



SUPREME COURT OF CANADA

CITATION: R. v. Paterson, 2017 SCC 15

APPEAL HEARD: November 2, 2016

JUDGMENT RENDERED: March 17, 2017

DOCKET: 36472

BETWEEN:

Brendan Paterson
Appellant

and

Her Majesty the Queen
Respondent

– and –

**Attorney General of Ontario, Attorney General of Alberta and British Columbia
Civil Liberties Association**
Interveners

CORAM: McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon and Brown JJ.

REASONS FOR JUDGMENT: Brown J. (McLachlin C.J. and Abella, Karakatsanis and Wagner JJ. concurring)
(paras. 1 to 59)

DISSENTING REASONS: Moldaver J. (Gascon J. concurring)
(paras. 60 to 99)

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R. v. PATERSON

Brendan Paterson

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v.

Her Majesty the Queen

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British Columbia Civil Liberties Association**

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Present: McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon and Brown JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Constitutional law — Charter of Rights — Search and seizure — Exclusion of evidence — Accused admitting to police to having marihuana in his residence — Accused allowing police to seize roaches after being told this would be “no case” seizure — Warrantless entry by police into residence resulting in police seeing other drugs and weapon and arresting accused — Whether “exigent circumstances”, within meaning of s. 11(7) of Controlled Drugs and Substances Act, made it “impracticable” to obtain warrant before entering and searching residence — Whether accused’s Charter right to be secure against unreasonable search or seizure infringed — If so, whether evidence obtained from warrantless entry and search of residence should be excluded — Controlled Drugs and Substances Act, S.C. 1996, c. 19, s. 11(7) — Canadian Charter of Rights and Freedoms, ss. 8, 24(2).

Criminal law — Evidence — Admissibility — Voir dire — Accused admitting to police to having marihuana in his residence — Whether Crown required to prove voluntariness of accused’s statement prior to its admission at voir dire considering lawfulness of entry and search of accused’s residence — Whether common law confessions rule should apply to statements tendered in context of voir dire under Charter.

This case arises from a warrantless entry by police officers into the apartment of the accused, P, which followed his agreement to surrender several marihuana roaches. The police told P they would treat this as a “no case” seizure, meaning that they intended to seize the roaches without charging him. Once inside,

the police observed a bulletproof vest, a firearm and drugs. They arrested P and obtained a telewarrant to search his apartment, which led to the discovery of other firearms and drugs and to charges against P. P was convicted at trial and the Court of Appeal of British Columbia upheld the convictions. The Court of Appeal rejected P's argument that the common law confessions rule should have precluded the admission of his statement about the roaches at the *voir dire*, as the Crown did not prove beyond a reasonable doubt that his statement was voluntarily made.

Held (Moldaver and Gascon dissenting): The appeal should be allowed, the convictions set aside and acquittals entered.

Per McLachlin C.J. and Abella, Karakatsanis, Wagner and **Brown JJ.**: The confessions rule should not be expanded to apply to statements tendered in the context of a *voir dire* under the *Charter*. The Crown must prove the voluntariness of an accused's statement before it can rely upon that statement at trial as supporting a finding of guilt. The purpose of the judicial inquiry in a *Charter voir dire* is distinct from the purpose of a criminal trial. A criminal trial is concerned with determining whether the accused is guilty of an offence. In a *Charter voir dire*, however, the focus is not on the accused's guilt, but on whether the accused's constitutional rights were infringed. A *Charter voir dire* therefore involves a review of the totality of the circumstances known to, and relied upon, by the state actor at the time of the impugned action. Only the state actor's contemporary state of mind and conduct is at issue, and not the truthfulness of the statement upon which he or she relied. It is for

this reason that the truthfulness of a statement has no bearing upon its admissibility; rather, the inquiry is focussed upon whether it was reasonable for the state actor to rely upon the statement as forming grounds for the action under scrutiny. Admitting a statement by an accused for the purpose of assessing the constitutionality of state action, as opposed to the purpose of determining the accused's guilt, does not engage the rationale for the confessions rule. To apply the confessions rule to evidence presented at a *Charter voir dire* would distort both the rule and its rationale. It would stifle police investigations, compromise public safety and needlessly lengthen and complicate *voir dire* proceedings.

The warrantless entry by the police into P's residence was not justified by "exigent circumstances" making it "impracticable" to obtain a warrant, within the meaning of s. 11(7) of the *Controlled Drug and Substances Act* ("CDSA"). It therefore infringed P's rights under s. 8 of the *Charter*. "Exigent circumstances" denotes not merely convenience, propitiousness or economy, but rather urgency. Even where exigent circumstances are present, however, they are not, on their own, sufficient to justify a warrantless search of a residence under s. 11(7). Those circumstances must render it "impracticable" to obtain a warrant. In order for a warrantless entry to satisfy s. 11(7), the Crown must show that the entry was compelled by urgency, calling for immediate police action to preserve evidence, officer safety or public safety. Further, this urgency must be shown to have been such that taking the time to obtain a warrant would pose serious risk to those imperatives.

In this case, no urgency compelled immediate action in order to preserve evidence. Nor, just as importantly, did the circumstances presented by P's admission to having some partially consumed roaches, coupled with the police officers' wish to seize them on a no case basis, make it impracticable to obtain a warrant. Section 11(7) is not satisfied by mere inconvenience, but impracticability. Here, the police had a practicable option: to arrest P and obtain a warrant to enter the residence and seize the roaches. If the situation was not serious enough to arrest and apply for a warrant, then it cannot have been serious enough to intrude into a private residence without a warrant. Further, concern for officer safety did not drive the decision to proceed with warrantless entry; rather, warrantless entry gave rise to concern for officer safety.

The evidence obtained as a result of the entry and search of P's residence should be excluded under s. 24(2) of the *Charter* as its admission would bring the administration of justice into disrepute. The police conduct, while not egregious, represented a serious departure from well-established constitutional norms. These police officers were not operating in unknown legal territory: their intention to effect a seizure on a "no case" basis was legally insignificant, in light of the well-established legal principles governing the authority of police to enter a residence without a warrant. The balancing of the relevant factors — seriousness of state conduct, seriousness of the infringement of *Charter* rights and the impact upon society's interest in adjudication — will never be an entirely objective exercise. While the effective destruction of the Crown's case weighs heavily, so does the

warrantless entry into a private residence, having occurred to prevent P from destroying three roaches which the police themselves intended to destroy. It is important not to allow the third factor of society's interest in adjudicating a case on its merits to trump all other considerations, particularly where, as here, the impugned conduct was serious and worked a substantial impact on P's *Charter* right. Considering all these factors separately and together, the importance of ensuring that such conduct is not condoned by the court favours exclusion.

Per Moldaver and Gascon JJ. (dissenting): The majority analysis and conclusion on the voluntariness issue is agreed with. Contrary to the findings of the trial judge and three judges of the Court of Appeal, it is agreed that the police entry into P's apartment was unlawful and in breach of his s. 8 privacy rights. However, the firearms and drugs seized by the police from P's apartment were properly admitted into evidence and the appeal should be dismissed.

The function of this Court, in a case like the present one, is to clarify the law so that police officers, defence and Crown counsel, trial and appellate judges and the public at large can know what the law is and how it is to be applied in future cases. It is not to judge the police conduct against a standard that exceeds the wisdom and training of experienced trial and appellate judges. In an effort to clarify the law, it is accepted that s. 11(7) of the *Controlled Drug and Substances Act* was not available to the police on the facts of this case. Rather, in the circumstances, the police had three options available to them. They could have (1) tried to obtain P's lawful consent

to enter his apartment and seize the roaches; (2) arrested P and obtained a warrant to search his apartment and seize the roaches; or (3) thrown up their hands and walked away, in dereliction of their duty to seize illicit drugs, even if only to catalogue and destroy them. That said, it is hardly fair to castigate the police for their conduct when prior to this case, the legal boundaries of s. 11(7) in the context of a “no case” seizure were at best unclear. One need only look to the lower court decisions to realize this.

This Court has consistently held that legal uncertainty is a factor which a court may take into account in assessing the seriousness of a *Charter* breach occasioned by police conduct. Where the law is evolving or in a state of uncertainty, and where the police are found to have acted in good faith, without ignorance or wilful or flagrant disregard of an accused’s *Charter* rights, the seriousness of the breach may be attenuated.

In this case, the seriousness of the breach is clearly attenuated by the uncertainty surrounding the interpretation of s. 11(7) of the *CDSA* in the context of a “no case” seizure, and the strong findings of the trial judge that the police were acting in good faith throughout. The impact of the police entry on P’s privacy interest is also attenuated because the evidence was lawfully discoverable if the police had obtained a warrant.

In sum, the police, acting in good faith, made a mistake about their authority to enter P’s apartment under the auspices of s. 11(7) in a “no case” seizure — the same mistake that the lower courts made. The cumulative effect of legal

uncertainty, police good faith, and the discoverability and reliability of critical evidence needed for there to be a trial on the merits resolves the balance in favour of admitting the evidence. In these circumstances, it is the exclusion of reliable and crucial evidence implicating P in very serious gun and drug offences that is far more likely to cause the public to lose faith and confidence in our criminal justice system. That said, in a case like this one, it is possible that an alternative remedy short of the exclusion of evidence, such as a sentence reduction, might be available under s. 24(1) of the *Charter*. Since this was not argued, it must be left for another day.

Cases Cited

By Brown J.

Applied: *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353; **referred to:** *R. v. Hodgson*, [1998] 2 S.C.R. 449; *Ibrahim v. The King*, [1914] A.C. 599; *Boudreau v. The King*, [1949] S.C.R. 262; *Rothman v. The Queen*, [1981] 1 S.C.R. 640; *R. v. Hebert*, [1990] 2 S.C.R. 151; *R. v. S. (R.J.)*, [1995] 1 S.C.R. 451; *R. v. MacKenzie*, 2013 SCC 50, [2013] 3 S.C.R. 250; *R. v. Orbanski*, 2005 SCC 37, [2005] 2 S.C.R. 3; *R. v. Soules*, 2011 ONCA 429, 105 O.R. (3d) 561; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, 2015 SCC 57, [2015] 3 S.C.R. 615; *R. v. Grant*, [1993] 3 S.C.R. 223; *R. v. Feeney*, [1997] 2 S.C.R. 13; *R. v. Silveira*, [1995] 2 S.C.R. 297; *R. v. MacDonald*, 2014 SCC 3, [2014] 1 S.C.R. 37; *R. v. Maccooh*, [1993] 2 S.C.R. 802; *R. v. Erickson*, 2003 BCCA 693, 192

B.C.A.C. 203; *R. v. Buhay*, 2003 SCC 30, [2003] 1 S.C.R. 631; *R. v. Harrison*, 2009 SCC 34, [2009] 2 S.C.R. 494; *R. v. McGuffie*, 2016 ONCA 365, 348 O.A.C. 365.

By Moldaver J. (dissenting)

R. v. Erickson, 2003 BCCA 693, 192 B.C.A.C. 203; *R. v. Grant*, [1993] 3 S.C.R. 223; *R. v. Feeney*, [1997] 2 S.C.R. 13; *R. v. M.(N.)* (2007), 223 C.C.C. (3d) 417; *R. v. Silveira*, [1995] 2 S.C.R. 297; *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34; *R. v. Aucoin*, 2012 SCC 66, [2012] 3 S.C.R. 408; *R. v. Vu*, 2013 SCC 60, [2013] 3 S.C.R. 657; *R. v. Spencer*, 2014 SCC 43, [2014] 2 S.C.R. 212; *R. v. Fearon*, 2014 SCC 77, [2014] 3 S.C.R. 621.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 7, 8, 9, 24(1),(2).

Controlled Drugs and Substances Act, S.C. 1996, c. 19, s. 11(1), (2), (7).

Criminal Code, R.S.C. 1985, c. C-46, ss. 117.02(1), 184.3(1), 487.1, 487.11, 529.3.

Narcotic Control Act, R.S.C. 1985, c. N-1 [rep. 1996, c. 19, s. 94], s. 10.

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Lederman, Sidney N., Alan W. Bryant and Michelle K. Fuerst. *The Law of Evidence in Canada*, 4th ed. Markham, Ont.: LexisNexis, 2014.

Penney, Steven, Vincenzo Rondinelli and James Stribopoulos. *Criminal Procedure in Canada*. Markham, Ont.: LexisNexis, 2011.

APPEAL from a judgment of the British Columbia Court of Appeal (Lowry, Frankel and Bennett JJ.A.), 2015 BCCA 205, 372 B.C.A.C. 148, 640 W.A.C. 148, 324 C.C.C. (3d) 305, 340 C.R.R. (2d) 41, [2015] B.C.J. No. 946 (QL), 2015 CarswellBC 1256 (WL Can.), affirming the convictions for possession of controlled substances, possession of controlled substances for the purpose of trafficking and possession of prohibited or restricted firearms entered by Blok J., 2012 BCSC 1680, [2012] B.C.J. No. 2343 (QL), 2012 CarswellBC 3519 (WL Can.). Appeal allowed, convictions set aside and acquittals entered, Moldaver and Gascon JJ. dissenting.

Daniel J. Song, Kenneth S. Westlake, Q.C., and Brent R. Anderson, for the appellant.

W. Paul Riley, Q.C., and Janna Hyman, for the respondent.

Gillian Roberts, for the intervener the Attorney General of Ontario.

Written submissions only by *Jolaine Antonio*, for the intervener the Attorney General of Alberta.

Roy Millen and Rebecca Spigelman, for the intervener the British Columbia Civil Liberties Association.

The judgment of McLachlin C.J. and Abella, Karakatsanis, Wagner and Brown. JJ. was delivered by

BROWN J. —

I. Introduction

[1] This appeal raises three distinct issues: (1) the applicability of the common law confessions rule to statements tendered in a *voir dire* under the *Canadian Charter of Rights and Freedoms*; (2) whether, on the facts of this case, exigent circumstances, within the meaning of s. 11(7) of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19 (“CDSA”), made it impracticable to obtain a warrant before entering and searching the appellant’s residence; and (3) whether the failure by police to comply with post-seizure reporting requirements constituted an infringement of s. 8 of the *Charter*. In addition, and depending on its determination of the second and third issues, the Court may have to consider whether the evidence obtained as the result of a warrantless entry and search of the appellant’s residence should be excluded under s. 24(2) of the *Charter*.

[2] These issues arise from a warrantless entry by police officers into the apartment of the appellant, Brendan Paterson, which followed his agreement to surrender several marihuana “roaches”. Once inside, the police observed a bulletproof vest, a firearm and drugs. They arrested the appellant and obtained a telewarrant,

which led to the discovery of other firearms and drugs and to charges against the appellant in a nine-count indictment. At trial, the appellant alleged that the warrantless entry into his residence breached his s. 8 *Charter* right to be secure from an unreasonable search or seizure, as there were no “exigent circumstances” rendering it impracticable to obtain a warrant, within the meaning of s. 11(7) of the *CDSA*. Additionally, he alleged a further s. 8 breach arising from the police filing a late and incomplete report to the clerk of the court for the telewarrant.

[3] The trial judge held that exigent circumstances justified the entry into the residence. He also, however, found that the late and incomplete report infringed the appellant’s s. 8 right, but he admitted the evidence and convicted the appellant. His decision was affirmed at the Court of Appeal of British Columbia, before which the appellant advanced a new argument. The common law confessions rule should, he said, have precluded the admission of his statement about the roaches at the *voir dire* considering the lawfulness of the entry and search, as the Crown did not prove beyond a reasonable doubt that his statement was voluntarily made. The Court of Appeal rejected that argument, and upheld the convictions.

[4] For the reasons that follow, I agree with the Court of Appeal that the confessions rule has no application here. I reach a different conclusion, however, on the matter of the police entry into the appellant’s residence which, in my respectful view, was not justified by exigent circumstances making it impracticable to obtain a warrant. As I am also of the view that the evidence obtained therefrom should be

excluded under s. 24(2) of the *Charter*, it is unnecessary to decide whether a late and incomplete report could itself be a ground for a finding of an infringement of s. 8 of the *Charter*, and whether there was in fact such a breach. I would therefore allow the appeal, set aside the appellant's convictions and enter acquittals.

II. Overview of Facts and Proceedings

A. *Background*

[5] On November 30, 2007, in Langley, British Columbia, RCMP officers Warner, Bell and Dykeman were assigned to respond to a 911 call from a woman, C.W., who was crying and apparently injured. After speaking to the caller's mother who directed them to the appellant (C.W.'s boyfriend), the officers attended at the appellant's apartment building. The building manager gave them the appellant's apartment number, and told them that C.W. had been taken to hospital with unknown injuries. (C.W. would later tell police that she had accidentally slipped and hit the back of her head, and that the appellant did not cause her injury.) After police repeatedly knocked on the appellant's apartment door and announced their presence, the appellant opened the door. As he did so, Constable Dykeman noticed the odour of raw and smoked marihuana.

[6] After questioning the appellant about the 911 call and satisfying themselves that no one was in need of assistance, the officers asked him about the odour. He first denied its source, then acknowledged possessing some unconsumed

portions of marihuana “roaches” in his residence. While the number of roaches was not confirmed, Constable Dykeman understood there to be three. The officers explained that they would have to seize the roaches, but that they would treat this as a “no case” seizure, meaning that they intended to seize the roaches without charging him. (Constable Dykeman testified to considering obtaining a warrant, but decided not to and instead simply seize the roaches so that he and the other officers could be on their way). The appellant agreed to hand over the roaches and attempted to close the door, but Constable Dykeman blocked the door with his foot and said he would not let the appellant out of his sight. He testified having done so out of concern that the appellant would destroy the roaches, and for “officer safety”. Constable Dykeman followed the appellant into his residence. Constable Bell followed out of a concern that it was unsafe for Constable Dykeman to be alone with the appellant. (C.W.’s mother had advised the police that the appellant had a shotgun.)

[7] Once inside, the appellant grabbed a bag containing the roaches to hand over to the officers. As he did so, Constable Dykeman observed a bulletproof vest on a couch, a handgun on an end table, and a bag of pills (which he believed to be ecstasy) on a speaker stand. He and Constable Bell immediately arrested and searched the appellant, finding a cell phone and a large amount of cash. A sweep of the residence revealed two large bags of pills (also believed to be ecstasy) and a bag of what appeared to be crack cocaine on a closet shelf.

[8] After securing the residence, Constable Dykeman returned to his detachment and applied for and obtained a telewarrant under s. 11(1) and (2) of the *CDSA* and s. 487.1 of the *Criminal Code*, R.S.C. 1985, c. C-46. Police executed the warrant that same day, finding quantities of cocaine, methamphetamine, ecstasy pills, marihuana and oxycodone, drug paraphernalia, four loaded weapons, a bulletproof vest as well as a large amount of cash. Ultimately, Mr. Paterson was convicted of four counts of possession of a prohibited or restricted firearm, three counts of possession of a controlled substance for the purpose of trafficking, and two counts of simple possession of a controlled substance.

[9] Section 487.1(9) of the *Criminal Code* requires a peace officer to whom a warrant is issued to file a report (a “form 5.2 report”) to the clerk of the court, “as soon as practicable but within a period not exceeding seven days after the warrant has been executed”, containing (among other things) a list of things seized and the grounds for seizing anything that was not listed on the Information to Obtain a Search Warrant. In this case, while the warrant was executed on November 30, 2007, the form 5.2 report was not filed until February 13, 2008. Moreover, the form 5.2 report was incomplete, omitting many of the items seized and stating no grounds for seizure.

B. *Judicial History*

- (1) British Columbia Supreme Court — Blok J. (2011 BCSC 1728)

[10] A *voir dire* hearing was conducted before the trial judge to determine the admissibility of evidence obtained by the police as a result of their search of the appellant's residence. The trial judge concluded that the common law duty upon police to protect life and public safety, as well as exigent circumstances within the meaning of s. 11(7) of the *CDSA*, justified their entry and search of the residence. While the late and incomplete filing of the form 5.2 report constituted a breach of the appellant's right to be secure against unreasonable search or seizure under s. 8 of the *Charter*, he refused to exclude the evidence under s. 24(2), since the breach was inadvertent and not serious, the impact on the appellant's rights was limited, and the evidence gathered therefrom was highly reliable and crucial to the Crown's case for conviction for serious offences. The trial judge ultimately convicted the appellant on all counts (2012 BCSC 1680).

(2) Court of Appeal of British Columbia — Lowry, Frankel and Bennett J.J.A. (2015 BCCA 205, 372 B.C.A.C. 148)

[11] On appeal, the appellant argued, for the first time, that the trial judge had erred by failing to determine the voluntariness of his statement about having roaches in his residence before relying on them in a *voir dire*. Additionally, he argued that the trial judge erred in finding that exigent circumstances justified police entry into his residence, and in finding that the late and incomplete filing of the form 5.2 report did not justify exclusion of the evidence under s. 24(2).

[12] The appeal was dismissed. On the matter of voluntariness, the Crown was not required to prove the voluntariness of an accused's statement for it to be admitted at a *voir dire*. This followed, the Court of Appeal explained, from the primary rationale of the common law confessions rule — ensuring reliability and trial fairness. That rationale does not apply where the evidence may never be heard by the trier of fact and where the inquiry is into state conduct, not the guilt of the accused. Further, police should be entitled to rely upon a statement to justify an investigation, even where that statement is not the product of an operating mind or is otherwise involuntarily made. Finally, imposing an onus upon the Crown in a *voir dire* would operate in tension with the prevailing burden upon the accused to demonstrate a breach.

[13] As to the entry by police into the residence, the Court of Appeal agreed with the trial judge that, as it was “impracticable” for police to obtain a warrant, the police officers were confronted with exigent circumstances. Constable Bell's entry behind Constable Dykeman was also reasonable, having occurred out of concern for officer safety. Finally, the trial judge's conclusion under s. 24(2) to admit the evidence obtained from the warrantless entry and subsequent search was entitled to deference. In the result, it was unnecessary to decide whether he correctly found that the mishandling of the form 5.2 report constituted a breach of s. 8.

III. Analysis

A. *Voluntariness*

[14] The law’s concern for “voluntariness” in relation to police investigative techniques is embodied in the confessions rule. That rule prohibits the admission *at trial* of statements made by suspects to police or to other persons in authority, unless the Crown proves beyond a reasonable doubt that such statements were voluntary (S. Penney, V. Rondinelli and J. Stribopoulos, *Criminal Procedure in Canada* (2011), at p. 272; *R. v. Hodgson*, [1998] 2 S.C.R. 449, at para. 17). The Crown’s burden — which is identical to its burden in respect of the accused’s guilt itself — highlights that the rule is linked to the law’s concern that involuntary statements are “unreliable as affirmations of guilt” (S. N. Lederman, A. W. Bryant and M. K. Fuerst, *The Law of Evidence in Canada* (4th ed. 2014), §8.24; *Ibrahim v. The King*, [1914] A.C. 599 (P.C.), at p. 609; *Boudreau v. The King*, [1949] S.C.R. 262; *Rothman v. The Queen*, [1981] 1 S.C.R. 640, pp. 653-54, per Estey J., dissenting).¹ As this Court recognized in *Hodgson* (at para. 19), statements obtained by force, threat or promises are inherently unreliable.

[15] The Court has also recognized, however, that concern for the untrustworthiness of involuntary confessions does not entirely capture the rationale for excluding evidence caught by the confessions rule. In *R. v. Hebert*, [1990] 2 S.C.R. 151, the rule was said to rest on fundamental notions of trial fairness and (at p. 173) “the idea that a person in the power of the state’s criminal process has the right to freely choose whether or not to make a statement to the police”, coupled with a “concern [for] the repute and integrity of the judicial process”. Those same concerns,

¹ In this regard, I respectfully disagree with the Court of Appeal’s statement, at para. 57, that the confessions rule “ensures that false confessions are not admitted”. Whether the impugned statement is true or false is irrelevant to the inquiry.

the Court added (at p. 175), underlay the privilege against self-incrimination, and supported recognition of a detainee's right to silence as a principle of fundamental justice under s. 7 of the *Charter*. "Voluntariness" then, as a concept designed to limit the scope of police investigative techniques, has been broadly associated with the principle that the Crown must, to maintain the repute and integrity of the trial process, establish guilt without the assistance of the accused (*Hodgson*, at para. 23, citing the *Report of the Federal/Provincial Task Force on Uniform Rules of Evidence* (1982), at p. 175).

[16] The foregoing explanations for the confessions rule are not neatly encapsulated and, as the Court has observed more than once, "a rationale for the confessions rule extending beyond trustworthiness has not always been easy to locate (*R. v. S. (R.J.)*, [1995] 1 S.C.R. 451, at para. 73; *Hodgson*, at para. 23). It suffices here to observe that the Crown must prove the voluntariness of an accused's statement before it can rely upon that statement at trial as supporting a finding of guilt, and that this rule applies to ensure trial fairness and to preclude conviction of an accused based upon compelled and as such inherently unreliable evidence. While, therefore, the rule's application has been confined to trial, the appellant says that its "broad purpose" should operate to require the Crown to prove the voluntariness of such statements for *any* purpose — "even for the limited purpose of establishing reasonable grounds for a search" in a *voir dire*. To confine the judicial inquiry into the voluntariness of a statement to *trial* evidence, he says, allows police to take "unfair . . . advantage" of mentally ill and disabled persons", thereby "engender[ing]

systemic imbalance against those in need of the highest legal protections”. Further, the appellant views any evidence assisting the Crown in any way as “incriminating”, such that a statement which justifies a search ought to be shown to have been voluntarily made. It follows, he says, that unreliable evidence such as an involuntary confession cannot be relied upon to justify a search.

[17] As to the procedure to be followed, the appellant says that the voluntariness of a statement — such as the appellant’s statement regarding the roaches — leading to a police search should be determined prior to the *voir dire* on the lawfulness of the search. Alternatively, he says, a blended *voir dire* could occur. In this case, since neither the trial judge nor counsel addressed the voluntariness of the appellant’s statement, and since there is a possibility that his statements could have been ruled involuntary, he says a new trial is necessary.

[18] In my view, the confessions rule should not be expanded as proposed by the appellant. More particularly, for the following reasons, the confessions rule should not apply to statements tendered in the context of a *voir dire* under the *Charter*.

[19] First, the appellant’s submissions fail to account for the purpose of the judicial inquiry in a *Charter voir dire*, and its distinction from the purpose of a criminal trial. A criminal trial is concerned with determining whether the accused is guilty of an offence. In a *Charter voir dire*, however, the focus is not on the accused’s guilt, but on whether the accused’s constitutional rights were infringed. A *Charter*

voir dire therefore involves a review of the totality of the circumstances known to, and relied upon by, the state actor at the time of the impugned action. To be clear, only the state actor's contemporary state of mind and conduct is at issue, and not the truthfulness of the statement upon which he or she relied. It is for this reason that the truthfulness of a statement has no bearing upon its admissibility; rather, the inquiry is focussed upon whether it was reasonable for him or her to rely upon the statement as forming grounds for the action under scrutiny.

[20] The significance of this distinction between the purpose of a *Charter voir dire* and a trial also governs the admissibility of other forms of evidence, such as hearsay, evidence of bad character or of past discreditable conduct, information obtained from confidential informants, information protected by privilege or, as discussed in *R. v. MacKenzie*, 2013 SCC 50, [2013] 3 S.C.R. 250, at paras. 61-62, personal opinion informed by prior training and experience. Each of these forms of evidence raises either reliability or policy concerns and is therefore subject to strict evidentiary rules which restrict or preclude altogether admissibility for substantive use at the trial proper. Such concerns do not, however, arise at a *Charter voir dire*, because of the limited purpose for which this evidence may be used — going only to the state actor's state of mind and conduct, and not to the ultimate reliability of the evidence in determining the guilt of the accused. It follows that admitting a statement made by an accused for that limited purpose without first establishing its voluntariness does not offend the rationales underlying the confessions rule. The

confessions rule's driving concern for trial fairness and avoiding conviction upon inherently unreliable evidence simply does not arise at the *voir dire* stage.

[21] In sum, admitting a statement by an accused for the purpose of assessing the constitutionality of state action, as opposed to the purpose of determining the accused's guilt, does not engage the rationale for the confessions rule. To apply the rule to evidence presented at a *Charter voir dire* would distort both the rule and its rationale.

[22] Second, the appellant's arguments regarding the ability of police officers to coerce information from vulnerable witnesses are already addressed by our criminal procedure. A substantial distinction separates, on one hand, allowing the Crown to adduce statements at a *Charter voir dire* without proving voluntariness and, on the other hand, condoning police conduct which coerces involuntary statements. The appellant's submissions construct a false choice by failing to account for other legal protections against abusive state conduct. For example, the appellant's concern that police might ignore obvious indicia of unreliability such as an operating mind is addressed by the requirement that the Crown demonstrate that police reasonably relied on an accused's statement and that it provided the requisite grounds to act. Similarly, coercive or otherwise abusive tactics by police designed to extract information involuntarily from an accused would be subject to scrutiny under ss. 7, 8 or 9 of the *Charter*, with a view to possible exclusion of such evidence under s. 24(2) or a stay of proceedings. In brief, the appellant's submissions offer no good reason for

concern that the rights of the accused are not entirely reconcilable with the state's reliance on an accused's statement to demonstrate the constitutionality of its investigative steps.

[23] Finally, applying the confessions rule to statements adduced in a *Charter voir dire* would lead to undesirable consequences, inhibiting legitimate and necessary police investigative powers. For example, and as the intervener, the Attorney General of Ontario observed, requiring police to prove the voluntariness of an accused's statement would contradict this Court's direction in *R. v. Orbanski*, 2005 SCC 37, [2005] 2 S.C.R. 3, that police may rely, for the limited purpose of forming grounds for an approved screening device demand, upon answers given roadside by drivers in response to questions about alcohol consumption. To be clear, such evidence entails, as the Court said, "compelled direct participation" by the driver (para. 58 (emphasis added)),² which would be inadmissible at trial to prove impairment. The limited purpose of justifying further investigation, however, coupled with the absence of concern for trial fairness and reliability, supports its admissibility at a *Charter voir dire* considering the constitutionality of the investigation itself and, in particular, of the reasonableness of the officer's grounds for demanding a breath sample.

[24] Indeed, in some instances, application of the confessions rule to statements adduced at a *Charter voir dire* would lead to absurdities. Police officers

² The Attorney General of Ontario notes that in *R. v. Soules*, 2011 ONCA 429, 105 O.R. (3d) 561, upon which the appellant relies, police were prohibited from relying on statutorily compelled statements from the accused *for any purpose*, including to establish grounds for further investigative steps. Without commenting on the correctness of *Soules*, I observe that *Orbanski's* direction that the police may rely upon roadside statements for the purpose I have described was categorical.

would be required to positively ascertain voluntariness in respect of almost every person they encounter in responding to an emergency, when receiving a 911 call or at other early points in an investigation, where it may be unclear who is a suspect and who is a mere witness. In dynamic and emergent circumstances, police officers must be permitted, within constitutional bounds, to respond and investigate with dispatch. Taken to its logical extension, the appellant's submission would cast doubt on basic and uncontroversial police practices which are dependent upon statements made by suspects. It would stifle police investigations, compromise public safety and needlessly lengthen and complicate *voir dire* proceedings — all, it bears reiterating, to secure protections which (as I have explained at para. 22) our criminal procedure already affords accused persons.

[25] It follows from the foregoing that I am of the view the Court of Appeal correctly decided that the Crown was not required to prove the voluntariness of the appellant's statement regarding the roaches in his residence prior to its admission at a *Charter voir dire*.

B. *Did Exigent Circumstances, Making it Impracticable to Obtain a Warrant, Justify a Warrantless Entry Into the Appellant's Residence?*

(1) The Meaning of “Exigent Circumstances” and “Impracticable”

[26] Before us, no one disputed that the police officers' warrantless entry into the appellant's residence constituted a search. At issue, however, is whether it was

justified by “exigent circumstances” making it, within the meaning of s. 11(7) of the CDSA, “impracticable” to obtain a warrant.

[27] Section 11(7) states:

(7) A peace officer may exercise any of the powers described in subsection (1), (5) or (6) without a warrant if the conditions for obtaining a warrant exist but by reason of exigent circumstances it would be impracticable to obtain one.	(7) L’agent de la paix peut exercer sans mandat les pouvoirs visés aux paragraphes (1), (5) ou (6) lorsque l’urgence de la situation rend son obtention difficilement réalisable, sous réserve que les conditions de délivrance en soient réunies.
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[28] Subsection (1) of s. 11 empowers a peace officer to conduct a warranted search of a place for, *inter alia*, a controlled substance and to seize it. The relevant effect of s. 11(7) to the facts of this appeal, then, was to empower Constables Dykeman and Bell to conduct a warrantless search of the appellant’s residence for a controlled substance, so long as conditions for obtaining a warrant existed (which is not disputed here), and exigent circumstances made it impracticable for them to obtain a warrant.

[29] As to the meaning of “exigent circumstances”, the appellant points to s. 529.3 of the *Criminal Code*, subs. (1) of which authorizes a peace officer to enter a dwelling-house without a warrant for the purpose of arresting or apprehending a person reasonably believed to be present therein, where “the conditions for obtaining a warrant . . . exist but by reason of exigent circumstances it would be impracticable

to obtain a warrant”. Subsection (2) of s. 529.3 defines “exigent circumstances” as including circumstances in which the peace officer:

(a) has reasonable grounds to suspect that entry into the dwelling-house is necessary to prevent imminent bodily harm or death to any person; or

(b) has reasonable grounds to believe that evidence relating to the commission of an indictable offence is present in the dwelling-house and that entry into the dwelling-house is necessary to prevent the imminent loss or imminent destruction of the evidence.

[30] The appellant’s submission, in essence, is that the definition of “exigent circumstances” found in s. 529.3(2) of the *Criminal Code* should be applied to define “exigent circumstances” as it appears in s. 11(7) of the *CDSA*. This would have the effect of requiring police to demonstrate either that entry is necessary to prevent imminent bodily harm or death, or that entry is necessary to prevent the imminent loss or destruction of evidence relating to the commission of an indictable offence — neither of which could have been established on the facts known to Constables Dykeman and Bell prior to entry.

[31] I reject this submission. Section 11 of the *CDSA* lacks the express language of s. 529.3(2) limiting its scope, where applied to the preservation of evidence, to *indictable* offences. Parliament, which regularly and expertly legislates pursuant to its criminal law power, could have easily conditioned warrantless searches under s. 11(7) in precisely the same terms as contained in s. 529.3(2). That it chose not to do so is unsurprising, when s. 529.3(2) is considered alongside other provisions in the *Criminal Code* authorizing warrantless entry — an important

consideration, given that statutory interpretation entails discerning Parliament's intent by examining the words of a statute in their entire context and in their grammatical and ordinary sense, in harmony with the statute's schemes and objects: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21. For example, the general provision on warrantless entry by reason of exigent circumstances (s. 487.11) and the provision authorizing warrantless entry to search for and seize firearms or other weapons in exigent circumstances (s. 117.02(1)) contain no statutory definition of "exigent circumstances". In light of those provisions, there is no good reason to believe that Parliament intended the definition of "exigent circumstances" in s. 529.3(2) of the *Criminal Code* to be read into s. 11(7) of the *CDSA*. I therefore decline the appellant's invitation to "do by 'interpretation' what Parliament chose not to do by enactment" (*Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, 2015 SCC 57, [2015] 3 S.C.R. 615, at para. 53).

[32] All that said, circumstances in which "exigent circumstances" have been recognized have borne close resemblance to the definitional categories in s. 529.3(2). This Court's jurisprudence considering s. 10 of the *Narcotic Control Act*, R.S.C. 1985, c. N-1 (which was repealed and replaced by the *CDSA*), which permitted a peace officer to search a place that was not a dwelling-house without a warrant so long as he or she believed on reasonable grounds that a narcotic offence had been committed, is instructive. That provision was held in *R. v. Grant*, [1993] 3 S.C.R. 223 "*Grant 1993*", to be consistent with s. 8 of the *Charter* if it were read down to permit warrantless searches only where there were exigent circumstances. Such exigent

circumstances were then described to exist where there is an “imminent danger of the loss, removal, destruction or disappearance of the evidence if the search or seizure is delayed” (*Grant* 1993, at p. 243; *R. v. Feeney*, [1997] 2 S.C.R. 13, at para. 153, per L’Heureux-Dubé J., dissenting; and *R. v. Silveira*, [1995] 2 S.C.R. 297, at para. 51, per La Forest J., dissenting). Similarly, circumstances in which “immediate action is required for the safety of the police” were also found to qualify as “exigent” (*Feeney*, at para. 52; see also, in respect of searches to preserve officer safety, this Court’s statement in *R. v. MacDonald*, 2014 SCC 3, [2014] 1 S.C.R. 37, at para. 32, that such searches will be responsive to “dangerous situations created by individuals, to which the police must react ‘on the sudden’”). In *Feeney*, at para. 47, exigency was also said to possibly arise when police officers are in “hot pursuit” of a suspect (see also *R. v. Maccooh*, [1993] 2 S.C.R. 802, at pp. 820-21).

[33] The common theme emerging from these descriptions of “exigent circumstances” in s. 11(7) denotes not merely convenience, propitiousness or economy, but rather *urgency*, arising from circumstances calling for immediate police action to preserve evidence, officer safety or public safety. This threshold is affirmed by the French version of s. 11(7), which reads “*l’urgence de la situation*”.

[34] Even where exigent circumstances are present, however, they are not, on their own, sufficient to justify a warrantless search of a residence under s. 11(7). Those circumstances must render it “impracticable” to obtain a warrant. In this regard, I respectfully disagree with the Court of Appeal’s understanding of s. 11(7) as

contemplating that the impracticability of obtaining a warrant would itself comprise exigent circumstances. The text of s. 11(7) (“by reason of exigent circumstances it would be impracticable to obtain [a warrant]”) makes clear that the impracticability of obtaining a warrant does not support a finding of exigent circumstances. It is the other way around: exigent circumstances must be shown to make it impracticable to obtain a warrant. In other words, “impracticability”, howsoever understood, cannot justify a warrantless search under s. 11(7) on the basis that it constitutes an exigent circumstance. Rather, exigent circumstances must be shown to cause impracticability.

[35] The appellant says that the requirement of “exigent circumstances” rendering it “impracticable” to obtain a warrant requires, in effect, that such circumstances “leav[e] the police *no choice* but to proceed with entering a dwelling-house”. In other words, he maintains that the “impracticability” of obtaining a warrant should be understood to mean impossibility. Conversely, the Crown submits that a much lower threshold is indicated, such that obtaining a warrant is not “realistic” (whatever that may mean) or “practical”.

[36] While I am not persuaded that the strict condition of impossibility urged by the appellant is denoted by Parliament’s chosen statutory language of impracticab[ility], neither am I satisfied by the Crown’s argument equating impracticability with mere impracticality. Viewed in the context of s. 11(7), however — including its requirement of exigent circumstances — “impracticability” suggests on balance a more stringent standard, requiring that it be impossible in practice or

unmanageable to obtain a warrant. The French version of “impracticable” in s. 11(7) — “*difficilement réalisable*” — is also consistent with a condition whose rigour falls short of impossibility but exceeds mere impracticality of obtaining a warrant.³ So understood, then, “impracticable” within the meaning of s. 11(7) contemplates that the exigent nature of the circumstances are such that taking time to obtain a warrant would seriously undermine the objective of police action — whether it be preserving evidence, officer safety or public safety.

[37] In sum, I conclude that, in order for a warrantless entry to satisfy s. 11(7), the Crown must show that the entry was compelled by urgency, calling for immediate police action to preserve evidence, officer safety or public safety. Further, this urgency must be shown to have been such that taking the time to obtain a warrant would pose serious risk to those imperatives.

(2) Was a Warrantless Search Under Section 11(7) Justified in this Case?

[38] The trial judge found that “exigent circumstances” were presented by two factors in this case. First, the police officers had “reasonable grounds to believe that there was a quantity, albeit a small quantity, of a controlled substance in the accused’s

³ For this reason, I stress that the foregoing interpretation of “impracticable” is directed solely to that term as it is employed in s. 11(7) of the *CDSA* to conditions of a warrantless search thereunder. My consideration of the meaning of “impracticable” here should not be taken as applying to that term as it is employed in other criminal statutory provisions, especially where the French version employs a term other than “*difficilement réalisable*”. For example, s. 184.3(1) of the *Criminal Code* allows telewarrants for intercepting private communications where it would be “impracticable” to appear personally before a justice. The French version of s. 184.3(1) employs not “*difficilement réalisable*” but “*peu commode*”. Similarly s. 487.1(4) of the *Criminal Code*, which requires an information submitted for the obtaining of a telewarrant to include “a statement of the circumstances that make it impracticable for the peace officer to appear personally before a justice”, employs “*peu commode*”.

apartment” (para. 75). Second, they reasonably believed “that the controlled substance would be lost, destroyed or consumed given that they did not intend to arrest the accused for possession of this amount of marihuana and accordingly he would have remained in the apartment” (para. 75 (emphasis added)). Those circumstances, he said (at para. 76, quoting *R. v. Erickson*, 2003 BCCA 693, 192 B.C.A.C. 203, at para. 33) made it impracticable (understood as “something less than impossible and import[ing] a large measure of practicality”) to obtain a warrant, such that the police officers’ actions were justified by s. 11(7). The Court of Appeal, in reaching the same conclusion, noted the appellant’s admission to having marihuana in his residence, that the police had no intention of arresting him but only wanted to seize the roaches and be on their way, and that, had they left the appellant to obtain a warrant, “he could have easily destroyed the roaches” (para. 72).

[39] With respect, the prospect of the appellant destroying roaches which the police officers hoped to seize on a “no case” basis and destroy themselves, with no legal consequences to the appellant whatsoever, did not remotely approach s. 11(7)’s threshold of exigency. No urgency compelled immediate action in order to preserve evidence. Nor, just as importantly, did the circumstances presented by the appellant’s admission to having some partially consumed roaches, coupled with the police officers’ wish to seize them on a no case basis, make it impracticable to obtain a warrant. Inconvenient or impractical, perhaps. But s. 11(7) is not satisfied by mere inconvenience, but *impracticability*. In this case, the police had a practicable option: to arrest the appellant and obtain a warrant to enter the residence and seize the

roaches. If, as the Crown says, the situation was not serious enough to arrest and apply for a warrant, then it cannot have been serious enough to intrude into a private residence without a warrant.

[40] There remains the matter of officer safety. As the Court of Appeal observed, Constable Bell's entry behind Constable Dykeman was motivated out of concern for Constable Dykeman's safety. Given the report from C.W.'s mother about the possibility of the appellant having a shotgun, this concern was well-founded. It was not, however, that concern which prompted Constable Dykeman's entry itself. While he testified to his concern for officer safety as well as his fear that the appellant might destroy the roaches, the trial judge saw officer safety (at para. 80) as being "really related to [Constables Dykeman's and Bell's] attempt to carry out the seizure in a less intrusive way". In other words, concern for officer safety did not drive the decision to proceed with warrantless entry; rather, warrantless entry gave rise to concern for officer safety. While Constable Dykeman's concern, like Constable Bell's, was well-founded, it was not the basis for the decision to enter, but the result of the decision to enter. These facts, therefore, do not qualify as exigent circumstances making it impracticable to obtain a warrant, within the meaning of s. 11(7) of the *CDSA*.

[41] It follows that the warrantless entry by the police into the appellant's residence was not authorized by s. 11(7) of the *CDSA*, and infringed his right under s. 8 of the *Charter* to be secure against unreasonable search.

C. *Exclusion of Evidence Under Section 24(2)*

[42] Having come to a different conclusion than the trial judge on the constitutionality of the entry into the appellant's residence, I would not defer to his conclusion regarding exclusion of evidence under s. 24(2) of the *Charter* (*R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353 ("*Grant 2009*"), at para. 129).

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

[43] The court's task in considering the seriousness of *Charter*-infringing state conduct is to situate that conduct on a scale of culpability. As this Court explained in *Grant 2009* (at para. 74), "admission of evidence obtained through inadvertent or minor violations . . . may minimally undermine public confidence in the rule of law", while "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". The Crown's submissions implicitly invoke this distinction, arguing that "the police intended to enter the apartment solely to seize the marihuana, with no 'ulterior purpose'".

[44] My colleague Moldaver J. recalls the trial judge's finding that the police were acting in good faith (para. 66; trial reasons, at para. 79). While "[g]ood faith' on the part of the police will . . . reduce the need for the court to disassociate itself from the police conduct" (*Grant 2009*, at para. 75), good faith errors must be *reasonable* (*R. v. Buhay*, 2003 SCC 30, [2003] 1 S.C.R. 631, at para. 59). This Court

has cautioned that negligence in meeting *Charter* standards cannot be equated to good faith (*Grant* 2009, at para. 75). Even where the *Charter* infringement is not deliberate or the product of systemic or institutional abuse, exclusion has been found to be warranted for clear violations of well-established rules governing state conduct (*R. v. Harrison*, 2009 SCC 34, [2009] 2 S.C.R. 494, at paras. 24-25).

[45] My colleague also places considerable emphasis (paras. 78-92) on the seizure having been made on a “no case” basis and, more to the point, on this fact having “played a crucial role in [the lower courts’] determination that the police entry into the appellant’s apartment without a warrant was lawful.” (paras. 76 and 80). This, he says, makes this case one of “first impression” (paras. 77 and 88).

[46] The intention to effect a “no case” seizure was indeed mentioned by the trial judge and the Court of Appeal while considering the police officers’ good faith (trial reasons, at para. 79) and the level of intrusiveness of the search, relative to an arrest (C.A. reasons, at paras. 72 and 74). That said, neither the trial judge nor the Court of Appeal described it as presenting a novel legal issue, nor was this suggested to us by the Crown. This is unsurprising, and marks my point of respectful departure from my colleague. This is simply not a case of first impression. These police officers were not operating in unknown legal territory: their intention to effect a seizure on a “no case” basis was legally insignificant, in light of the well-established legal principles governing the authority of police to enter a residence without a warrant. The presumptive unreasonableness of warrantless searches, and the high

privacy interest attaching to a person's residence have long been fundamental to our understanding of the proper relationship between citizen and state. And, longstanding judgments of this Court — *Grant* 1993, *Silveira* and *Feeney* — have, in considering the exigency of circumstances prompting warrantless entry, required the Crown to show *urgency*, particularly in the context of the search of a residence. As the Court observed in *Silveira*, at para. 140, “[t]here is no place on earth where persons can have a greater expectation of privacy than within their ‘dwelling-house’.” Similarly, (at para. 41, in dissent, but not on this point), La Forest J. reiterated the high value which the law places upon the security of a home from state intrusion. It is, he said, a “bulwark for the protection of the individual against the state [which] affords the individual a measure of privacy and tranquillity against the overwhelming power of the state”.

[47] No urgency is demonstrated or even suggested by the facts of this appeal. Even accepting, therefore, the Crown's submission about the absence of an “ulterior purpose”, the nature of the *Charter*-infringing state conduct here was, in my view, and in light of this Court's prior statements regarding exigent circumstances, sufficiently serious to favour exclusion of the evidence obtained as a result.

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

[48] 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 standpoint of society's interest in respect for *Charter* rights. This entails

considering the degree to which a *Charter* infringement undermined the *Charter*-protected interest. In this regard, the Court's statement in *Grant* 2009 (at para. 76) should be borne in mind:

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.

[49] Where, therefore, the *Charter*-protected interest in privacy is at stake (as it is here), infringements arising from circumstances denoting a "high expectation of privacy" tend to favour exclusion of evidence, while — all other considerations being equal — infringements of lesser interests in privacy will not pull as strongly towards exclusion. As the Court said in *Grant* 2009 (at para. 78): "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."

[50] The Crown acknowledges that the warrantless entry into the appellant's residence was a "relatively serious intrusion", but says that any impact on the appellant's *Charter*-protected interests was "attenuated by the relative brevity and focussed nature of the initial warrantless search", since the police retreated to obtain a warrant after observing the firearm and drugs. While I agree that the decision by police to obtain a warrant before conducting a further search of the appellant's residence prevented a serious impact on the appellant's privacy interest from

becoming even more serious, I also agree with the Crown that this was a “serious intrusion”, “relativ[e]” to other forms of intrusion. It is well settled that “[a]n illegal search of a house will therefore be seen as more serious at this stage of the analysis” (*Grant* 2009, at para. 113). I therefore conclude that the impact of the warrantless entry on the appellant’s rights under s. 8 of the *Charter* was significant. This factor strongly favours exclusion of the evidence.

(3) Society’s Interest in an Adjudication of the Case on its Merits

[51] It remains to consider the effect of admitting the evidence on the public interest in having a case adjudicated on its merits. This entails considering the reliability of the evidence and its importance to the Crown’s case. On these points, the Crown submits:

Finally, the societal interest in a trial on the merits weighed in favour of admitting the evidence. The exclusion of such highly reliable evidence, essential to the prosecution of serious drug and firearms offences, would exact a heavy toll on the truth seeking function of the trial, and would tend to bring the administration of justice into disrepute.

(R.F., at para. 105)

[52] The charges against the appellant are indisputably serious. Further, I agree with the Crown’s submissions: the evidence seized in the appellant’s residence is highly reliable, and is essential to the Crown’s case against the appellant. This factor strongly supports admitting the evidence, notwithstanding the infringement of the appellant’s s. 8 rights.

(4) The Evidence Should be Excluded

[53] To summarize, the police conduct, while not egregious, represented a serious departure from well-established constitutional norms. The impact of the s. 8 infringement on the appellant's interests protected thereunder was considerable, intruding into a place in which he was entitled to repose the highest expectation of privacy. But the value of the evidence to deciding the truth of the charges against the appellant is also considerable.

[54] This is a close call. As was observed in *Grant* 2009, at para. 140, “[t]he balancing mandated by s. 24(2) is qualitative in nature and therefore not capable of mathematical precision.” Indeed, because the *Grant* factors are mutually incommensurable — balancing seriousness of state conduct, seriousness of the infringement of *Charter* rights and the impact upon society's interest in adjudication — the “balancing” will never be an entirely objective exercise. A reviewing court must, however, come to a reasoned conclusion. While the effective destruction of the Crown's case weighs heavily, so does the warrantless entry into a private residence, having occurred to prevent the appellant from destroying three roaches which the police themselves intended to destroy.

[55] In weighing these considerations, my colleague relies on the seriousness of the offence to hold that excluding the evidence will be “far more likely to cause the public to lose faith and confidence in our criminal justice system” (para. 94). This is premised, however, upon a limited view of public confidence which this Court has

already rejected. As the Court observed in *Grant* 2009 (at para. 84), “seriousness of the alleged offence . . . has the potential to cut both ways. . . . [W]hile 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.” The public interest in maintaining a justice system “above reproach” has helpfully been explained by Doherty J.A. in *R. v. McGuffie*, 2016 ONCA 365, 348 O.A.C. 365, at para. 73:

On the one hand, if the evidence at stake is reliable and important to the Crown’s case, the seriousness of the charge can be said to enhance society’s interests in an adjudication on the merits. On the other hand, society’s concerns that police misconduct not appear to be condoned by the courts, and that individual rights be taken seriously, come to the forefront when the consequences to those whose rights have been infringed are particularly serious [Citations omitted.]

[56] It is therefore important not to allow the third *Grant* 2009 factor of society’s interest in adjudicating a case on its merits to trump all other considerations, particularly where (as here) the impugned conduct was serious and worked a substantial impact on the appellant’s *Charter* right. In this case, I find that the importance of ensuring that such conduct is not condoned by the court favours exclusion. As Doherty J.A. also said in *McGuffie*, at para. 83, “[t]he court can only adequately disassociate the justice system from the police misconduct and reinforce the community’s commitment to individual rights protected by the *Charter* by excluding the evidence. . . . This unpalatable result is the direct product of the manner in which the police chose to conduct themselves.”

[57] Having considered these factors separately and together, I am of the view that the evidence obtained as a result of the entry and search of the appellant's residence should be excluded, as its admission would bring the administration of justice into disrepute.

IV. Conclusion

[58] In view of my conclusion under s. 24(2), it is unnecessary for me to consider whether a late and incomplete filing of the form 5.2 report could itself have constituted an infringement of s. 8 of the *Charter*, and whether it did so in this case.

[59] I would allow the appeal, set aside the appellant's convictions and enter acquittals.

The reasons of Moldaver and Gascon JJ. were delivered by

MOLDAVER J. —

[60] I have had the benefit of reading the reasons of my colleague Justice Brown and I agree with his analysis and conclusion on the voluntariness issue. I also agree with his finding that the police entry into the appellant's apartment violated the appellant's s. 8 privacy rights under the *Canadian Charter of Rights and Freedoms*. Respectfully, however, I do not agree with my colleague's s. 24(2) *Charter* analysis on the admissibility of the firearms and drugs seized by the police from the

appellant's apartment. Those items, in my view, were properly admitted into evidence and I would accordingly dismiss the appeal. In so concluding, like my colleague, I find it unnecessary to decide the issues surrounding the form 5.2 report to the justice, other than to say that even if the late and incomplete filing did constitute a breach of the appellant's s. 8 *Charter* rights, the breach was inadvertent and had no impact on the appellant's privacy interest. As such, it could not possibly have tipped the s. 24(2) scales in favour of exclusion.

I. Background Facts

[61] My colleague has summarized the background facts and I see no need to duplicate his efforts. I do, however, consider it important to identify the specific offences for which the appellant was convicted and the various items of evidence the police seized from his apartment. I also consider it important to refer to the trial judge's assessment of the police conduct and his findings of fact in this regard.

A. *The Offences and Items of Evidence Seized*

[62] The appellant was charged with nine offences, five involving drugs and four involving the illegal possession of handguns. All of the charges stem from evidence found in the appellant's apartment.

[63] The evidence relating to the drug charges consists of the following:

- (a) 825 grams of cocaine, valued at \$31,200 on the wholesale market (possession for the purposes of trafficking);
- (b) 200 grams of methamphetamine, valued at \$5,850 on the wholesale market (possession for the purposes of trafficking);
- (c) 9,000 ecstasy pills, valued at \$17,466 on the wholesale market (possession for the purposes of trafficking);
- (d) a small amount of marijuana (simple possession); and
- (e) a small amount of oxycodone (simple possession).

[64] The evidence relating to the gun charges consists of the following:

- (a) a loaded Smith and Wesson 38 special revolver (a prohibited firearm);
- (b) a loaded Ruger P85 9-millimeter semi-automatic pistol (a restricted firearm);
- (c) a loaded Ruger P90 45-calibre semi-automatic pistol (a restricted firearm); and

- (d) a loaded 1M1 Desert Eagle 44-calibre Remington Magnum semi-automatic pistol (a restricted firearm).

[65] In addition to those items, the appellant was found on arrest to have \$4,655 in cash on his person. Another \$30,000 in cash was found in a box located underneath a couch in the living room area. The police also located a bulletproof vest on the same couch.

B. *Police Conduct*

[66] In the course of his *voir dire* ruling on the admissibility of the evidence seized from the appellant's apartment, the trial judge found that the police were acting in good faith when they entered the appellant's apartment. He specifically rejected the defence's suggestion that their entry into the apartment was a ruse. In his words:

Here, there is no suggestion in the evidence of bad faith or ulterior motive such as might be the case if the stated intention of the police was a mere excuse or ruse to gain entry for the purpose of having a look around. Nothing of that sort was made out on the evidence.

(2011 BCSC 1728, at para. 79 (CanLII))

Rather, the trial judge accepted that the police were engaged in a "no case" seizure, meaning that they simply wanted to retrieve the marijuana roaches and leave, without arresting the appellant or charging him with an offence.

[67] In concluding that the police were acting throughout in good faith, the trial judge observed that in their dealings with the appellant, they conducted themselves in a way which “demonstrated a measure of respect for his privacy rights”; that initially, their entry was “very brief and relatively non-intrusive”; and that once they observed the handgun and ecstasy pills in plain view, “no further search was done (other than a clearing search or searches for officer safety purposes) until a search warrant was sought and obtained” (para. 121). Finally, the trial judge accepted the police evidence that valid safety concerns prevented them from waiting outside the door, in the hallway, while the appellant retrieved the roaches on his own.

II. Analysis

[68] The warrantless entry by the police into the appellant’s apartment in this case is governed by s. 11(7) of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19 (“CDSA”). That provision states:

(7) A peace officer may exercise any of the powers described in subsection (1), (5) or (6) without a warrant if the conditions for obtaining a warrant exist but by reason of exigent circumstances it would be impracticable to obtain one.

(7) L’agent de la paix peut exercer sans mandat les pouvoirs visés aux paragraphes (1), (5) ou (6) lorsque l’urgence de la situation rend son obtention difficilement réalisable, sous réserve que les conditions de délivrance en soient réunies.

[69] It is uncontroversial that the police had lawful authority to seize the roaches and that the conditions for obtaining a warrant existed. The lawfulness of the

police entry without a warrant and the admissibility of the seized evidence under s. 24(2) of the *Charter* are the central issues in this appeal.

[70] The lawfulness of the police entry hinges on whether the requirements of “exigent circumstances” and “impracticab[ility]” were satisfied. Contrary to the findings of the trial judge and three judges of the British Columbia Court of Appeal (2015 BCCA 205, 372 B.C.A.C. 148), Justice Brown finds, and I agree, that these requirements were not met and the police entry into the appellant’s apartment breached his s. 8 privacy rights. In so concluding, however, my colleague finds that the police entry was not just unlawful; he says that they knew or should have known as much — in other words, the police should have known what the trial judge and three judges of the Court of Appeal did not know.

[71] My colleague then turns to s. 24(2) of the *Charter* and finds that the police conduct in breaching the appellant’s s. 8 rights was so serious, and the impact on his privacy interests so great, that the administration of justice would be brought into disrepute if the guns and drugs and other evidence seized by the police were to be admitted into evidence — this, despite the strong findings of the trial judge, which no one challenges, that the police were acting in good faith throughout and that their conduct was designed to spare the appellant the trouble of being arrested for a few roaches of marijuana that they intended to seize on a “no case” basis.

[72] I see this matter very differently than my colleague. The function of this Court, in a case like the present one, is to clarify the law so that police officers,

defence and Crown counsel, trial and appellate judges and the public at large can know what the law is and how it is to be applied in future cases. It is not to judge the police conduct against a standard that exceeds the wisdom and training of experienced trial and appellate judges.

[73] In an effort to clarify the law, I accept that s. 11(7) of the *CDSA* was not available to the police on the facts of this case. Rather, in the circumstances, the police had three options available to them. They could have (1) tried to obtain the appellant's lawful consent to enter his apartment and seize the roaches; (2) arrested the appellant and obtained a warrant to search his apartment and seize the roaches; or (3) thrown up their hands and walked away, in dereliction of their duty to seize illicit drugs, even if only to catalogue and destroy them.

[74] That said, in my respectful view, it is hardly fair to castigate the police for their conduct when prior to this case, the legal boundaries of s. 11(7) in the context of a "no case" seizure were at best unclear. One need only look to the lower court decisions to realize this.

[75] Justice Brown takes a different view. He does not accept that the "no case" component added any novelty to the legal analysis of s. 11(7). In his view, the police "were not operating in unknown legal territory" (para. 46). According to my colleague (para. 39):

. . . the prospect of the appellant destroying roaches which the police officers hoped to seize on a “no case” basis and destroy themselves, with no legal consequences to the appellant whatsoever, did not remotely approach s. 11(7)’s threshold of exigency. [Emphasis added.]

[76] I cannot accept my colleague’s assessment. It involves hindsight reasoning on a matter of some complexity — the interpretation of s. 11(7) in the context of a “no case” seizure — and does a disservice to the reasoning of the lower courts in which the “no case” component played a crucial role in their determination that the police entry into the appellant’s apartment without a warrant was lawful.

[77] That the lower courts focused on the “no case” component comes as no surprise. To my knowledge, this is the first case in which a court has been called upon to interpret s. 11(7) in the context of a “no case” seizure. In other words, it is a case of first impression. Just as this Court is now tasked, for the first time, with determining the meaning and application of the words “exigent circumstances” and “impracticable” in the context of a “no case” seizure under s. 11(7), so too were the lower courts. And as I will explain, their decisions, though ultimately found by this Court to be in error, were both thoughtful and carefully reasoned.

A. *Reasons of the Trial Judge*

[78] In concluding that the Crown had made out a case for exigent circumstances, the trial judge reviewed several authorities from the British Columbia Court of Appeal and interpreted the words “exigent circumstances” in terms that

closely approximate the interpretation my colleague ascribes to them. The trial judge then explained why, in his view, exigent circumstances existed on the facts of this case (para. 75):

. . . in the case at bar the police had: (1) reasonable grounds to believe that there was a quantity, albeit a small quantity, of a controlled substance in the accused's apartment, based on the smell detected when he opened a door as well as his admission, and thus they had grounds to obtain a search warrant; and (2) there was a reasonable basis for their belief that the controlled substance would be lost, destroyed or consumed given that they did not intend to arrest the accused for possession of this amount of marihuana and accordingly he would have remained in the apartment. I am therefore satisfied that the requirement for "exigent circumstances" is met. [Emphasis added.]

[79] The trial judge next considered the impracticability of obtaining a warrant in these circumstances. Following *R. v. Erickson*, 2003 BCCA 693, 192 B.C.A.C. 203, he defined the word "impracticable" as "something less than impossible [that] imports a large measure of practicality, what may be termed common sense" (para. 76, citing *Erickson*, at para. 33). He then stated the following, at para. 77:

. . . I conclude that by reason of the exigent circumstances in this case, it was impracticable to obtain a search warrant such that seizure of the controlled substance under s. 11(7) of the *CDSA* was justified.

[80] As can be seen, the "no case" component played a crucial role in the trial judge's determination that exigent circumstances existed, making it impracticable for police to obtain a warrant before entering the appellant's apartment. To characterize it

as being insignificant to the resolution of the legal issues in this case, as my colleague does, is to ignore the trial judge's explicit reasoning to the contrary.

B. *Reasons of the Court of Appeal*

[81] Nor does my colleague's characterization conform with the reasoning of the Court of Appeal. Like the trial judge, the Court of Appeal was alive to the meaning of "exigent circumstances" and "impracticable". Indeed, in defining "exigent circumstances", the court referred to and quoted from two of the three authorities which my colleague identifies as governing — *R. v. Grant*, [1993] 3 S.C.R. 223 and *R. v. Feeney*, [1997] 2 S.C.R. 13.

[82] In endorsing the trial judge's finding that exigent circumstances existed on the facts of this case, the Court of Appeal considered the appellant's submission that by taking the approach they did, the police artificially created their own exigent circumstances and impracticability. In rejecting that submission, the court quoted from para. 232 of *R. v. M.(N.)* (2007), 223 C.C.C. (3d) 417 (Ont. S.C.J.), in which Hill J. catalogued all of the leading authorities, including *R. v. Silveira*, [1995] 2 S.C.R. 297, to which my colleague refers, dealing with situations of artificial urgency created by the police.

[83] The Court of Appeal then turned its attention to the existence of exigent circumstances and at para. 72, endorsed the trial judge's finding as follows:

As there were clearly grounds to arrest Mr. Paterson and obtain a warrant, I turn to s. 11(7) of the *CDSA*. In analyzing whether the trial judge correctly concluded that s. 11(7) of the *CDSA* applied, I start with the question of whether there were exigent circumstances. In my view, clearly there were. The police smelled marihuana and Mr. Paterson admitted having marihuana in the premises. Mr. Paterson was in the premises, and the police had no intention of arresting him. I note, parenthetically, that the trial judge was alive to the possibility that the police were creating a situation so they could enter the apartment without a warrant, and found that they had not done so. He accepted their evidence that they only wanted to seize the “roaches”, and then would be on their way in a “no case” seizure. Had they left Mr. Paterson to obtain a warrant, he could have easily destroyed the roaches. [Emphasis added.]

As is apparent, the “no case” component played a central role in the court’s “exigent circumstances” analysis.

[84] The Court of Appeal next considered the issue of impracticability, which it defined in accordance with its decision in *Erickson*. The court then returned to the import of the “no case” seizure and made the following significant observation at para. 74:

In this case, the police would have had to arrest Mr. Paterson, a much greater interference with his liberty rights, and obtain a warrant to seize the roaches. The police weighed these options, and concluded that it was not practical (in my words) to take those steps for what they believed would be a “no case” seizure. In these circumstances, the trial judge concluded that it was impracticable to obtain a warrant, and there is no basis to interfere with this finding. [Emphasis added.]

[85] In other words, according to the Court of Appeal, in proceeding as they did, the police weighed their options in the context of a “no case” seizure — (1) arrest the appellant; or (2) enter his apartment without a warrant for a very limited and

narrow purpose — and chose the second option which in their view, was less intrusive and more respectful of the appellant’s *Charter* rights than the first.

C. *The Admissibility of the Evidence Under Section 24(2)*

[86] In the face of these observations by British Columbia’s highest court, I cannot accept my colleague’s position that the “no case” component added nothing new to the legal analysis. And that brings me to the feature of this case — legal uncertainty — which I consider to be crucial in assessing whether the conduct of the police here was so serious and so intrusive of the appellant’s privacy rights that the drugs and loaded firearms located in the appellant’s apartment should be excluded under s. 24(2) of the *Charter* on the basis that their admission would bring the administration of justice into disrepute.

[87] By way of prelude, I accept that the police entry into the apartment was unlawful. To put the matter succinctly, there was no immediate risk of the roaches being destroyed that the police could not have prevented without resorting to a warrantless entry into the appellant’s apartment. In other words, exigent circumstances did not exist. In my view, the word “exigent” connotes urgency — nothing more — and there was no genuine urgency here. The police could have arrested the appellant and obtained a warrant to search his premises. While proceeding that way would have been inconvenient and involved an intrusion of some significance on the appellant’s liberty interest — particularly when this was a “no case” seizure in which the police did not intend to charge the appellant —

inconvenience and the anticipated loss of liberty occasioned by it cannot convert non-exigent circumstances into exigent circumstances. As stated earlier, the police had three options available to them in the circumstances: (1) seek the appellant's lawful consent to enter the apartment and seize the roaches; (2) arrest the appellant and obtain a search warrant; or (3) forget about the roaches and walk away, in dereliction of their duty to seize illicit drugs, even if only to catalogue and destroy them.

[88] That said, I do not find the legal analysis of exigency under s. 11(7) in the context of a “no case” seizure to be straightforward or obvious at all. In this regard, I have gone to some length to show how the “no case” component figured prominently in the decisions of the trial judge and the Court of Appeal — and understandably so. As indicated, this a case of first impression. The law was unsettled at the time the police entered the apartment. One only need compare this Court's analysis of it with that of the lower courts to realize this.

[89] My colleague disagrees. He says this case is not one of first impression. It posed no new legal issues. The police were not acting in “unknown legal territory” (para. 46). They were well aware of the legal principles that governed their entry into a residence in the context of a “no case” seizure — and, in entering the appellant's apartment without a warrant, they either wilfully breached those well-settled principles or ignored them (paras. 45-46). He further maintains that the “no case” component did not feature prominently in the legal analysis which led the trial judge and the Court of Appeal to find that the police entry was lawful. Rather, both courts

merely “mentioned” it “while considering the police officers’ good faith . . . and the level of intrusiveness of the search, relative to an arrest” (para. 46 (citation omitted)). Like the police, they too were perfectly aware of the governing law, which was both clear and settled.

[90] In the case of the police, my colleague relies on this line of reasoning to show that their misconduct was very serious — that they knew or should have known that they had no authority to enter the appellant’s apartment without a warrant, and yet they did so in wanton or reckless disregard of his privacy rights. What he does not, and cannot explain, is why the lower courts, also well versed in the settled law, failed to apply it.

[91] The answer, in my respectful view, is plain. The law governing a “no case” seizure in the context of s. 11(7) was not clear and settled and the decisions of the trial judge and the Court of Appeal attest to this. They show, clearly and decisively, that both courts placed considerable emphasis on the “no case” component in determining that the police entry into the appellant’s apartment was lawful. Much as my colleague contends otherwise, he can point to no authority that even addresses the “no case” component in this context, let alone one that supposedly settles the law.

[92] In sum, contrary to my colleague’s assessment, this case highlights the uncertainty as to the meaning of “exigent circumstances” and “impracticable” under s. 11(7) in the context of a “no case” seizure. I emphasize this uncertainty because over the past number of years, this Court has consistently held that legal uncertainty

is a factor which a court may take into account in assessing the seriousness of a *Charter* breach occasioned by police conduct. Where the law is evolving or in a state of uncertainty, and where the police are found to have acted in good faith, without ignorance or wilful or flagrant disregard of an accused's *Charter* rights, the seriousness of the breach may be attenuated: see *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34, at paras. 86-89; *R. v. Aucoin*, 2012 SCC 66, [2012] 3 S.C.R. 408, at para. 50; *R. v. Vu*, 2013 SCC 60, [2013] 3 S.C.R. 657, at paras. 69 and 71; *R. v. Spencer*, 2014 SCC 43, [2014] 2 S.C.R. 212, at para. 77; and *R. v. Fearon*, 2014 SCC 77, [2014] 3 S.C.R. 621, at paras. 93-95.

[93] That describes to a tee the situation here. The seriousness of the breach is, in my view, clearly attenuated by the uncertainty surrounding the interpretation of s. 11(7) of the *CDSA* in the context of a “no case” seizure, and the strong findings of the trial judge that the police were acting in good faith throughout.

[94] And once the seriousness of the police conduct is properly situated and aligned with the unquestioned reliability of the evidence seized and society's interest in having the case tried on the merits, in my respectful view, the s. 24(2) analysis shifts in favour of admitting the impugned evidence. The police, acting in good faith, made a mistake about their authority to enter the appellant's apartment under the auspices of s. 11(7) in a “no case” seizure — the same mistake that both the trial judge and the British Columbia Court of Appeal made. In these circumstances, I fail to see how the admission of the evidence found in the appellant's apartment would

cause the public to lose faith in the criminal justice system and bring the administration of justice into disrepute. If anything, it is the exclusion of reliable and crucial evidence implicating the appellant in very serious gun and drug offences that is far more likely to cause the public to lose faith and confidence in our criminal justice system.

[95] In so concluding, I do not question that the police entry into the appellant's apartment had a significant impact on the appellant's privacy interest. However, I note that the impugned evidence was lawfully discoverable. Had the police obtained a warrant to seize the roaches, they would have discovered the drugs and guns. Bearing in mind that the police were acting in good faith throughout and that there was no deliberate flouting of the appellant's *Charter* rights, this attenuates the impact of the breach on the appellant's privacy interests: *Cole*, at paras. 89 and 93. I am therefore not persuaded that this factor is sufficient to tip the scales in favour of exclusion.

[96] In sum, it is the cumulative effect of the legal uncertainty, police good faith, and the discoverability and reliability of critical evidence needed for there to be a trial on the merits that resolves the balance in favour of admitting the evidence.

[97] In holding that the evidence of the drugs and guns should be admitted, I should not be taken as condoning police misconduct or failing to take seriously the individual rights of the appellant. I recognize that we must be vigilant in protecting against wilful, deliberate, and even in some cases, negligent misconduct on the part of

the police. But that is not this case. Excluding reliable evidence required to prove serious criminal charges in circumstances where the police, acting in good faith, made a mistake in believing that they could enter the appellant's apartment without a warrant — the very mistake that the trial judge and the Court of Appeal made — does nothing to promote public confidence in the administration of justice. On the contrary, it betrays that confidence.

[98] That said, in a case like this one, where there was a significant intrusion on the appellant's privacy interests, albeit one that occurred in circumstances where the law was unclear and the police were acting in good faith, I would not foreclose the possibility that a remedy short of exclusion might be available under s. 24(1) of the *Charter*, perhaps in the form of a sentence reduction. However, as this point was not raised by the appellant, it must be left for another day.

III. Conclusion

[99] For these reasons, I would dismiss the appeal.

Appeal allowed, convictions set aside and acquittals entered, MOLDAVER and GASCON JJ. dissenting.

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