. At the other end of the spectrum, admitting evidence obtained through a wilful or reckless disregard of *Charter* rights will inevitably have a negative effect on the public confidence in the rule of law, and risk bringing the administration of justice into disrepute.

[75] Extenuating circumstances, such as the need to prevent the disappearance of evidence, may attenuate the seriousness of police conduct that results in a *Charter* breach: *R. v. Silveira*, [1995] 2 S.C.R. 297, *per* Cory J. “Good faith” on the part of the police will

also reduce the need for the court to disassociate itself from the police conduct. However, ignorance of *Charter* standards must not be rewarded or encouraged and negligence or wilful blindness cannot be equated with good faith: *R. v. Genest*, [1989] 1 S.C.R. 59, at p. 87, *per* Dickson C.J.; *R. v. Kokesch*, [1990] 3 S.C.R. 3, at pp. 32-33, *per* Sopinka J.; *R. v. Buhay*, 2003 SCC 30, [2003] 1 S.C.R. 631, at para. 59. Wilful or flagrant disregard of the *Charter* by those very persons who are charged with upholding the right in question may require that the court dissociate itself from such conduct. It follows that deliberate police conduct in violation of established *Charter* standards tends to support exclusion of the evidence. It should also be kept in mind that for every *Charter* breach that comes before the courts, many others may go unidentified and unredressed because they did not turn up relevant evidence leading to a criminal charge. In recognition of the need for courts to distance themselves from this behaviour, therefore, evidence that the *Charter*-infringing conduct was part of a pattern of abuse tends to support exclusion.

(b) *Impact on the Charter-Protected Interests of the Accused*

[76] This inquiry focusses on the seriousness of the impact of the *Charter* breach on the *Charter*-protected interests of the accused. It calls for an evaluation of the extent to which the breach actually undermined the interests protected by the right infringed. The impact of a *Charter* breach may range from fleeting and technical to profoundly intrusive. The more serious the impact on the accused's protected interests, the greater the risk that admission of the evidence may signal to the public that *Charter* rights, however high-sounding, are of little actual avail to the citizen, breeding public cynicism and bringing the

administration of justice into disrepute.

[77] To determine the seriousness of the infringement from this perspective, we look to the interests engaged by the infringed right and examine the degree to which the violation impacted on those interests. For example, the interests engaged in the case of a statement to the authorities obtained in breach of the *Charter* include the s. 7 right to silence, or to choose whether or not to speak to authorities (*Hebert*) — all stemming from the principle against self-incrimination: *R. v. White*, [1999] 2 S.C.R. 417, at para. 44. The more serious the incursion on these interests, the greater the risk that admission of the evidence would bring the administration of justice into disrepute.

[78] Similarly, an unreasonable search contrary to s. 8 of the *Charter* may impact on the protected interests of privacy, and more broadly, human dignity. An unreasonable search that intrudes on an area in which the individual reasonably enjoys a high expectation of privacy, or that demeans his or her dignity, is more serious than one that does not.

(c) *Society's Interest in an Adjudication on the Merits*

[79] Society generally expects that a criminal allegation will be adjudicated on its merits. Accordingly, the third line of inquiry relevant to the s. 24(2) analysis asks whether the truth-seeking function of the criminal trial process would be better served by admission of the evidence, or by its exclusion. This inquiry reflects society's "collective interest in ensuring that those who transgress the law are brought to trial and dealt with according to the

law”: *R. v. Askov*, [1990] 2 S.C.R. 1199, at pp. 1219-20. Thus the Court suggested in *Collins* that a judge on a s. 24(2) application should consider not only the negative impact of admission of the evidence on the repute of the administration of justice, but the impact of *failing to admit* the evidence.

[80] The concern for truth-seeking is only one of the considerations under a s. 24(2) application. The view that reliable evidence is admissible regardless of how it was obtained (see *R. v. Wray*, [1971] S.C.R. 272) is inconsistent with the *Charter*’s affirmation of rights. More specifically, it is inconsistent with the wording of s. 24(2), which mandates a broad inquiry into all the circumstances, not just the reliability of the evidence.

[81] This said, public interest in truth-finding remains a relevant consideration under the s. 24(2) analysis. The reliability of the evidence is an important factor in this line of inquiry. If a breach (such as one that effectively compels the suspect to talk) undermines the reliability of the evidence, this points in the direction of exclusion of the evidence. The admission of unreliable evidence serves neither the accused’s interest in a fair trial nor the public interest in uncovering the truth. Conversely, exclusion of relevant and reliable evidence may undermine the truth-seeking function of the justice system and render the trial unfair from the public perspective, thus bringing the administration of justice into disrepute.

[82] The fact that the evidence obtained in breach of the *Charter* may facilitate the discovery of the truth and the adjudication of a case on its merits must therefore be weighed

against factors pointing to exclusion, in order to “balance the interests of truth with the integrity of the justice system”: *Mann*, at para. 57, *per* Iacobucci J. The court must ask “whether the vindication of the specific *Charter* violation through the exclusion of evidence exacts too great a toll on the truth-seeking goal of the criminal trial”: *R. v. Kitaitchik* (2002), 166 C.C.C. (3d) 14 (Ont. C.A.), at para. 47, *per* Doherty J.A.

[83] The importance of the evidence to the prosecution’s case is another factor that may be considered in this line of inquiry. Like Deschamps J., we view this factor as corollary to the inquiry into reliability, in the following limited sense. The admission of evidence of questionable reliability is more likely to bring the administration of justice into disrepute where it forms the entirety of the case against the accused. Conversely, the exclusion of highly reliable evidence may impact more negatively on the repute of the administration of justice where the remedy effectively guts the prosecution.

[84] It has been suggested that the judge should also, under this line of inquiry, consider the seriousness of the offence at issue. Indeed, Deschamps J. views this factor as very important, arguing that the more serious the offence, the greater society’s interest in its prosecution (para. 226). In our view, while the seriousness of the alleged offence may be a valid consideration, it has the potential to cut both ways. Failure to effectively prosecute a serious charge due to excluded evidence may have an immediate impact on how people view the justice system. Yet, as discussed, it is the long-term repute of the justice system that is s. 24(2)’s focus. As pointed out in *Burlingham*, the goals furthered by s. 24(2) “operate independently of the type of crime for which the individual stands accused” (para. 51). And

as Lamer J. observed in *Collins*, “[t]he *Charter* is designed to protect the accused from the majority, so the enforcement of the *Charter* must not be left to that majority” (p. 282). The short-term public clamour for a conviction in a particular case must not deafen the s. 24(2) judge to the longer-term reputé of the administration of justice. Moreover, while the public has a heightened interest in seeing a determination on the merits where the offence charged is serious, it also has a vital interest in having a justice system that is above reproach, particularly where the penal stakes for the accused are high.

[85] To review, the three lines of inquiry identified above — the seriousness of the *Charter*-infringing state conduct, the impact of the breach on the *Charter*-protected interests of the accused, and the societal interest in an adjudication on the merits — reflect what the s. 24(2) judge must consider in assessing the effect of admission of the evidence on the reputé of the administration of justice. Having made these inquiries, which encapsulate consideration of “all the circumstances” of the case, the judge must then determine whether, on balance, the admission of the evidence obtained by *Charter* breach would bring the administration of justice into disrepute.

[86] In all cases, it is the task of the trial judge to weigh the various indications. No overarching rule governs how the balance is to be struck. Mathematical precision is obviously not possible. However, the preceding analysis creates a decision tree, albeit more flexible than the *Stillman* self-incrimination test. We believe this to be required by the words of s. 24(2). We also take comfort in the fact that patterns emerge with respect to particular types of evidence. These patterns serve as guides to judges faced with s. 24(2) applications in

future cases. In this way, a measure of certainty is achieved. Where the trial judge has considered the proper factors, appellate courts should accord considerable deference to his or her ultimate determination.

3. Application to Different Kinds of Evidence

[87] We have seen that a trial judge on a s. 24(2) application for exclusion of evidence obtained in breach of the *Charter* must consider whether admission would bring the administration of justice into disrepute, having regard to the results of the three lines of inquiry identified above.

[88] We now turn to some of the types of evidence the cases have considered.

(a) *Statements by the Accused*

[89] Statements by the accused engage the principle against self-incrimination, “one of the cornerstones of our criminal law”: *R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609, at para. 2. This Court in *White*, at para. 44, *per* Iacobucci J., described the principle against self-incrimination as “an overarching principle within our criminal justice system, from which a number of specific common law and *Charter* rules emanate, such as the confessions rule, and the right to silence”. The principle also informs “more specific procedural protections such as, for example, the right to counsel in s. 10(b), the right to non-compellability in s. 11(c), and the right to use immunity set out in s. 13”. Residual

protection for the principle against self-incrimination is derived from s. 7.

[90] This case concerns s. 24(2). However, it is important to note at the outset that the common law confessions rule, quite apart from s. 24(2), provides a significant safeguard against the improper use of a statement against its maker. Where a statement is made to a recognized person in authority, regardless of whether its maker is detained at the time, it is inadmissible unless the Crown can establish beyond a reasonable doubt that it was made voluntarily. Only if such a statement survives scrutiny under the confessions rule and is found to be voluntary, does the s. 24(2) remedy of exclusion arise. Most commonly, this will occur because of added protections under s. 10(b) of the *Charter*.

[91] There is no absolute rule of exclusion of *Charter*-infringing statements under s. 24(2), as there is for involuntary confessions at common law. However, as a matter of practice, courts have tended to exclude statements obtained in breach of the *Charter*, on the ground that admission on balance would bring the administration of justice into disrepute.

[92] The three lines of inquiry described above support the presumptive general, although not automatic, exclusion of statements obtained in breach of the *Charter*.

[93] The first inquiry focusses on whether admission of the evidence would harm the repute of justice by associating the courts with illegal police conduct. Police conduct in obtaining statements has long been strongly constrained. The preservation of public confidence in the justice system requires that the police adhere to the *Charter* in obtaining

statements from a detained accused.

[94] The negative impact on the justice system of admitting evidence obtained through police misconduct varies with the seriousness of the violation. The impression that courts condone serious police misconduct is more harmful to the reputation of the justice system than the acceptance of minor or inadvertent slips.

[95] The second inquiry considers the extent to which the breach actually undermined the interests protected by the right infringed. Again, the potential to harm the reputation of the justice system varies with the seriousness of the impingement on the individual's protected interests. As noted, the right violated by unlawfully obtained statements is often the right to counsel under s. 10(b). The failure to advise of the right to counsel undermines the detainee's right to make a meaningful and informed choice whether to speak, the related right to silence, and, most fundamentally, the protection against testimonial self-incrimination. These rights protect the individual's interest in liberty and autonomy. Violation of these fundamental rights tends to militate in favour of excluding the statement.

[96] This said, particular circumstances may attenuate the impact of a *Charter* breach on the protected interests of the accused from whom a statement is obtained in breach of the *Charter*. For instance, if an individual is clearly informed of his or her choice to speak to the police, but compliance with s. 10(b) was technically defective at either the informational or implementational stage, the impact on the liberty and autonomy interests of the accused in making an informed choice may be reduced. Likewise, when a statement is made

spontaneously following a *Charter* breach, or in the exceptional circumstances where it can confidently be said that the statement in question would have been made notwithstanding the *Charter* breach (see *R. v. Harper*, [1994] 3 S.C.R. 343), the impact of the breach on the accused's protected interest in informed choice may be less. Absent such circumstances, the analysis under this line of inquiry supports the general exclusion of statements taken in breach of the *Charter*.

[97] The third inquiry focusses on the public interest in having the case tried fairly on its merits. This may lead to consideration of the reliability of the evidence. Just as involuntary confessions are suspect on grounds of reliability, so may, on occasion, be statements taken in contravention of the *Charter*. Detained by the police and without a lawyer, a suspect may make statements that are based more on a misconceived idea of how to get out of his or her predicament than on the truth. This danger, where present, undercuts the argument that the illegally obtained statement is necessary for a trial of the merits.

[98] In summary, the heightened concern with proper police conduct in obtaining statements from suspects and the centrality of the protected interests affected will in most cases favour exclusion of statements taken in breach of the *Charter*, while the third factor, obtaining a decision on the merits, may be attenuated by lack of reliability. This, together with the common law's historic tendency to treat statements of the accused differently from other evidence, explains why such statements tend to be excluded under s. 24(2).

(b) *Bodily Evidence*

[99] Bodily evidence is evidence taken from the body of the accused, such as DNA evidence and breath samples. Section 8 of the *Charter* protects against unreasonable search and seizure, and hence precludes the state from obtaining such evidence in a manner that is unreasonable.

[100] The majority in *Stillman*, applying a capacious definition of conscription, held that bodily evidence is “conscriptive” and that its admission would affect trial fairness. This resulted in a near-automatic exclusionary rule for bodily evidence obtained contrary to the *Charter*.

[101] *Stillman* has been criticized for casting the flexible in “all the circumstances” test prescribed by s. 24(2) into a straitjacket that determines admissibility solely on the basis of the evidence’s conscriptive character rather than all the circumstances; for inappropriately erasing distinctions between testimonial and real evidence; and for producing anomalous results in some situations: see, e.g., *Burlingham, per L’Heureux-Dubé J.*; *R. v. Schedel* (2003), 175 C.C.C. (3d) 193 (B.C.C.A.), at paras. 67-72, *per* Esson J.A.; D. M. Paciocco, “*Stillman*, Disproportion and the Fair Trial Dichotomy under Section 24(2)” (1997), 2 *Can. Crim. L.R.* 163; R. Mahoney, “Problems with the Current Approach to s. 24(2) of the Charter: An Inevitable Discovery” (1999), 42 *Crim. L.Q.* 443; S. Penney, “Taking Deterrence Seriously: Excluding Unconstitutionally Obtained Evidence Under Section 24(2) of the Charter” (2004), 49 *McGill L.J.* 105; D. Stuart, *Charter Justice in Canadian Criminal Law* (4th ed. 2005), at p. 581. We will briefly review each of these criticisms.

[102] The first criticism is that the *Stillman* approach transforms the flexible “all the circumstances” test mandated by s. 24(2) into a categorical conscriptive evidence test. Section 24(2) mandates a broad contextual approach rather than an automatic exclusionary rule: D. M. Paciocco, “The Judicial Repeal of s. 24(2) and the Development of the Canadian Exclusionary Rule” (1989-90), 32 *Crim. L.Q.* 326; A. A. McLellan and B. P. Elman, “The Enforcement of the Canadian Charter of Rights and Freedoms: An Analysis of Section 24” (1983), 21 *Alta. L. Rev.* 205, at pp. 205-8; *Orbanski*, at para. 93. As stated in *Orbanski*, per LeBel J., the inquiry under s. 24(2) “amounts to finding a proper balance between competing interests and values at stake in the criminal trial, between the search for truth and the integrity of the trial All the *Collins* factors remain relevant throughout this delicate and nuanced inquiry” (para. 94).

[103] A flexible, multi-factored approach to the admissibility of the evidence is required, not only by the wording of s. 24(2) but by the wide variation between different kinds of bodily evidence. The seriousness of the police conduct and the impact on the accused’s rights of taking the bodily evidence, may vary greatly. Plucking a hair from the suspect’s head may not be intrusive, and the accused’s privacy interest in the evidence may be relatively slight. On the other hand, a body cavity or strip search may be intrusive, demeaning and objectionable. A one-size-fits-all conscription test is incapable of dealing with such differences in a way that addresses the point of the s. 24(2) inquiry — to determine if the admission of the evidence will bring the administration of justice into disrepute.

[104] Recent decisions suggest a growing consensus that the admissibility of bodily

samples should not depend solely on whether the evidence is conscriptive: *R. v. Richfield* (2003), 178 C.C.C. (3d) 23 (Ont. C.A.), *per* Weiler J.A.; *R. v. Dolynchuk* (2004), 184 C.C.C. (3d) 214 (Man. C.A.), *per* Steel J.A.; *R. v. Banman*, 2008 MBCA 103, 236 C.C.C. (3d) 547, *per* MacInnes J.A. This Court in *R. v. S.A.B.*, 2003 SCC 60, [2003] 2 S.C.R. 678, dealing with the constitutionality of DNA warrant provisions in the *Criminal Code*, acknowledged that the *Charter* concerns raised by the gathering of non-testimonial evidence are better addressed by reference to the interests of privacy, bodily integrity and human dignity, than by a blanket rule that by analogy to compelled statements, such evidence is always inadmissible. See also: L. Stuesser, “*R. v. S.A.B.*: Putting ‘Self-Incrimination’ in Context” (2004), 42 *Alta. L. Rev.* 543.

[105] The second and related objection to a simple conscription test for the admissibility of bodily evidence under s. 24(2) is that it wrongly equates bodily evidence with statements taken from the accused. In most situations, statements and bodily samples raise very different considerations from the point of view of the administration of justice. Equating them under the umbrella of conscription risks erasing relevant distinctions and compromising the ultimate analysis of systemic disrepute. As Professor Paciocco has observed, “in equating intimate bodily substances with testimony we are not so much reacting to the compelled participation of the accused as we are to the violation of the privacy and dignity of the person that obtaining such evidence involves” (“*Stillman*, Disproportion and the Fair Trial Dichotomy under Section 24(2)”, at p. 170). Nor does the taking of a bodily sample trench on the accused’s autonomy in the same way as may the unlawful taking of a statement. The pre-trial right to silence under s. 7, the right against testimonial self-

incrimination in s. 11(c), and the right against subsequent use of self-incriminating evidence in s. 13 have informed the treatment of statements under s. 24(2). These concepts do not apply coherently to bodily samples, which are not communicative in nature, weakening self-incrimination as the sole criterion for determining their admissibility.

[106] A third criticism of the conscription test for admissibility of bodily evidence under s. 24(2) is that from a practical perspective, the conscriptive test has sometimes produced anomalous results, leading to exclusion of evidence that should, in principle and policy, be admitted: see *Dolynchuk; R. v. Shepherd*, 2007 SKCA 29, 218 C.C.C. (3d) 113 (*per* Smith J.A. dissenting), *aff'd* 2009 SCC 35, [2009] 2 S.C.R. 527 (released concurrently); and *R. v. Padavattan* (2007), 223 C.C.C. (3d) 221 (Ont. S.C.J.), *per* Ducharme J. Notably, breath sample evidence tendered on impaired driving charges has often suffered the fate of automatic exclusion even where the breach in question was minor and would not realistically bring the administration of justice into disrepute. More serious breaches in other kinds of cases — for instance, those involving seizures of illegal drugs in breach of s. 8 — have resulted in admission on the grounds that the evidence in question was non-conscriptive. This apparent incongruity has justifiably raised concern.

[107] We conclude that the approach to admissibility of bodily evidence under s. 24(2) that asks simply whether the evidence was conscripted should be replaced by a flexible test based on all the circumstances, as the wording of s. 24(2) requires. As for other types of evidence, admissibility should be determined by inquiring into the effect admission may have on the repute of the justice system, having regard to the seriousness of the police conduct, the

impact of the *Charter* breach on the protected interests of the accused, and the value of a trial on the merits.

[108] The first inquiry informing the s. 24(2) analysis — the seriousness of the *Charter*-infringing conduct — is fact-specific. Admission of evidence obtained by deliberate and egregious police conduct that disregards the rights of the accused may lead the public to conclude that the court implicitly condones such conduct, undermining respect for the administration of justice. On the other hand, where the breach was committed in good faith, admission of the evidence may have little adverse effect on the reputation of the court process.

[109] The second inquiry assesses the danger that admitting the evidence may suggest that *Charter* rights do not count, thereby negatively impacting on the reputation of the system of justice. This requires the judge to look at the seriousness of the breach on the accused's protected interests. In the context of bodily evidence obtained in violation of s. 8, this inquiry requires the court to examine the degree to which the search and seizure intruded upon the privacy, bodily integrity and human dignity of the accused. The seriousness of the intrusion on the accused may vary greatly. At one end of the spectrum, one finds the forcible taking of blood samples or dental impressions (as in *Stillman*). At the other end of the spectrum lie relatively innocuous procedures such as fingerprinting or iris-recognition technology. The greater the intrusion on these interests, the more important it is that a court exclude the evidence in order to substantiate the *Charter* rights of the accused.

[110] The third line of inquiry — the effect of admitting the evidence on the public

interest in having a case adjudicated on its merits — will usually favour admission in cases involving bodily samples. Unlike compelled statements, evidence obtained from the accused's body is generally reliable, and the risk of error inherent in depriving the trier of fact of the evidence may well tip the balance in favour of admission.

[111] While each case must be considered on its own facts, it may be ventured in general that where an intrusion on bodily integrity is deliberately inflicted and the impact on the accused's privacy, bodily integrity and dignity is high, bodily evidence will be excluded, notwithstanding its relevance and reliability. On the other hand, where the violation is less egregious and the intrusion is less severe in terms of privacy, bodily integrity and dignity, reliable evidence obtained from the accused's body may be admitted. For example, this will often be the case with breath sample evidence, whose method of collection is relatively non-intrusive.

(c) *Non-Bodily Physical Evidence*

[112] The three inquiries under s. 24(2) will proceed largely as explained above. Again, under the first inquiry, the seriousness of the *Charter*-infringing conduct will be a fact-specific determination. The degree to which this inquiry militates in favour of excluding the bodily evidence will depend on the extent to which the conduct can be characterized as deliberate or egregious.

[113] With respect to the second inquiry, the *Charter* breach most often associated with

non-bodily physical evidence is the s. 8 protection against unreasonable search and seizure: see, e.g., *Buhay*. Privacy is the principal interest involved in such cases. The jurisprudence offers guidance in evaluating the extent to which the accused's reasonable expectation of privacy was infringed. For example, a dwelling house attracts a higher expectation of privacy than a place of business or an automobile. An illegal search of a house will therefore be seen as more serious at this stage of the analysis.

[114] Other interests, such as human dignity, may also be affected by search and seizure of such evidence. The question is how seriously the *Charter* breach impacted on these interests. For instance, an unjustified strip search or body cavity search is demeaning to the suspect's human dignity and will be viewed as extremely serious on that account: *R. v. Simmons*, [1988] 2 S.C.R. 495, at pp. 516-17, *per* Dickson C.J.; *R. v. Golden*, 2001 SCC 83, [2001] 3 S.C.R. 679. The fact that the evidence thereby obtained is not itself a bodily sample cannot be seen to diminish the seriousness of the intrusion.

[115] The third inquiry, whether the admission of the evidence would serve society's interest in having a case adjudicated on its merits, like the others, engages the facts of the particular case. Reliability issues with physical evidence will not generally be related to the *Charter* breach. Therefore, this consideration tends to weigh in favour of admission.

(d) *Derivative Evidence*

[116] The class of evidence that presents the greatest difficulty is evidence that

combines aspects of both statements and physical evidence — physical evidence discovered as a result of an unlawfully obtained statement. The cases refer to this evidence as derivative evidence. This is the type of evidence at issue in this case.

[117] We earlier saw that at common law, involuntary confessions are inadmissible. The common law's automatic exclusion of involuntary statements is based on a sense that it is unfair to conscript a person against himself or herself and, most importantly, on a concern about the unreliability of compelled statements. However, the common law drew the line of automatic inadmissibility at the statements themselves and not the physical or "real" evidence found as a result of information garnered from such statements. Because reliability was traditionally the dominant focus of the confessions rule, the public interest in getting at the truth through reliable evidence was seen to outweigh concerns related to self-incrimination: *Wray and R. v. St. Lawrence*, [1949] O.R. 215 (H.C.J.).

[118] Section 24(2) of the *Charter* implicitly overruled the common law practice of always admitting reliable derivative evidence. Instead, the judge is required to consider whether admission of derivative evidence obtained through a *Charter* breach would bring the administration of justice into disrepute.

[119] The s. 24(2) jurisprudence on derivative physical evidence has thus far been dominated by two related concepts — conscription and discoverability. Physical evidence that would not have been discovered but for an inadmissible statement has been considered conscriptive and hence is inadmissible: *R. v. Feeney*, [1997] 2 S.C.R. 13, and *Burlingham*.

The doctrine of “discoverability” has been developed in order to distinguish those cases in which the accused’s conscription was necessary to the collection of the evidence, from those cases where the evidence would have been obtained in any event. In the former cases, exclusion was the rule, while in the latter, admission was more likely.

[120] The conscription-discoverability doctrine has been justifiably criticized as overly speculative and capable of producing anomalous results: D. Stuart, “Questioning the Discoverability Doctrine in Section 24(2) Rulings” (1996), 48 C.R. (4th) 351; Hogg, at section 41.8(d). In practice, it has proved difficult to apply because of its hypothetical nature and because of the fine-grained distinctions between the tests for determining whether evidence is “derivative” and whether it is “discoverable”: see *Feeney*, at paras. 69-71.

[121] The existing rules on derivative evidence and discoverability were developed under the *Collins* trial fairness rationale. They gave effect to the insight that if evidence would have been discovered in any event, the accused’s conscription did not truly *cause* the evidence to become available. The discoverability doctrine acquired even greater importance under *Stillman* where the category of conscriptive evidence was considerably enlarged. Since we have concluded that this underlying rationale should no longer hold and that “trial fairness” in the *Collins/Stillman* sense is no longer a determinative criterion for the s. 24(2) inquiry, discoverability should likewise not be determinative of admissibility.

[122] Discoverability retains a useful role, however, in assessing the actual impact of the breach on the protected interests of the accused. It allows the court to assess the strength

of the causal connection between the *Charter*-infringing self-incrimination and the resultant evidence. The more likely it is that the evidence would have been obtained even without the statement, the lesser the impact of the breach on the accused's underlying interest against self-incrimination. The converse, of course, is also true. On the other hand, in cases where it cannot be determined with any confidence whether evidence would have been discovered in absence of the statement, discoverability will have no impact on the s. 24(2) inquiry.

[123] To determine whether the admission of derivative evidence would bring the administration of justice into disrepute under s. 24(2), courts must pursue the usual three lines of inquiry outlined in these reasons, taking into account the self-incriminatory origin of the evidence in an improperly obtained statement as well as its status as real evidence.

[124] The first inquiry concerns the police conduct in obtaining the statement that led to the real evidence. Once again, the extent to which this inquiry favours exclusion will depend on the factual circumstances of the breach: the more serious the state conduct, the more the admission of the evidence derived from it tends to undermine public confidence in the rule of law. Were the police deliberately and systematically flouting the accused's *Charter* rights? Or were the officers acting in good faith, pursuant to what they thought were legitimate policing policies?

[125] The second inquiry focusses on the impact of the breach on the *Charter*-protected interests of the accused. Where a statement is unconstitutionally obtained, in many cases the *Charter* right breached is the s. 10(b) right to counsel, which protects the accused's interest

in making an informed choice whether or not to speak to authorities. The relevant consideration at this stage will be the extent to which the *Charter* breach impinged upon that interest in a free and informed choice. Where that interest was significantly compromised by the breach, this factor will strongly favour exclusion. In determining the impact of the breach, the discoverability of the derivative evidence may also be important as a factor strengthening or attenuating the self-incriminatory character of the evidence. If the derivative evidence was independently discoverable, the impact of the breach on the accused is lessened and admission is more likely.

[126] The third inquiry in determining whether admission of the derivative evidence would bring the administration into disrepute relates to society's interest in having the case adjudicated on its merits. Since evidence in this category is real or physical, there is usually less concern as to the reliability of the evidence. Thus, the public interest in having a trial adjudicated on its merits will usually favour admission of the derivative evidence.

[127] The weighing process and balancing of these concerns is one for the trial judge in each case. Provided the judge has considered the correct factors, considerable deference should be accorded to his or her decision. As a general rule, however, it can be ventured that where reliable evidence is discovered as a result of a good faith infringement that did not greatly undermine the accused's protected interests, the trial judge may conclude that it should be admitted under s. 24(2). On the other hand, deliberate and egregious police conduct that severely impacted the accused's protected interests may result in exclusion, notwithstanding that the evidence may be reliable.

[128] The s. 24(2) judge must remain sensitive to the concern that a more flexible rule may encourage police to improperly obtain statements that they know will be inadmissible, in order to find derivative evidence which they believe may be admissible. The judge should refuse to admit evidence where there is reason to believe the police deliberately abused their power to obtain a statement which might lead them to such evidence. Where derivative evidence is obtained by way of a deliberate or flagrant *Charter* breach, its admission would bring the administration of justice into further disrepute and the evidence should be excluded.

4. Application to This Case

[129] The issue is whether the gun produced by Mr. Grant after Toronto police stopped and questioned him should be excluded from the evidence at his trial. The trial judge held that had a *Charter* breach been established, he would not have excluded the evidence. While the trial judge's s. 24(2) conclusion may not command deference where an appellate court reaches a different conclusion on the breach itself (see *R. v. Grant*, [1993] 3 S.C.R. 223, at pp. 256-57, *per* Sopinka J.; *R. v. Harris*, 2007 ONCA 574, 225 C.C.C. (3d) 193, at p. 212), the trial judge's underlying factual findings must be respected, absent palpable and overriding error.

[130] Here, the admissibility of Mr. Grant's incriminatory statements is not in issue, the statements having no independent evidentiary value. The only issue is the admission or

exclusion of the gun. This falls to be determined in accordance with the inquiries described earlier.

[131] At the outset, it is necessary to consider whether the gun was “obtained in a manner” that violated Mr. Grant’s *Charter* rights: see *R. v. Strachan*, [1988] 2 S.C.R. 980, and *R. v. Goldhart*, [1996] 2 S.C.R. 463. As explained above, we have concluded that Mr. Grant’s rights under ss. 9 and 10(b) of the *Charter* were breached. The discovery of the gun was both temporally and causally connected to these infringements. It follows that the gun was obtained as a result of a *Charter* breach.

[132] Because the gun was discovered as a result of statements taken in breach of the *Charter*, it is derivative evidence. The question, as always, is whether its admission would bring the administration of justice into disrepute. To answer this question, it is necessary to consider the concerns that underlie the s. 24(2) analysis, as discussed above, in “all the circumstances” of the case, including the arbitrary detention and the breach of the right to counsel.

[133] We consider first the seriousness of the improper police conduct that led to the discovery of the gun. The police conduct here, while not in conformity with the *Charter*, was not abusive. There was no suggestion that Mr. Grant was the target of racial profiling or other discriminatory police practices. The officers went too far in detaining the accused and asking him questions. However, the point at which an encounter becomes a detention is not always clear, and is something with which courts have struggled. Though we have concluded that

the police were in error in detaining the appellant when they did, the mistake is an understandable one. Having been under a mistaken view that they had not detained the appellant, the officers' failure to advise him of his right to counsel was similarly erroneous but understandable. It therefore cannot be characterized as having been in bad faith. Given that the police conduct in committing the *Charter* breach was neither deliberate nor egregious, we conclude that the effect of admitting the evidence would not greatly undermine public confidence in the rule of law. We add that the Court's decision in this case will be to render similar conduct less justifiable going forward. While police are not expected to engage in judicial reflection on conflicting precedents, they are rightly expected to know what the law is.

[134] The second inquiry under the s. 24(2) analysis focusses on whether the admission of the evidence would bring the administration of justice into disrepute from the perspective of society's interest in respect for *Charter* rights. This inquiry focusses on the impact of the breach on the accused's protected interests. Because the two infringed *Charter* rights protect different interests, it is necessary to consider them separately at this stage.

[135] The initial *Charter* violation was arbitrary detention under s. 9 of the *Charter*, curtailing Mr. Grant's liberty interest. This interaction, beginning as a casual conversation, quickly developed into a subtly coercive situation that deprived Mr. Grant of his freedom to make an informed choice as to how to respond. This is so, notwithstanding the fact that the detention did not involve any physical coercion and was not carried out in an abusive manner. We therefore conclude that the impact of this breach, while not severe, was more than

minimal.

[136] The second *Charter* violation was breach of Mr. Grant's s. 10(b) right to counsel. Cst. Gomes, by his own admission, was probing for answers that would give him grounds for search or arrest. Far from being spontaneous utterances, the appellant's incriminating statements were prompted directly by Cst. Gomes' pointed questioning. The appellant, in need of legal advice, was not told he could consult counsel.

[137] As discussed, discoverability remains a factor in assessing the impact of *Charter* breaches on *Charter* rights. The investigating officers testified that they would not have searched or arrested Mr. Grant but for his self-incriminatory statements. Nor would they have had any legal grounds to do so. Accordingly, the fact that the evidence was non-discoverable aggravates the impact of the breach on Mr. Grant's interest in being able to make an informed choice to talk to the police. He was in "immediate need of legal advice" (*Brydges*, at p. 206) and had no opportunity to seek it.

[138] Considering all these matters, we conclude that the impact of the infringement of Mr. Grant's rights under ss. 9 and 10(b) of the *Charter* was significant.

[139] The third and final concern is the effect of admitting the gun on the public interest in having a case adjudicated on its merits. The gun is highly reliable evidence. It is essential to a determination on the merits. The Crown also argues that the seriousness of the offence weighs in favour of admitting the evidence of the gun, so that the matter may be

decided on its merits, asserting that gun crime is a societal scourge, that offences of this nature raise major public safety concerns and that the gun is the main evidence in the case. On the other hand, Mr. Grant argues that the seriousness of the offence makes it all the more important that his rights be respected. In the result, we do not find this factor to be of much assistance.

[140] To sum up, the police conduct was not egregious. The impact of the *Charter* breach on the accused's protected interests was significant, although not at the most serious end of the scale. Finally, the value of the evidence is considerable. These effects must be balanced in determining whether admitting the gun would put the administration of justice into disrepute. We agree with Laskin J.A. that this is a close case. The balancing mandated by s. 24(2) is qualitative in nature and therefore not capable of mathematical precision. However, weighing all these concerns, in our opinion the courts below did not err in concluding that the admission of the gun into evidence would not, on balance, bring the administration of justice into disrepute. The significant impact of the breach on Mr. Grant's *Charter*-protected rights weighs strongly in favour of excluding the gun, while the public interest in the adjudication of the case on its merits weighs strongly in favour of its admission. Unlike the situation in *R. v. Harrison*, 2009 SCC 34, [2009] 2 S.C.R. 494, the police officers here were operating in circumstances of considerable legal uncertainty. In our view, this tips the balance in favour of admission, suggesting that the reputation of the justice system would not suffer from allowing the gun to be admitted in evidence against the appellant.

C. *The Meaning of “Transfer” in Sections 84, 99 and 100 of the Criminal Code*

[141] Mr. Grant argues that his conviction of possession of a firearm for the purposes of weapons trafficking under s. 100(1) of the *Criminal Code* should be quashed on the grounds that he did not “transfer” the firearm within the meaning of that section. Section 100(1) states:

100. (1) Every person commits an offence who possesses a firearm, a prohibited weapon, a restricted weapon, a prohibited device, any ammunition or any prohibited ammunition for the purpose of

(a) transferring it, whether or not for consideration, or

(b) offering to transfer it,

knowing that the person is not authorized to transfer it under the *Firearms Act* or any other Act of Parliament or any regulations made under any Act of Parliament.

[142] In the Court of Appeal, Laskin J.A. noted that “[t]he word ‘transfer’ is defined in s. 84 to mean ‘sell, provide, barter, give, lend, rent, send, transport, ship, distribute or deliver’” (para. 72 (italics in original, underlining added)). He observed that the dictionary definition of “transport” is to “carry, convey or remove from *one place or person to another*” (para. 72 (emphasis in original)). He also noted that ss. 84 and 100 of the *Code* were enacted with reference to the *Firearms Act*, S.C. 1995, c. 39, and he considered this wider context. Laskin J.A. was not persuaded that there was any reason to depart from the plain meaning of the word. On this definition, Mr. Grant’s admission that he was “dropping off” the gun somewhere “up the road” entailed moving the gun from one place to another and was

therefore sufficient to establish all elements of the offence defined by s. 100(1).

[143] Mr. Grant submits that a contextual reading of s. 100 and the related provisions reveals that Parliament intended to reserve the stiffest penalties for transfers that amount to weapons trafficking, not the mere movement of a firearm from place to place. Since the trial judge did not find that he was in possession of the gun for the purpose of transferring it to another person, Mr. Grant argues that the s. 100(1) conviction cannot stand.

[144] We agree with Mr. Grant that Parliament did not intend s. 100(1) to address the simple movement of a firearm from one place to another. First, according to the “associated meaning” principle of statutory interpretation, “when two or more words linked by ‘and’ or ‘or’ serve an analogous grammatical and logical function within a provision, they should be interpreted with a view to their common features”: *McDiarmid Lumber Ltd. v. God’s Lake First Nation*, 2006 SCC 58, [2006] 2 S.C.R. 846, at para. 30, *per* McLachlin C.J. See also R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at pp. 227-31. Once again, the definition of “transfer” is given in s. 84 as “sell, provide, barter, give, lend, rent, send, transport, ship, distribute or deliver”. Of these words, only “transport” can plausibly be said to include moving a thing from place to place without the thing actually changing hands. The common element is the notion of a *transaction*. This suggests a more restrictive meaning than indicated by the dictionary definition of “transport”.

[145] It should also be noted that s. 100(1)(a) applies to the transfer of a firearm, “whether or not for consideration”. Even if “transfer” is equated with “transport”, the

underlined words suggest that the import of the provision is to criminalize the transfer of firearms for purposes that implicate others. In other words, the inclusion of the phrase “whether or not for consideration” in s. 100(1)(a) suggests that Parliament did not intend to criminalize simple movement of firearms by this provision, but rather transport for purposes that implicate another person. Further, the criminalization of an “offer” to transfer a firearm under s. 100(1)(b) suggests that a “transfer” is transactional in nature.

[146] We do not accept, as did Laskin J.A., the proposition that the more restrictive reading of s. 100(1) would “destroy the cohesion between the *Criminal Code* provisions on firearms and the *Firearms Act*” (para. 77). While it is undoubtedly true that Parliament intended to place tight restrictions on the movement of firearms, there are other provisions in both regimes that deal specifically with “transfers” that fall short of trafficking. Moving a firearm in an unauthorized manner could result in prosecution under s. 86(2) of the *Criminal Code*, which penalizes the transportation of a firearm in contravention of the regulations made pursuant to the *Firearms Act*. Moreover, the *Firearms Act* defines “transfer” differently from the *Criminal Code*, so their cohesion should not be overstated: see s. 21 of the Act.

[147] Finally, s. 100(1) appears in the *Code* under the heading “Trafficking Offences”. As the Court held in *R. v. Davis*, [1999] 3 S.C.R. 759, at para. 53, *per* Lamer C.J., headings “should be considered part of the legislation and should be read and relied on like any other contextual feature” (quoting R. Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994), at p. 269). Firearms trafficking offences are extremely serious, carrying substantial

penalties. Indeed, since amendments to the *Code* in 2008, a conviction under s. 100(1) now carries a mandatory minimum penitentiary sentence of three years for a first-time offender, up from one year when Mr. Grant was convicted. It should not be lightly assumed that Parliament intended to deem anyone moving a firearm from place to place without authorization to be a weapons trafficker, liable to at least three years' imprisonment on a first offence. In our view, a contextual reading of the applicable provisions suggests the contrary. Mr. Grant's offence was serious and potentially extremely dangerous, but on the evidence he did not commit the crime of trafficking.

[148] We would therefore allow the appeal on Count 4.

V. Conclusion

[149] We would allow the appeal on Count 4 (the trafficking charge) and enter an acquittal. On all other counts, we would dismiss the appeal.

The following are the reasons delivered by

[150] BINNIE J. — I concur with the disposition of the appeal proposed by my colleagues the Chief Justice and Charron J. and with their modified framework for determinations under s. 24(2) of the *Canadian Charter of Rights and Freedoms* regarding the admission or rejection of evidence obtained in a manner that violates the *Charter*. I differ,

with respect, on their approach to the definition of “detention” in ss. 9 and 10 of the *Charter*. In particular, I believe their approach lays too much emphasis on the *claimant’s* perception of psychological pressure, albeit as filtered through the eyes of the hypothetical reasonable person in the claimant’s situation. My colleagues summarize their position on this point as follows:

1. Detention under ss. 9 and 10 of the *Charter* refers to a suspension of the individual’s liberty interest by a significant physical or psychological restraint. Psychological detention is established either where the individual has a legal obligation to comply with the restrictive request or demand, or a reasonable person would conclude by reason of the state conduct that he or she had no choice but to comply. [Emphasis added; para. 44.]

My colleagues then set out a number of factors to help “determine whether the reasonable person in the individual’s circumstances would conclude that he or she had been deprived by the state of the liberty of choice” (*ibid.*).

[151] The Court’s continued embrace of a wholly claimant-centred approach may lead to the impression that it is more important to enquire whether the hypothetical reasonable person “in the individual’s circumstances” would *think* himself or herself to be detained than whether he or she *is* detained. The perspective of the person stopped (or a “reasonable person” caught in that particular situation) is important because it is *that* person’s liberty that is at issue, but, in my view, the claimant’s perspective does not exhaust the relevant considerations. I agree there can be no detention unless the liberty of the person stopped is (or is reasonably perceived by that person to be) significantly constrained, but there may be much happening of which the person stopped is unaware, and this other context ought

potentially to affect the legal characterization of the encounter. I agree with Professor Stuart when he writes that

the focus should not be exclusively on the state of mind of the accused. As Courts of Appeal have persuasively suggested, detention should also take into account the perceptions of the police. . . . [Otherwise] [t]hose perhaps most in need of Charter protection against coercive police practices will have none. On the other hand, it would be unfortunate if preliminary police questioning of any suspect would have to be peppered with Charter warnings.

(D. Stuart, *Charter Justice in Canadian Criminal Law* (4th ed. 2005), at p. 327)

My colleagues do take into account some police-related factors (e.g., whether the individual is singled out for “focussed investigation” (para. 44(2)(a)) but, as will be seen, they do so only to the extent this information is made evident to the person stopped.

[152] Also important, in my view, is an *objective* assessment of the facts of the encounter divorced from the perception of both parties, neither of whom may have a very clear idea of what is going on in the rush of events.

A. When Does a “Stop” Become a Detention?

[153] While the uniformed police embody society’s collective desire for public order and livable and safe communities, they also present a serious and continuing risk to the individual’s right to be left alone by the state in the absence of objective justification for the state’s intervention. Interactions between the police and members of the public are not only rich in diversity but exceedingly common. Quite apart from police assistance offered to the

general public, a traditional part of the daily routine of the “cop on the beat” is to check out “suspicious persons”. Clear guidance on the rules governing such encounters is, or ought to be, an important part of police training: C.D. Shearing and P.C. Stenning, *Police Training in Ontario: An Evaluation of Recruit and Supervisory Courses* (1980), at p. 41. This case is about a pedestrian. No one doubts the importance of being able to determine at what moment an *interaction* between the police and a pedestrian is converted into a *detention* of that individual, thereby triggering the rights subsidiary to detention, including the right to involve his or her lawyer who can generally be expected to advise his or her client not to say anything further. In the first instance it is the police who must decide if a detention exists because they are the people who administer the caution and inform the person detained about the right to counsel. Their intentions and perceptions will inevitably be factored into their determinations whether disclosed to the claimant or not, and should be taken into account in the legal test for detention when the matter eventually comes before a judge.

[154] A growing body of evidence and opinion suggests that visible minorities and marginalized individuals are at particular risk from unjustified “low visibility” police interventions in their lives: *R. v. Golden*, 2001 SCC 83, [2001] 3 S.C.R. 679, at para. 83. See also A. Young, “All Along the Watchtower: Arbitrary Detention and the Police Function” (1991), 29 *Osgoode Hall L.J.* 329, at p. 390; D. M. Tanovich, “Using the Charter to Stop Racial Profiling: The Development of an Equality-Based Conception of Arbitrary Detention” (2002), 40 *Osgoode Hall L.J.* 145; Ontario Human Rights Commission, Inquiry Report. *Paying the Price: The Human Cost of Racial Profiling* (2003); *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* (1995), at p. 337. The appellant, Mr.

Grant, is black. Courts cannot presume to be colour-blind in these situations.

[155] At the same time, members of visible minorities may, as much as anyone else, be approached and asked questions by police. While, even more so than others, they may feel unable to choose to walk away, the perspective of the police and the information (if any) the police possess when they initiate an encounter would help assess whether the liberty interest of the person stopped is truly at issue, even if the police perspective on the encounter is not made known by words or conduct to the person stopped.

B. A Brief History of the “Reasonable Perception” Test

[156] Our approach to detention, as with so much of this area of the law, draws heavily on the U.S. Fourth Amendment jurisprudence. Both societies, Canada and the United States, place a high value on the right of citizens to go about their business without being arbitrarily stopped by the police and told to give an account of activities that they consider to be none of the police’s affair. We therefore want a definition of detention that protects our liberty. Accordingly, in *R. v. Therens*, [1985] 1 S.C.R. 613, Le Dain J. held, and subsequent cases have agreed, that a person is detained where he or she “submits or acquiesces in the deprivation of liberty and reasonably believes that the choice to do otherwise does not exist” (p. 644). This approach corresponded to earlier decisions of the U.S. Supreme Court establishing that “a person has been ‘seized’ [i.e. detained] within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave”: *United States v. Mendenhall*, 446

U.S. 544 (1980), at p. 554, endorsed in *Florida v. Royer*, 460 U.S. 491 (1983), and subsequent cases.

[157] Stewart J. in *Mendenhall* stated quite categorically that the “subjective intention” of the state authority (a drugs enforcement officer) “to detain the respondent, had she attempted to leave, is irrelevant except insofar as that may have been conveyed to the respondent” (p. 554, fn. 6 (emphasis added)). The approach of excluding from consideration information not reasonably evident to the person stopped is endorsed by my colleagues at numerous points in their judgment, for example:

The question is whether the police conduct would cause a reasonable person to conclude that he or she was not free to go and had to comply with the police direction or demand. [para. 31]

. . .

Accordingly, we must consider all relevant circumstances to determine if a reasonable person in Mr. Grant’s position would have concluded that his or her right to choose how to interact with the police (i.e. whether to leave or comply) had been removed. [para. 46]

. . .

In our view, the evidence supports Mr. Grant’s contention that a reasonable person in his position (18 years old, alone, faced by three physically larger policemen in adversarial positions) would conclude that his or her right to choose how to act had been removed by the police, given their conduct. [para. 50]

[158] The *Mendenhall* approach to detention adopted in *Therens* and affirmed in this case by my colleagues has different consequences in the U.S. than it does here. In relation to the right to counsel, for example, that right does not arise in the U.S. “without delay” upon

a psychological detention (“or seizure”), but only where there is “a ‘formal arrest or restraint on freedom of movement’ of the degree associated with a formal arrest”: *California v. Beheler*, 463 U.S. 1121 (1983), at p. 1125; *Oregon v. Mathiason*, 429 U.S. 492 (1977), at p. 495. See also *Escobedo v. Illinois*, 378 U.S. 478 (1964), at pp. 490-91; *Miranda v. Arizona*, 384 U.S. 436 (1966), at p. 444; *Thompson v. Keohane*, 516 U.S. 99 (1995), at p. 112. Whether such a situation of formal restraint exists under U.S. law “depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned”: *Stansbury v. California*, 511 U.S. 318 (1994), at p. 323 (emphasis added). In other words, in the U.S. psychological detention does not, without more, invoke entitlement to the assistance of counsel. The U.S. courts take a generous view of when “psychological detention” occurs because it triggers scrutiny under the Fourth Amendment of police conduct that would otherwise lie outside judicial oversight under their Constitution. In practical terms, the U.S. can live with such a broad claimant-centred definition because it does not have the effect of bringing in the lawyers at an early stage in encounters between the police and the citizen. The significant effect of a finding of detention in the U.S., as under our decision in *R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 59, is to require the police to meet the standard of reasonable suspicion. Thus, the *Mendenhall* doctrine of psychological detention, when imported into Canada, raises a complication under s. 10(b) not present in the United States.

C. Recognizing an “Obvious Tension”

[159] In this case, Laskin J.A., speaking for the Ontario Court of Appeal, recognized

that:

The definition of “psychological detention” reflects a judicial balance between competing values. On the one hand, the police have the duty and the authority to investigate and prevent crime in order to keep our community safe. In carrying out their duty, they must interact daily with ordinary citizens. Not every such encounter between the police and a citizen amounts to a constitutional “detention”. This court and other courts have recognized that police must be able to speak to a citizen without triggering that citizen’s *Charter* rights.

...

On the other hand, ordinary citizens must have the right to move freely about their community.

((2006), 81 O.R. (3d) 1, at paras. 10 and 12)

[160] In the companion case of *R. v. Suberu*, 2009 SCC 33, [2009] 2 S.C.R. 460, where the police intercepted an individual as he tried to leave an Ontario liquor store where a fraud had just been committed, Doherty J.A., also speaking for the Ontario Court of Appeal, recognized the “obvious tension between the requirement to inform detained persons of their right to counsel and the proper and effective use of brief investigative detentions” (2007 ONCA 60, 85 O.R. (3d) 127, at para. 41).

[161] Having found a breach of s. 9, Laskin J.A. did not go on in this case to deal with the s. 10(b) right to counsel. However, as my colleagues treat *Suberu* in this Court as a more or less straightforward application of their analysis of detention in *Grant*, I propose to deal with both ss. 9 and 10(b) here.

[162] The Crown’s argument is that by introducing a right to legal counsel (and “to be

informed of that right”) prematurely into commonplace interactions between police and members of the public, the Court would hamstring essential police services and unduly tilt the constitutional balance against the public interest in effective law enforcement. For the police, in Professor Uviller’s mellifluous phrase, “[t]he confession is the ‘queen of the evidentiary chessboard’” (quoted in *Young*, at pp. 365-66). When lawyers are on the scene, the potential for obtaining confessions tends to dry up.

[163] The defence, on the other hand, supports a broad definition of detention and quick access to legal advice because under a less generous *Charter* approach a member of the public risks serious prejudice to his or her defence before the lawyer can get involved, since few members of the public are clear about their *Charter* rights. The solution to this dilemma offered by the Ontario Court of Appeal in *Suberu* was to read down s. 10(b) so that the concept of “without delay” is stretched more readily to accommodate the reasonable needs of law enforcement (which in practice might well result in a situation similar to that prevailing in the U.S.). The problem with the Ontario court’s solution, as my colleagues note, is that the interpretation does not sit easily with what those words mean, whether interpreted purposefully, textually or contextually with the *Charter*.

[164] The appellant, supported by the Criminal Lawyers’ Association (Ontario) and the Canadian Civil Liberties Association, suggests that the “obvious tension” could be eased by declaring inadmissible any incriminating statements made by an accused between the moment the detention crystallized and the subsequent notification to the accused of the right to retain and instruct counsel. However, this presupposes that the s. 9 detention has indeed

crystallized, which is the point in issue.

[165] Another way to ease the “obvious tension” (other than resort to s. 1) would be for the courts to re-examine the concept of “psychological detention” with a view to broadening the perspectives from which the encounter is viewed. This would help obviate some of the problems with a purely claimant-centred approach, in my opinion.

D. Problems With the Claimant-Centred Approach

[166] I believe there are a number of problems with the Court’s continuing endorsement of the *Therens/Mendenhall* approach to determine when a simple interaction crystallizes into a detention. Insistence that the claimant’s circumstances be viewed from the more detached perspective of a “reasonable person” provides in some cases a welcome corrective, but in other cases, by exaggerating the ability of ordinary people to stand up to police assertion of authority, that approach may compel the conclusion that the claimant had the choice to walk away whereas in reality no such choice existed.

1. *The Perception of the Police May Be of Significance*

[167] My colleagues refer to the “complex situation”, for example,

where the non-coercive police role of assisting in meeting needs or maintaining basic order can subtly merge with the potentially coercive police role of investigating crime and arresting suspects so that they may be brought to justice.
[para. 40]

I agree that this “subtle” change of police perspective is relevant to the analysis but it will not always be made apparent to a person who is unambiguously stopped but remains unsure whether the encounter is benign or perilous. Police investigators assemble a mosaic of facts. Apparent “general inquiries” may be designed, unknown to the person stopped, to elicit the missing piece of self-incrimination. The success of the police investigation may indeed depend on the police skill in *masking* their information and intentions from the person stopped.

[168] Of relevance in this respect is the judgment of Martin J.A. in *R. v. Moran* (1987), 36 C.C.C. (3d) 225 (Ont. C.A.), leave to appeal refused, [1988] 1 S.C.R. xi, setting out some of the considerations he thought relevant to finding a detention, including

the stage of the investigation, that is, whether the questioning was part of the general investigation of a crime or possible crime or whether the police had already decided that a crime had been committed and that the accused was the perpetrator or involved in its commission and the questioning was conducted for the purpose of obtaining incriminating statements from the accused; [p. 259]

These are matters that would certainly be known to the police but not necessarily communicated to the person stopped. Perhaps, as mentioned, the stage of the investigation will be intentionally concealed with a view to a more productive interrogation. Other *Moran* considerations would be apparent to the person stopped, for example,

the nature of the questions: whether they were questions of a general nature designed to obtain information or whether the accused was confronted with evidence pointing to his or her guilt; [p. 259]

If, for example, the police arrive at a street disturbance and it is not clear to them whether the occurrence is a crime or an accident, and they tell everyone to stay put until the situation is clarified, such a “stay put” direction should carry a different legal consequence than if used at what is clearly a crime scene to hold an individual they believe is a likely suspect. In the former case, the situation may be explicable by reference to police responsibilities for public safety and order. In the latter case, the police are attempting to gather evidence about (and from) a particular individual in relation to a particular crime. The reality is that in *both* cases, to borrow Laskin J.A.’s formulation in the court below, “any reasonable person hearing these words from a uniformed officer three feet away would treat them not as a request that might be ignored, but as a command that must be obeyed” (para. 24). Although in both cases the police command to “stay put” will likely constrain psychologically the individuals subject to the police direction from walking away, only in the latter instance ought the *Charter* right to be triggered because it is only in that instance that “a person may reasonably require the assistance of counsel” (*Therens*, at pp. 641-42).

2. *The Uncertain Characteristics of the “Reasonable Person”*

[169] In a useful commentary on the U.S. *Mendenhall* test, Professor Butterfoss writes:

Application of the test has created a broad “nonseizure” category of police-citizen encounters that permits officers substantial leeway in approaching and questioning citizens without being required to show objective justification for such conduct. This has been accomplished both by constructing a highly artificial “reasonable person,” who is much more assertive in encounters with police officers than is the average citizen, and by ignoring the subjective intentions of the officer. The result is that fourth amendment rights of citizens are determined through a legal fiction. [Emphasis added.]

(E. J. Butterfoss, “Bright Line Seizures: The Need for Clarity in Determining When Fourth Amendment Activity Begins” (1988-1989), 79 *J. Crim. L. & Criminology* 437, at p. 439)

In other words, encounters with police that average citizens would consider left them with no choice but to comply are denied the status of “detentions” through the device of putting in their place an artificially robust and assertive “reasonable person”. Self-incriminatory conduct may also be rationalized in the state’s favour by the attributed sense of “moral or social duty on the part of every citizen to answer questions put to him or her by the police” (see *R. v. Grafe* (1987), 36 C.C.C. (3d) 267 (Ont. C.A.), at p. 271). This gap between the reality on the street and the court constructed “reasonable person” is of particular relevance to visible minorities who may, because of their background and experience, feel especially unable to disregard police directions, and feel that assertion of their right to walk away will itself be taken as evasive and later be argued by the police to constitute sufficient grounds of suspicion to justify a *Mann* detention.

[170] Leaving aside the issue of visible minorities, is the concept of the reasonable person intended to describe average cooperative members of the public? If so, the Canadian reality is that such people will almost always regard a direction from a police officer as a demand that must be complied with. This was recognized in *Therens* (and adopted in this case by my colleagues) when Le Dain J. acknowledged that “[m]ost citizens are not aware of the precise legal limits of police authority” and “the reasonable person is [therefore] likely to err on the side of caution, assume lawful authority and comply with the demand” (p. 644). Viewed in this way, police instructions or demands readily constrain a claimant’s choice to

leave and, therefore, on that interpretation, even the less intrusive encounters between the police and citizens ought frequently to be declared detentions despite the fact that at that stage such people do not reasonably require the assistance of counsel.

[171] On the other hand, perhaps the “reasonable person” is to be invested with a higher level of legal sophistication, leading to a more robust attitude towards the police. My colleagues refer to the reasonable person’s assessment being informed by “generally understood legal rights and duties” (para. 33; see also para. 37). This more erudite version of the “reasonable person” might know that apart from some statutory exceptions, he or she ordinarily has the right to walk away from the encounter regardless of what the police officer says, unless and until the police possess reasonable grounds to suspect involvement in a criminal offence and therefore grounds for a *Mann*-type investigative detention. If the test envisages the perception of this more knowledgeable type of “reasonable person”, then anything short of an investigative detention as described in *Mann* would fail to constrain freedom of choice, and whatever is said in those critical early moments of an encounter will be presumed to be “voluntary” and based on consent.

[172] A further problem with the “reasonable person” device is to define exactly what information this fictional person possesses. While “the factors” identified by my colleagues include “whether the police were providing general assistance; maintaining general order; making general inquiries regarding a particular occurrence; or, singling out the individual for focussed investigation” (para. 44(2)(a)), it is not suggested that the “reasonable person” is a mind-reader. On their view, this information can only affect the “reasonable person”

assessment to the extent it is made manifest to the claimant, whose perception would otherwise remain oblivious and unaffected.

[173] Yet, another difficulty with calibrating the “reasonable person” approach is that it is not at all clear what experience this hypothetical individual brings to the assessment of the encounter and what criteria this individual applies in deciding whether or not the person stopped is free to choose to break off the encounter. There is a difference between the listing of a broad range of factors to be considered by a court and identifying their relative weight and importance.

[174] In the absence of explicit criteria, various judges will tend to read into the “reasonable person” their own projections of the moment at which, in *their* view, the person stopped *ought* to be able to call a lawyer. This creates the risk of a very results-oriented analysis. Perceptions will vary depending on the personality of the judge seized with the case. My colleagues emphasize at different places the need for deference to the assessment of the trial judges (e.g., para. 43) which may further complicate the task of developing a consistent approach. In other words, continued reliance on the “reasonable person” whose attributed experience and choice of criteria are unspecified except for a presumed commitment to “reasonableness” helps to mask rather than clarify the actual criteria being applied by the Court.

E. Broader Approach

[175] As a majority of the Court is satisfied with the *Therens/Mendenhall* claimant-centred approach, I will not belabour the existence of alternatives. However, I believe more attention should be paid to the *objective* facts of the encounter between a police officer and members of the public, whether or not such facts are made apparent to the person stopped.

[176] There is, of course, an important continuing role for psychological detention as perceived by the person stopped, but in that respect serious weight should be given to the values and experience of the person *actually* stopped, including the experience of visible minorities, and less emphasis on the hypothetical opinion of the “reasonable person” insofar as the latter is presumed to be able to handle such stressful encounters without sensing “significant . . . psychological restraint” (*Mann*, at para. 19). As mentioned, Mr. Grant is black. In determining whether he (or a reasonable person in his position) would feel free to choose to walk away from three policemen, contrary to their wishes in the circumstances here, his ethnicity raises a significant issue. As the above-mentioned studies show, trial judges differ in the weight they are willing to accord to ethnicity in such “low visibility” encounters, despite the over-representation of Aboriginals and other visible minorities in encounters with police patrols. That is why, from my point of view, the police perspective and the information (if any) the police possessed when they initiated the encounter is important to shed light on whether or not the liberty interest of the person stopped was truly compromised.

[177] I agree with my colleagues that a claim of psychological detention must meet the three-fold test of (i) a police command or direction (ii) compliance by the person now

claiming a s. 9 detention and (iii) grounds for a reasonable belief that there was no choice but to comply. However, in my view, police words and conduct should be interpreted in light of the *purpose* of the encounter from the police perspective — whether disclosed to the person from whom cooperation is requested or not. The U.S. *Model Code of Pre-Arraignment Procedure* (ALI 1975), § 110.1(2), for instance, includes special provisions for questioning suspects as opposed to seeking cooperation from citizens and requires warnings to suspects that no legal obligation exists to respond to questioning. See also the English *Judges' Rules*, Rules I and II (*Practice Note (Judges' Rules)*, [1964] 1 W.L.R. 152 (C.C.A.), at p. 153). The police know, but the claimant does not know, the point at which a person of interest begins to emerge as a suspect and ceases to be, as my colleagues put it, a person whose “rights are not seriously in issue” (para. 29).

[178] A central problem with the *Therens/Mendenhall* claimant-centred approach, as I see it, is that it does not take adequately into account what the police know and when they knew it except insofar as this information is conveyed to the person stopped, but which the police may not consider to be in their interest to convey. Police may know (as in *Suberu*) if a crime has allegedly been committed and whether they are making the approach to an individual with a view to obtaining general information or, on the other hand, corralling a suspect and collecting admissible evidence to bring him or her to justice. Possession of such knowledge may in fact place the police in an adversarial relationship to the person approached whether that person is aware of the jeopardy or not. It is the adversarial relationship together with the “stop” that generates the need for counsel. At that point, the power imbalance is significant. The unsuspecting suspect may fatally compromise his or her

position simply through ignorance of his or her rights and the fact the police have now adopted an adversarial position. At that point, as Le Dain J. put it in *Therens*, “a person may reasonably require the assistance of counsel” (pp. 641-42), but may not have any idea of the perilous turn of events.

[179] On the other hand, a more benign police purpose may deprive even an unambiguous police command of the legal effect of a detention, and thereby enure to the benefit of the Crown. Had Constable Roughley in the *Suberu* case, for example, come rushing up to Mr. Suberu in the parking lot of the liquor store saying “Wait a minute. I need to talk to you before you go anywhere” because police had just received information, unknown to Mr. Suberu, that Mr. Suberu’s van had been wired with an explosive device by a local member of the Hell’s Angels, the detention analysis ought to be quite different although the constable’s words and the forcefulness of their expression may be the same.

[180] It is not controversial that in the early stages of a criminal investigation the police must be afforded some flexibility before the lawyers get involved. The police do have the right to ask questions and they need to seek the co-operation of members of the public, including those who turn out to be miscreants. The question is how to accommodate that need within a plausible framework of s. 9 analysis. In my view, without wishing to prolong this discussion, a better and broader approach to detention would explicitly take into account (i) the objective facts of such encounters, whether or not evident to the person stopped, as well as (ii) the perception of the police in initiating the encounter, whether or not evident to the person stopped, and (iii) whatever information the police possess at the time, which may

or may not be known to the person stopped, as well as whatever change in the police perception occurs as the encounter develops. These matters should all be factored into a more comprehensive analysis of when a “detention” occurs for *Charter* purposes than is provided in the *Therens/Mendenhall* claimant-centred approach affirmed today by the Court.

F. Application to the Facts

[181] In this case, I agree with my colleagues that Mr. Grant was arbitrarily detained. The safety of school neighbourhoods is of great importance but under our system of law it cannot be achieved by random detention of pedestrians on the off-chance that some of them might (or might not) be implicated in criminal activity.

[182] The purpose of these police officers, whether or not couched in terms of community policing, was to investigate crime, whether actual or anticipated. Constable Worrell testified that when the officers drove past in an unmarked car, Mr. Grant “stared” at them in an unusually intense manner and continued to do so as they proceeded down the street. He wore a “big jacket” and was “fidgeting” with his coat and pants. Staring at an unmarked car and fidgeting are lawful activities but it was enough to cause three police officers to converge on Mr. Grant. The police purpose for initiating the encounter is important, I believe, and Constable Worrell testified:

Q. Well, when you stop these people, I take it, the object of the exercise in light of what you said about the nature of the area is to find out if perhaps they might be involved in swarmings or robberies or drugs?

A. That's correct.

Q. And when you and your partner talked about potentially stopping Mr. Grant yourselves and what you had in mind was having a chat with him —

A. Mm-hmm.

Q. — to determine whether he might be involved in swarmings or robberies or drugs, correct?

A. It's possible he may have been, but we didn't know for sure.

The police had no information whatsoever that Mr. Grant may have been implicated in criminal activity or even whether a crime had been committed, but Mr. Grant's further "fidget" with his jacket convinced Constable Gomes to take charge of the situation (whether or not Mr. Grant was aware of how his fidgets were being interpreted by Constable Gomes) and to order Mr. Grant to "keep his hands in front of him". That command crystallized the detention.

[183] However, in my view, the finding of a detention is properly the product not only of Mr. Grant's perception (filtered through the hypothetical reasonable person) but also of the objective facts of why the encounter was initiated (crime detection) and the other facts surrounding the encounter whether or not evident to Mr. Grant, e.g., the agreement among the three officers (unknown to Mr. Grant) to converge on him and thereafter effectively to form "a small phalanx blocking the path in which the appellant was walking" (Laskin J.A., at para. 29). As Mr. Grant did not testify, we do not have any first-hand evidence of *his* perception, although his lack of choice must have been manifest when every time he moved Constable Gomes, who was standing only three feet away, moved in a corresponding way to

maintain the nose-to-nose impasse. What we do have in considerable detail is the perception of each of the three police officers. Their forthright account of their own intentions and their acknowledged lack of any information that any crime was or was about to be committed, apart from a “hunch”, none of which was conveyed to Mr. Grant, give rise to the conclusion that Mr. Grant *was* arbitrarily detained.

[184] I therefore concur in the conclusion of the Chief Justice and Charron J. that Mr. Grant was detained. I also agree with their analysis under s. 24(2) and the consequent disposition of the appeal.

English version of the reasons delivered by

[185] DESCHAMPS J. — The difficulty in resolving the problems related to detention and to the exclusion of evidence in three appeals now before the Court reveals a number of deficiencies in the applicable rules. These three cases show that it is sometimes hard to reconcile the protection of constitutional rights with the public interest in bringing cases to trial. I have read the reasons of the majority, and I agree with them that the tests for determining whether a person was actually detained and whether evidence should be excluded need to be reformulated. With respect, however, I must comment further on the application of the new rules concerning detention to the facts of this case. As for the factors to consider in deciding whether to admit or exclude evidence obtained in violation of constitutional rights, I find that the test proposed by the majority is problematic, and that it is inconsistent with the purpose of the constitutional provision that applies to such decisions.

Although my analysis differs from the majority's, I reach the same conclusion as them.

1. Test for Determining Whether a Person Was Detained

[186] Where the state interacts with citizens in a criminal law context, be it in the streets or in a courtroom, the applicable rules must be clear so that all those involved in the criminal justice system know the scope of their respective rights and powers. I agree with the majority that the police cannot do their work effectively without the co-operation of the public (para. 39). The applicable rules must therefore take into account the fact that the police need to act so as to foster public co-operation, not to discourage it.

[187] In the instant case, the trial judge stressed the fact that the police officers, who were patrolling an area around four schools where numerous disturbances had been reported, had conducted themselves politely and seemed to have been conscientious in doing their work. On whether the law prohibits or should prohibit this type of police action, the trial judge quoted with approval the following comment by one of his colleagues:

We do not expect the police to sit in their station houses waiting for those who commit offences to walk in and confess. We expect them to be out in the community and when suspicious events occur to make inquiries. The Charter is not a barrier to those inquiries.

(2004 CarswellOnt 8779, at para. 9, quoting *R. v. Orellana*, [1999] O.J. No. 5746 (QL) (Ct. J.))

This approach is the very one on which the majority of this Court are basing the test adopted

today to guide the public, law enforcement agencies and judges in determining at what point a person is “detained” in the legal sense of this term.

[188] In the companion case of *R. v. Suberu*, 2009 SCC 33, [2009] 2 S.C.R. 460, the majority of the Court acknowledge that police officers may interact with the public and that not every contact between a police officer and a member of the public constitutes detention. There is a clear distinction between the nature of the police action in the case at bar and that of the action in *Suberu*. *Suberu* concerns a targeted action by officers who had received specific information. In the case at bar, the action was one of prevention, and the officers’ approach was necessarily different. It will be helpful to consider the trial judge’s findings of fact.

[189] Constables Worrell and Forde were on patrol, in plainclothes in an unmarked car, in an area where four high schools are located. The area was experiencing problems related to intimidation, robberies and drug offences involving students. The two officers had been ordered to maintain a presence there for purposes of prevention. They drove past an individual, Mr. Grant, and noted that he was staring at them. After they had passed him, Constable Worrell turned around and saw that he was still watching them and that he was fidgeting with his clothes at his waist and pulling on his pants with his right hand. At this point, the officers felt that it would be appropriate to speak with him. As they continued along their way, they saw another officer, Constable Gomes, who was on patrol in a marked cruiser. They suggested that he go speak with Mr. Grant, which he did. While speaking with Constable Gomes, Mr. Grant behaved nervously and touched his clothes at his waist, which

prompted Constable Gomes to ask him to keep his hands in front of him. At first, constables Worrell and Forde stayed apart from Mr. Grant and Constable Gomes, but on seeing that Mr. Grant still appeared nervous and continued to look at them, they decided to move closer to make sure everything was all right. They identified themselves, showing their badges, and then stood behind Constable Gomes. I will not repeat the exchange that took place between Constable Gomes and Mr. Grant. The relevant passages are reproduced in the majority's reasons. All I need say here is that Mr. Grant made an incriminating statement.

[190] In analysing all these facts, the trial judge found that Mr. Grant had not been detained. The following is his own lengthy summary of his reasons for so finding:

- (1) The Location being the sidewalk of a main street in the City of Toronto in full view of the public.
- (2) The means by which the police spoke to the accused; i.e., on the street, and the accused not being required to stay or get into any vehicle or any closed type of situation.
- (3) The time of day. It was broad daylight. It was approximately 12:30 p.m., the usual noon hour for students.
- (4) There was no physical force. There was no pat down search and there was no grabbing where someone, especially the accused, in any situation might feel intimidated.
- (5) There was no actual search or physical search, of course. There were just some questions put.
- (6) There was an absence of reasonable and probable grounds to conduct an arrest and there was no reason to take physical control of the accused until, of course, the marijuana and firearm surfaced.
- (7) What would Police Constable Gomes have done if the accused, for example, left the scene? He may have followed him. He may have asked him further questions. There again, that is subject to speculation.

(8) The length of the interaction. It was short. It consisted of minutes. This was not a one-half hour or hour interrogation. It wasn't off the street or in a police cruiser.

(9) The response of the other police officers. These officers stood behind Gomes, but they were not involved in the discussion. They didn't surround the accused nor did they detain him. And I may address that issue further in due course.

(10) The nature of the conversation with Gomes. It was not in aggressive language. There were no demands or directions. The only request was that he keep his hands in front of him. There was no demand to enter a cruiser, and nothing was said that I find would be compelling. There were no threats or inducements. This officer just asked some general questions and in response to those questions the accused produced identification as to who he was, where he lived, and he even gave his phone number.

(11) The accused could have walked away. He could have walked around the one police officer or the three police officers and could have kept going. All he had to do, in my view, is say, "Excuse me." To suggest for one moment that he couldn't or they wouldn't permit it is speculation. There was no evidence that the accused felt compelled or had a subjective belief in relation to anything. The inference is, that the accused decided to cooperate all the way with the police. The quantity of time spent was referred to.

I conclude very easily that this was a conversation of an extremely short duration, lasting no more than several moments, but no more than three or four minutes. So much so, that I find the ultimate crime, the solving of the crime and the arrest and search incidental to the arrest took some four minutes more or less.

I also find that the limited conversation between Police Constable Gomes and the accused was no more than that, a conversation and an attempt to chit chat or make chit chat. Here again, I find it was all meant to check on the temperature of the community.

(2004 CarswellOnt 8779, at para. 9)

[191] Unlike the trial judge, the Court of Appeal concluded that Mr. Grant had been detained: (2006), 81 O.R. (3d) 1. I agree with this conclusion: viewed as a whole, the facts support the conclusion that there was indeed a detention. However, I wish to point out that the detention came to a head when the officers asked Mr. Grant certain direct questions that,

viewed objectively, might have caused a reasonable person to feel singled out, cornered and, therefore, detained. Owing to the nature of the questions asked by Constable Gomes, the line between prevention and suppression was crossed. Constable Gomes asked Mr. Grant if he had committed a crime. Once such a question had been asked of a person who had known he was being watched from the time he had crossed paths with constables Worrell and Forde — who had since arrived on the scene — the encounter could no longer be described simply as an interaction between a police officer and a member of the public. I agree with the Court of Appeal’s conclusion that the exchange was no longer an impromptu conversation that a young man such as Mr. Grant would think he could walk away from as he pleased.

[192] In light of the conclusion that Mr. Grant was detained, I must consider the power of the police to detain a person for investigation purposes in performing their crime prevention function. Unlike in the context of crime suppression, police officers who are charged with preventing crime — in particular, as in the instant case, in an area near schools experiencing problems related to violence — know that unlawful acts have been or will be committed, but do not know when, where or by whom a specific crime will be committed. They must therefore have some leeway to be able to perform this function adequately.

[193] Although I cannot conclude that the officers in the case at bar had a reasonable suspicion that an offence had been committed, I would not want what is said in this judgment to discourage them from intervening. As can be seen from the trial judge’s reasons, the officers were calm and polite. Even though their actions may, viewed objectively, have constituted detention, that was most likely not intentional. It would therefore be best in

future for police officers to avoid asking incriminating questions of people who are likely to be viewed as suspects. The direct questions in the instant case can be compared with the circumspect approach taken by the officers in *R. v. Kang-Brown*, 2008 SCC 18, [2008] 1 S.C.R. 456. If, in the course of an exchange of words in which officers act circumspectly, the behaviour of the person they are speaking with changes, the next question is whether the facts are sufficient to give rise to a reasonable suspicion that an offence has been or will be committed. If they are sufficient, it will then be open to the officers to exercise their power of investigative detention.

[194] In short, I believe it is important to educate the police about how their conduct affects members of the public. If they do not really intend to detain a person, they should — by their deeds and their words — let the person know that he or she is not being singled out.

2. Factors Supporting the Admission or Exclusion of Evidence Obtained in Violation of the Charter

[195] The majority propose revising the test developed in *R. v. Collins*, [1987] 1 S.C.R. 265, for admitting or excluding evidence obtained in violation of a right protected by the *Canadian Charter of Rights and Freedoms*. I agree with them that the test needs to be revised, but in my view, the formulation they propose is inconsistent with the purpose of s. 24(2). I will be proposing a simpler rule that focusses the analysis on two aspects: the societal interest in protecting constitutional rights and the societal interest in the adjudication of the case on the merits. On the basis of these two aspects, it will be possible to consider all the relevant circumstances in order to determine whether the exclusion or admission of

the evidence would bring the administration of justice into disrepute.

A) *Purpose of Section 24(2) of the Charter*

[196] The identification of the purpose of s. 24(2) of the *Charter* is of prime importance for the determination of the factors to be considered in applying this provision. According to Professor David M. Paciocco, “[r]ecent experience in the United States has demonstrated that the vitality of the exclusionary rule depends entirely on the purposes that are identified for exclusion. This is because each of the rationales has its own level of vulnerability and its own sphere of operation” (“The Judicial Repeal of s. 24(2) and the Development of the Canadian Exclusionary Rule” (1989-90), 32 *Crim. L.Q.* 326, at p. 334). However, Professor Kent Roach cautions that “[i]f none of the approaches is in a preferred position, the choice of which rationale will prevail in a particular case is likely to be inconsistent and result-oriented” (“Constitutionalizing Disrepute: Exclusion of Evidence after *Therens*” (1986), 44 *U.T. Fac. L. Rev.* 209, at p. 228).

[197] *Collins* had the merit of setting out the first test for applying s. 24(2). But neither in that case nor in those that followed can the Court be said to have identified a guiding principle or taken a clear position ranking the various purposes that are often cited for the provision and can be drawn — sometimes implicitly and sometimes explicitly — from the case law. The failure to do so is surprising, given the importance the Court has attached to contextual analysis and to the need, in interpreting any provision, to consider its purpose.

[198] I accordingly agree with the majority that the purpose of s. 24(2) of the *Charter* is found in the words of the provision. Section 24 reads as follows:

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.

The purpose of s. 24(2) is to maintain public confidence in the administration of justice.

[199] Since this purpose is a general one, it makes it possible to take the various functions of the criminal justice system into account. This purpose also makes it possible to identify a common denominator between ss. 24(1) and (2). It is clear that one of the purposes of the remedy provided for in s. 24(1), more specifically a stay of proceedings for abuse of process, is to maintain the repute of the administration of justice: *R. v. Conway*, [1989] 1 S.C.R. 1659, at p. 1667. Although a stay of proceedings can be granted only in the clearest of cases because it allows the accused to go free, the comparison with s. 24(2) is not without interest, especially in a case where the exclusion of evidence would in practice lead to the discharge of the accused by resulting in his or her acquittal.

[200] A court that must decide under s. 24(1) whether to order a stay of proceedings may consider the “balance . . . between the public interest in having all charges dealt with on

their merits [and] the public interest in having all charges stayed to show the court's determination to ensure the continued vigour of checks and balances in the criminal justice system" (*R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297, dissent, at para. 231 (emphasis deleted); see also the majority's reasons, at para. 57). This balancing exercise is also essential to the analysis required by s. 24(2). Under s. 24(2), the judge must decide whether the best way to maintain the reputation of the administration of justice would be to admit the evidence or to exclude it.

[201] I also agree with the majority's proposition that the exclusionary rule has, primarily, a prospective societal role and that the judge's analysis must focus on systemic concerns (para. 70). The court cannot consider the case of the accused person who is on trial without addressing the long-term impact of its decision on the administration of justice in general. If, where the stay of proceedings and the admission or exclusion of evidence are concerned, the point of convergence between the first and second subsections of s. 24 is the balancing of two factors, what distinguishes these provisions is that the purpose of the first is to provide for an individual remedy, whereas the ultimate purpose of the second lies in the societal interest in maintaining public confidence in the administration of justice. The first is focussed on the individual, the second on society.

[202] The statement that s. 24(2) has a long-term societal purpose is of great significance for the identification of the factors to be considered in the analysis. In my view, the test proposed by the majority, by focussing the analysis on the conduct of the police in the first branch and on the interest of the accused in the second, and by attaching less

importance to the seriousness of the offence in the third, does not give sufficient consideration to the long-term societal interest that must guide the judge in reaching a decision.

B) *The Test: Branches and Factors*

[203] Since *Collins*, the courts have generally applied a test under which the factors relevant to the analysis to be conducted in applying s. 24(2) were grouped in three broad branches. This Court has applied this test in many subsequent decisions, including *R. v. Greffe*, [1990] 1 S.C.R. 755, at pp. 783-84, in which Lamer J. (as he then was) summarized the test as follows:

The first set of factors are those relevant to the fairness of the trial. The second set of factors concerns the seriousness of the *Charter* violations as defined by the conduct of the law enforcement authorities. The third set of factors recognizes the possibility that the administration of justice could be brought into disrepute by excluding the evidence despite the fact that it was obtained in a manner that infringed the *Charter*.

[204] First, the courts had to determine the nature of the evidence obtained in violation of the rights of the accused. Where real evidence was adduced, admitting it rarely led to a finding that trial fairness had been impaired. Second, they had to assess the seriousness of the violation in light of both the interests protected by the infringed right and the state conduct. Third, the courts considered the consequences of excluding the evidence and determined, more specifically, whether the evidence was essential, having regard to the seriousness of the offence (*Greffe*, per Dickson C.J., at pp. 762-63).

[205] In the case at bar, the majority propose to reformulate the test. The new version continues to have three branches: a review of the state conduct, the impact of the violation on the *Charter*-protected interests and the public interest in an adjudication on the merits.

[206] It is appropriate that trial fairness is no longer a cornerstone of the test. One of the problems with the reliance on trial fairness in the first branch of the *Collins* test was that it is a concept with several possible meanings and can accordingly lead to confusion.

[207] Trial fairness is sometimes defined narrowly and sometimes more broadly. Defined narrowly, it concerns solely the reliability of the evidence. More broadly, trial fairness corresponds to “courtroom fairness” (P. Mirfield, “The Early Jurisprudence of Judicial Disrepute” (1987-88), 30 *Crim. L.Q.* 434, at pp. 444 and 452). In the latter sense, fairness is related to the concept of “conscriptive evidence”. Its purpose is to safeguard certain fundamental rights of the accused at trial, such as the right against self-incrimination. This interpretation is essentially the same as the one in *R. v. Stillman*, [1997] 1 S.C.R. 607. Finally, trial fairness has been defined very broadly by certain commentators and in certain judgments (see the dissent in *R. v. Burlingham*, [1995] 2 S.C.R. 206, at para. 86). According to this approach, any use of evidence obtained in violation of constitutional rights is — regardless of the quality of the evidence (reliable, conscriptive, derivative, etc.) — a breach of trial fairness. It is clear that, although the concept of fairness seems to go hand in hand with any system of justice worthy of that name, it is not precise enough to serve as a reliable guide.

[208] The reformulation of the first of the criteria from *Collins* so as to exclude the trial fairness concept and take *Charter*-protected interests into account in the second branch of the new test is a refinement that may help judges refer to concrete and objective factors. I am in complete agreement that the greater the impact of the violation on the *Charter*-protected interests, the more likely it is that there will be negative consequences for public confidence in the administration of justice. For example, interference with bodily integrity and a search of a rented car will not have the same impact on the confidence an objective person with good knowledge of the circumstances of the case will have in the administration of justice (*Collins*, at p. 282).

[209] However, I cannot agree with focussing the analysis on the accused, as the purpose remains at all times to maintain public confidence in the administration of justice in the long term, and what is important is the public interest in the protection of constitutional rights. Nor can I accept that one of the factors — state conduct — formerly taken into account when analysing the seriousness of a violation is now a separate branch of the test. In pursuing the purpose of maintaining confidence in the administration of justice, the courts must dissociate themselves from violations of protected rights, regardless of whether or not they were intentional. Although state conduct is of course the source of the violation, it is but one of the factors to be considered in analysing the impact of the violation on *Charter*-protected interests.

[210] I find the majority's emphasis on state conduct puzzling in view of the purpose

of s. 24(2). Although the majority acknowledge that the purpose of the s. 24(2) rule is neither to punish the police officers nor to compensate the accused, the importance they attach to this factor places the judge on a slippery slope. Since any distinction between the role of the exclusion of evidence as a way for a court to dissociate itself from a violation and its role as a deterrent — which has been sharply criticized — will be a fine one, I wonder what role this factor will actually play. The Court’s attitude in this respect has already been criticized as being one of “doublespeak” (D. Stuart, *Charter Justice in Canadian Criminal Law* (4th ed. 2005), at pp. 543-44). I fear that the same word will also be used to refer to the new test. Moreover, by making state conduct a separate branch of the test, the Court is drawing closer to the rules applied in the United States, which are based on very different constitutional provisions and a very different socio-political context (see the reasons of Esson J.A. in *R. v. Strachan* (1986), 25 D.L.R. (4th) 567 (B.C.C.A.)).

[211] It might have been thought that the courts would over time have understood that it is unhelpful to begin the constitutional analysis by considering state conduct. The main problem with the importance attached to this factor is that the deterrent effect of the exclusion of evidence has never been proved empirically (S. Penney, “Taking Deterrence Seriously: Excluding Unconstitutionally Obtained Evidence Under Section 24(2) of the *Charter*” (2004), 49 *McGill L.J.* 105, at p. 114).

[212] In the United States, many commentators have attempted to demonstrate that the exclusionary rule is either effective or ineffective as a deterrent, and the question is still open to debate: L. T. Perrin et al., “If It’s Broken, Fix It: Moving Beyond the Exclusionary Rule

— A New and Extensive Empirical Study of the Exclusionary Rule and a Call for a Civil Administrative Remedy to Partially Replace the Rule” (1998), 83 *Iowa L. Rev.* 669; W. R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* (4th ed. 2004), vol. 1, at pp. 32-37; *Herring v. United States*, 555 U.S. 1 (2009); Law Reform Commission of Canada, Working Paper 10, *Evidence — The Exclusion of Illegally Obtained Evidence* (1974), at pp. 19-20. The question has also been the subject of debate in Canada. According to Paciocco, at p. 340, s. 24(2) cannot have a deterrent effect, because it does not establish a clear and predictable rule requiring the exclusion of evidence. To other commentators, from the perspective of the conduct of state agents, exclusion is not an effective sanction. The police certainly have an interest in the conviction of an accused, but that interest is above all one of society as a whole. Administrative or disciplinary measures may have a greater deterrent effect on the police (Law Reform Commission, at pp. 20-22; *R. v. Duguay*, [1989] 1 S.C.R. 93, at pp. 123-24, and *Burlingham*, at para. 104, *per* L’Heureux-Dubé J., dissenting). In my view, the reservations expressed regarding the effectiveness of the exclusion of evidence as a deterrent are an invitation to be very prudent as regards the importance attached to state conduct.

[213] Furthermore, a parallel can be drawn with the order for a stay of proceedings for abuse of process, which also has as its purpose the maintenance of public confidence in the administration of justice. As the Court pointed out in *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391, at para. 91, and in *R. v. Taillefer*, 2003 SCC 70, [2003] 3 S.C.R. 307, at para. 119, the purpose of such an order is not to punish state misconduct. In my view, there is no justification for attributing this role, even indirectly, to

s. 24(2). Although I agree that the exclusion of evidence may have a deterrent *effect*, I do not think state conduct should be considered separately in the determination of what must be done to maintain public confidence in the administration of justice. If a judge must decide whether to admit or exclude evidence, a violation of rights must already have been proved. It is therefore the impact of that violation that needs to be examined, not the inherent seriousness of the state conduct.

[214] In sum, I agree with incorporating into the assessment of the impact of the violation a broader perspective according to which all *Charter*-protected interests are taken into account. However, this new approach should be focussed not on the accused, but on the public interest in the protection of constitutional rights. Moreover, even though this approach may permit the courts to examine state conduct in order to determine its impact on the protected interests and, if necessary, to dissociate themselves from it, the purpose being pursued is to maintain public confidence in the administration of justice. The need for the courts to dissociate themselves from state conduct is at most one factor to be considered in relation to the overall purpose. Furthermore, in applying the *Collins* test, the courts have considered both state conduct and the seriousness of the infringement of the interests protected by the violated right in their review of the seriousness of the violation. In my view, therefore, the proposed change incorporates into the test a branch that is in itself inconsistent with the purpose of the provision and that does not make the rule any clearer or easier to apply. I accordingly find that the objective of the reformulation has not been achieved.

[215] At the third stage of the *Collins* analysis, the judge had to determine the effect

that excluding the evidence would have on the repute of the administration of justice. The third branch of the new test proposed by the majority requires the judge to assess the “public interest in an adjudication on the merits”. Although this formulation is clearly broad enough that it will be possible to consider the factors formerly regarded as important in the third branch of the *Collins* test, certain factors are unduly de-emphasized or simply disregarded in the new test.

[216] In this regard, the majority’s position on the seriousness of the offence being prosecuted is ambiguous. Although the majority describe this factor as a “valid consideration”, they mention that it “has the potential to cut both ways”, that is, in favour of either excluding or admitting evidence. Their justification for this position is that although the public has a heightened interest in an adjudication on the merits where the crime is a serious one, it also has a heightened interest in having a justice system that is above reproach, particularly where the penal stakes for the accused are high (para. 84). I note that they also consider the heightened interest of the accused in having a justice system that is above reproach, especially where the crime with which he or she is charged is a serious one. These comments by the majority help me put the problem in context, and they suggest that the interest of the accused is equal to that of society where the charge is serious. In addition to my doubts about how the seriousness of the offence actually fits into the majority’s test, I must say that I disagree with the proposition that in the analysis relating to the maintenance of the repute of the administration of justice, this factor is neutral.

[217] First of all, the third branch of the majority’s test requires the judge to consider

the factors that weigh in favour of or against proceeding to trial. At first glance, it is hard to imagine how the seriousness of the offence, and even the harshness of the sentence, could weigh against proceeding to trial. However, it is conceivable that when the factor of the seriousness of the offence is combined with other circumstances — where, for example, the evidence is unreliable — the accused might claim to have a greater interest in not standing trial if he or she could face a harsher sentence owing to the seriousness of the charge. But this interest is subsumed in the public's interest, which is of course opposed to having an accused convicted on the basis of unreliable evidence. Moreover, a well-informed person who is objective and is apprised of all the circumstances would surely be shocked if unreliable evidence were used in any criminal trial (*R. v. O'Connor*, [1995] 4 S.C.R. 411, at para. 62).

[218] What the majority suggest is in reality that, on the one hand, the interest of the accused in having the evidence excluded increases with the seriousness of the offence and the harshness of the potential sentence and, on the other hand, the societal interest in an adjudication on the merits increases with the seriousness of the offence. The result is that this factor is considered to be neutral. But I find it unacceptable to place value in the benefit derived by the accused from the exclusion of reliable evidence. The accused has a legitimate interest in having his or her rights protected, but not in having the evidence truncated to his or her advantage. In other words, the outcome of the analysis cannot be factored into the analysis itself. Moreover, the protection of the interests of the accused is considered in the first and second branches of the test proposed by the majority, not in the third.

[219] The analysis to be conducted under s. 24(2) should not be more likely to result in the exclusion of evidence where the charge is murder than where it is theft. To the extent that the majority's approach has the effect of including, in the third branch of the test, factors related to the consequences of the charges for the accused, it is inconsistent with the analysis required at this stage.

[220] The suggestion that the effect of the factor of the seriousness of the offence is neutral because of the heightened societal interest in having a system of justice that is above reproach is also problematic. What might be criticized is the admission of evidence obtained in violation of constitutional rights. This implies that the violation is taken into account at this stage of the analysis. In other words, the violation will have been taken into account at every stage: at the first, in reviewing the conduct of the police; at the second, in assessing the impact of the violation on the protected interests; and lastly, at the third, in considering the interest in maintaining a system of justice that is above reproach. Furthermore, this approach evokes the broad concept of trial fairness even though that concept is not formally included in the test proposed by the majority. Thus, trial fairness would be reintroduced indirectly, but in a more diffuse sense that is potentially much broader than the one in which it was used in the approach developed in *Collins* and *Stillman*.

[221] In my view, assessing the seriousness of the offence is as important as determining whether the evidence is reliable or essential. To disregard this factor would make as little sense as to disregard the fact that an accused who is granted a stay of proceedings will not be prosecuted.

[222] If the role of the courts is to conduct trials to seek the truth about the commission of crimes, the importance of this role reaches its apogee where the crime is a particularly serious one. I think it goes without saying that society has a greater interest in an adjudication on the merits where the crime is a serious one, such as murder, sexual assault or importing hard drugs, than where it is less serious, as in the case of shoplifting, possession of cannabis or assault.

C) *Proposed Test*

[223] In short, I agree that the time has come for the Court to revisit the test for the admission or exclusion of evidence obtained in violation of a *Charter* right. I am proposing a simple test that takes into account both the public interest in protecting *Charter* rights and the public interest in an adjudication on the merits. I agree with the majority that the judge's approach should be to foster the maintenance of public confidence in the administration of justice in the long term, but I would add that it is by striking a fair balance between these two societal interests that this result will be attained. These are the only two aspects that a judge should consider in determining whether the maintenance of confidence in the administration of justice would be better served by admitting the evidence or by excluding it.

[224] On the branch related to the protection of constitutional rights, I would suggest that any facts that help show the effect of the violation on the protected rights be considered. In this respect, the state conduct that gave rise to the violation is obviously a relevant factor.

However, the purpose of the judge's review is not to punish the police officers or to compensate the accused for the violation. Rather, it is to assess the impact of that conduct on the protected interests with a view to ultimately balancing the societal interest in the protection of constitutional rights against the role of the judicial system as the institution responsible for holding trials. There may be cases in which conduct is so serious that the courts feel a need to dissociate themselves from it and, in the end, to attach paramount importance to it in their analysis. In the test I am proposing, however, state conduct is but one of the factors to be considered in assessing the impact of the violation on the protected rights.

[225] The impact of a violation on protected interests will vary with the circumstances, and it would be impossible here to list all the circumstances that might be relevant. Suffice it to mention the place of the search, the nature of the evidence, the nature of the violated right, the urgency of the situation for the police officers, the availability of other less intrusive investigation methods, the officers' knowledge of the applicable law, their training, and the clarity of the law. In short, the judge must take into account all the facts that may be used to assess the long-term impact of his or her decision on the repute of the administration of justice, that is, not on the rights of the accused being tried, but rather on those of every individual whose rights might be violated in a similar way.

[226] As for the branch related to the public interest in an adjudication on the merits, I would suggest taking the reliability of the evidence into account. In my view, this consideration is crucial to the maintenance of public confidence. On the one hand, unreliable

evidence will invariably undermine public confidence in the courts' ability to determine whether accused persons are guilty or innocent. On the other hand, a decision to exclude reliable evidence without good reason is also likely to be seen as an abdication by the court of its institutional role. As a corollary, whether the evidence in issue is essential or peripheral is highly significant. Similarly, the importance of the factor of the seriousness of the offence must be recognized, given society's strong interest in being protected from the commission of serious crimes. I have already explained why I feel this factor cannot reasonably be excluded without causing the test itself to bring the administration of justice into disrepute. This is why I would make it an important factor in the analysis.

[227] The question the judge must answer is whether the repute of the administration of justice would be better protected by admitting the evidence or by excluding it. In some cases, the impact on constitutional rights will be the determining factor because, owing to certain circumstances of the violation, the long-term effect of admitting the evidence would be to bring the administration of justice into disrepute. But the converse is also true. Thus, there will be other cases in which it is the public interest in an adjudication on the merits that should prevail: see, for example, the companion case of *R. v. Harrison*, 2009 SCC 34, [2009] 2 S.C.R. 494. Absent an error in principle, the decision is a matter for the trier of fact.

3. Application of the Principles to the Facts of the Case

[228] On whether admitting the weapon in evidence would have a positive effect on the repute of the administration of justice, I agree with the majority's conclusion. I refer to

the following findings of fact made by the trial judge: the exchange lasted only a few minutes, the officers were polite to Mr. Grant, and they were motivated by a desire to take a proactive approach in patrolling an area near schools with serious problems related to youth crime and safety. On the protection of the public, it should be noted that the charge here is firearms-related, that it would be impossible to establish guilt without the evidence and that the evidence is eminently reliable.

[229] When balanced against each other, the limited impact of the violation on the protected interests and the great importance of the evidence for the purposes of the trial favour admitting the physical evidence. Furthermore, on the charge of possession of a firearm for the purposes of trafficking, I am in complete agreement with the majority.

[230] For these reasons, I reach the same conclusion as the majority.

Appeal allowed in part.

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