

SHOCKING THE PUBLIC: EARLY INDICATIONS OF THE MEANING OF "DISREPUTE" IN SECTION 24(2) OF THE CHARTER

Dale Gibson*

The drafters of the *Canadian Charter of Rights and Freedoms* handed judges, lawyers and law professors an intriguing new tool when they stated, in section 24(2) of the *Charter* that "evidence ... obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter ... 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 notion of bringing the administration of justice into disrepute being unique to Canada, foreign analogies offer little assistance. The concept seems to have been employed only once previously in Canadian legislation,¹ and that was so recently that there was, at the time the *Charter* came into force, only one significant judicial examination of the idea. That examination was both incomplete and inconclusive. In the case in question, *Rothman v. The Queen*², the majority of the Supreme Court of Canada did not address the issue, and the three judges who did so had differing views as to what would bring the administration of justice into disrepute. Lamer J. who concurred with the majority in the result, commented at length on the notion, summarizing his thoughts by equating it with that which would "shock the public". Estey J. and Laskin C.J. on the other hand, opted, in dissent, for a more stringent standard.

Academic commentators, including the author of this paper, leaped enthusiastically into the void.³ Now that we have the benefit of 18 months' judicial consideration of the question, it is interesting to compare these first decisions with earlier academic speculation. This paper will comment on the manner in which the early decisions have dealt with certain substantive aspects of the question.⁴

Before turning to those particular aspects, however, a few general remarks may be in order. Section 24(2) of the *Charter* has been invoked frequently during the past 18 months, with the result that the jurisprudence, though far from mature, is much fuller than that which concerns many other aspects of the *Charter*. Those who regarded this new power to exclude unconstitutionally obtained evidence as a desirable improvement in the law will be heartened to know that it has often been employed

* Professor, Faculty of Law, University of Manitoba.

1. *Criminal Code*, R.S.C. 1970, c. C34, s. 178.16(2).

2. [1981] 1 S.C.R. 640.

3. D. Gibson, "Enforcement of the Canadian Charter of Rights and Freedoms", in W. Tarnopolsky and G. Beaudoin., (eds.), *Canadian Charter of Rights and Freedoms: Commentary*, (1982), 489, at 508, *et seq.*; D. Gibson, "Determining Disrepute: Opinion Polls and the Canadian Charter of Rights and Freedoms", (1983), 61 *Can. Bar Rev.* 377; D.C. McDonald, *Legal Rights in the Canadian Charter of Rights and Freedoms*, (1982), at 130, *et seq.*; M. Manning, *Rights, Freedoms and the Courts*, (1983), at 489, *et seq.*; P. Hogg, *Canada Act Annotated*, (1982), at 66-8.

4. Procedural questions will not be dealt with.

by the trial courts; the fear that it would prove to be a mere paper tiger is not generally borne out by the early decisions at the trial level. Of course, as was to be expected, many inconsistencies can be found between the decisions of various courts, and even between various judges within the same courts. At one extreme, for example, one finds the statement that "it would be a very rare case where an illegal search is carried out and ... the admission of evidence obtained as a result of that search would not bring the administration of justice into disrepute",⁵ and at the other an assertion that "cases in which the evidence should be excluded will be rare".⁶ Such discrepancies are likely to persist at least until the Supreme Court of Canada has had an opportunity to provide some general guidelines. Nevertheless, an impressionistic overview of the present jurisprudence discloses a remarkably uniform general attitude to the interpretation of section 24(2). Canadian trial courts appear, in general, to view the section as a significant constitutional protection, to be employed in circumstances where investigators have seriously interfered with other constitutional rights, but not where the interference has been technical or inconsequential.

When the early decisions are compared with academic speculations, both similarities and discrepancies are evident. Many of the academic predictions are being confirmed by the courts. Some of the questions that exercised the scholars have not yet arisen in the courtroom. And the courts have been called upon to deal with some points upon which no prior academic speculation existed.

Let us now turn to a more specific outline of some of the major substantive questions raised by section 24(2).

What is meant by "Administration of Justice"?

Exactly what is it that must be subjected to disrepute in order to call for the exclusion of evidence under section 24(2) of the *Charter*? Some have suggested that "administration of justice" refers only to the courts. Others have speculated that because the term "administration of justice" describes one of the headings of provincial jurisdiction under section 92 of the *Constitution Act, 1867*, its use in the *Charter* should be restricted to those matters which are within provincial jurisdiction. Neither idea seems to have been accepted. In an instructive and influential early decision on the meaning of section 24(2), *R. v. Samson*,⁷ Borins, J., of the Ontario County Court, opted for a very broad interpretation of the term:

I believe that it is clear from the *British North America Act* and the *Administration of Justice Act* that the 'administration of justice', with particular reference to the criminal law, is a compendious term that stands for all the complexes of activity that operate to bring the substantive law of crime to bear, or to keep it from coming to bear, on persons

5. *Per Hutton P.C.J. in R. v. O'Connor* (1983), 2 C.R.D. 850.50-03 (Ont. P.C.).

6. *Per Seaton J.A. in R. v. Collins* (1983), 148 D.L.R. (3d) 40, at 53 (B.C.C.A.).

7. (1982) 37 O.R. (2d) 237 (Ont. Cty. Ct.).

who are suspected of having committed crimes. It refers to the rules of law that govern the detection, investigation, apprehension, interviewing and trial of persons suspected of crime and those persons whose responsibility it is to work within these rules. The administration of justice is not confined to the courts; it encompasses officers of the law and others whose duties are necessary to ensure that the courts function effectively. The concern of the administration of justice is the fair, just and impartial upholding of rights, and punishment of wrongs, according to the rule of law.⁸

This view seems to accord with that of most courts which have dealt with section 24(2).

"Would" or "Could"?

As I pointed out in an earlier article,⁹ the French and English texts of section 24(2) differ substantially. Whereas the English text speaks of that which "would" bring the administration of justice into disrepute, the equivalent expression in the French version is "est susceptible", which is the equivalent of "is capable of" or "could" in English. There seems to be general agreement that the broader French version ought to operate. This was specifically held to be the case by Veit J., of the Alberta Court of Queen's Bench, in *R. v. MacIntyre*,¹⁰ and the case law seems generally to concur.

Whose Opinion?

Section 24(2) does not explicitly state whose disesteem the provision is intended to avoid. Common sense suggests, however, that it is disrepute in the eyes of the general community that is relevant, and despite the occasional suggestion that some other standard, such as the view of "a policeman on the beat",¹¹ or that which would "make a judge vomit",¹² the cases consistently uphold the common sense approach. See, for example, the views by Seaton J.A.:

... [T]he views of the community at large, developed by concerned and thinking citizens, ought to guide the courts when they are questioning whether or not the admission of evidence would bring the administration of justice into disrepute.¹³

How is Public Opinion to be Determined?

There appear to be two ways in which a judge could determine the state of "the views of the community". He or she could simply rely upon his or her individual knowledge of the community, or he or she could consult such scientific evidence of public opinion as might be made available by means of professionally administered public opinion polls. In an earlier article, I suggested the usefulness, within limits, of opinion surveys

8. *Ibid.*, at 246.

9. See Gibson, "Enforcement", *supra*, n. 3, at 517.

10. (1982), 139 D.L.R. (3d) 602 (Alta. Q.B.).

11. *Per* Veit J. in *R. v. MacIntyre*, *ibid.*, at 608. She also stated, however, that the standard should be that of "the ordinary person".

12. Suggestion of a witness (probably tongue-in-cheek) before the Joint Parliamentary Committee: Proceedings #48, p. 124, Jan. 29, 1981.

13. *R. v. Collins*, *supra*, n. 6, at 50.

for this purpose, and discussed some of the problems involved and the methods by which they could be overcome.¹⁴ There is, as yet, no indication that this suggestion has been acted upon by any lawyer, much less any court. So far, judges have chosen (or have been forced) to regard themselves as barometers of public opinion for the purposes of section 24(2). Inevitably, therefore, assessments of that which would bring the administration of justice into disrepute have reflected the views of the judiciary more closely than that of the citizenry at large. As Cardozo J. once said: "We cannot transcend the limitations of the ego and see anything as it really is...."¹⁵

Factors to be Considered

Section 24(2) stipulates that in deciding what would or would not bring the administration of justice into disrepute, the court should have regard "to all the circumstances". Obviously, therefore, no list of factors to be considered could ever be exhaustive. Nevertheless, as the courts have gone about the task of attempting to determine what the public would regard as disreputable in the gathering of evidence, they have indicated certain factors they regard as particularly significant. Generally speaking, these factors correspond to those identified in the earlier academic writing,¹⁶ but certain of these have received considerably more attention than others, and at least one has been added to the list by some courts. The scholarly commentaries, drawing upon the *Rothman* case, and certain royal commission reports, suggested that the following factors ought to be taken into account: willfulness of the *Charter* violation; urgency of obtaining the evidence in the particular manner, and availability of other investigative techniques; fairness to the accused; seriousness of the *Charter* violation; seriousness of the charge being investigated; effect of the violation on the reliability of the evidence; the availability to the accused of other remedies; and the availability of other methods of preventing future *Charter* violations of the same kind.¹⁷ Of these, the courts have given most attention to willfulness and the seriousness of the *Charter* violation. Some courts have purported to add a new factor: the deterrent effect of exclusion on future police behavior. These three items will be discussed separately.

Willfulness has received considerable judicial attention. Obviously, the existence of a willful violation of constitutional rights by the police ought to argue persuasively for exclusion of the resulting evidence, and there are cases to support that view.¹⁸ It does not follow, however, that the absence of willfulness necessarily supports admissibility of the evidence, since police negligence would be condoned or perhaps even encouraged by such an approach. Nevertheless, merely technical or inad-

14. Gibson, "Determining", *supra*, n. 3.

15. B. N. Cardozo, *The Nature of the Judicial Process*, (1921), at 106.

16. See, e.g., Gibson, "Enforcement", *supra*, n. 3, at 519, *et seq.*

17. The final two factors are given special emphasis by McDonald, *supra*, n. 3, at 153.

18. See, e.g., *R. v. Caron*, Ont. Dist. Ct., Nov. 16/82 in *Canadian Charter of Rights Annotated*, at 23.3-15.

vertent *Charter* violations have been held not to invalidate evidence in numerous cases. For example, in *R. v. Hynds*¹⁹ it was held that the administration of justice would not be brought into disrepute by admitting evidence obtained during a search of a house under the authority of a search warrant that contained a typographical error as to the address, and had been "corrected" by the police. In some cases, the fact that the *Charter* had only been in operation for a few months at the time of the police activity in question has been held to excuse "inadvertent" *Charter* violations.²⁰ These cases may strike some as being overly tolerant of the slowness of police to adjust to important changes in the law, but now that 18 months have elapsed since the proclamation of the *Charter*, their significance is diminished. A decision of the British Columbia County Court, *R. v. Thompson*,²¹ makes the important point that even inadvertence can be a basis for the exclusion of evidence under section 24(2) if it amounts in totality to a serious disregard of the accused's constitutional rights. In that case, a number of relatively small errors were involved in the investigation. In holding that the evidence resulting from the flawed investigation should have been rejected, Millward C.C.J. commented:

It may well be that no one of those errors individually would suffice to bring the matter within section 24(2), but here we have such a concatenation of errors, trivial or otherwise, and apparent disregard or indifference to the niceties and the normal rules of procedure in matters of this kind, that the community would be shocked by the acceptance of evidence obtained in this fashion....²²

The seriousness of the *Charter* breach is another factor that has frequently been taken into account by the courts. It was suggested in one decision that certain constitutional guarantees of the *Charter* are more important than others, and that violations of those more important guarantees would be more likely to cause disrepute in the community:

... [s]ome of the rights and freedoms guaranteed by the Charter are more fundamental to the values of society than others. From time immemorial the inviolability of a person's home has been held up and defended as one of the most cherished values.²³

While there are few other decisions in which *Charter* rights have been explicitly ranked in this manner, there does appear to be a greater tendency on the part of the courts to exclude evidence unconstitutionally obtained where the violation of the home or the violation of the person were involved, than in other circumstances. One *Charter* right whose importance does not seem to be agreed upon by the courts is the right to be told of the right to retain counsel. Whereas some courts have obviously placed great significance on that right, others seem to treat it as one of the lesser guarantees under the *Charter*.

A third factor commented upon by a number of courts is the likelihood that exclusion of the evidence in question would deter future similar

19. (1982), 8 W.C.B. 181 (Alta. Q.B.).

20. See, e.g., *R. v. William*, B.C.S.C., Apr. 15/83 in *Canadian Charter of Rights Annotated*, at 23.3-13.

21. (1983), 2 C.R.D. 850.50-06.

22. *Ibid.*

23. *R. v. Carriere* (1983), 32 C.R. (3d) 117, at 140 (Ont. P.C.).

violations by the police. In *R. v. Jackie*,²⁴ for example, Scheibel J., of the Saskatchewan Court of Queen's Bench, rejected breathalyzer evidence obtained by police without notifying the accused of his right to counsel. One of the factors to which the Court attached considerable importance was: "If the evidence is not excluded this type of violation will continue to occur. The courts must be careful not to provide an inducement to the authorities to disregard the rights of an individual."²⁵ In *R. v. Unrau*²⁶ Judge Durreault of the Manitoba County Court, placed great emphasis on the same factor:

Nothing is more likely to bring the administration of justice into disrepute than the judicial sanctioning of infringement of denial by the police of our constitutionally enshrined rights. It is totally unacceptable that the police not be bound by the rule of law and one sure way of having the police conform to the law is for the courts to exclude in proceedings initiated by the police any evidence obtained in a manner which constitutes a breach of *Charter* rights. That ought to be the clear message to all law enforcement agencies of the land....²⁷

This approach was firmly rejected, in *R. v. Johnston*,²⁸ by Shupe P.C.J., of the British Columbia Provincial Court, in refusing to exclude evidence of a breath sample obtained without informing the accused of the right to retain counsel:

It is not open to a court in Canada to exclude evidence to discipline the police. The court has only to exclude evidence to avoid the administration of justice being brought into disrepute.²⁹

Although it is submitted that Judge Shupe went too far in some of his other comments (such as his assertion that the accused must show "some element of *mala fides*" on the part of the police), the view expressed about deterrence would appear to be correct.

Deterrence of unconstitutional behavior by police is probably the basic rationale for the American rule of evidence that evidence obtained as a result of an unconstitutional search or seizure should automatically be excluded.³⁰ However, it is clear from the history of the enactment of section 24(2)³¹ that the American rule of total exclusion was not desired by those who fashioned the *Charter*, and that the unique Canadian solution embodied in section 24(2) was clearly intended to permit the admissibility of evidence resulting from some forms of unconstitutional police behavior. As Judge Shupe points out, only those forms of unconstitutionally obtained evidence whose admission would bring the administration of justice into disrepute can be excluded. Since *any* exclusion would have a

24. (1983), 3 C.R.D. 200.30-07.

25. *Ibid.*

26. (1983), 3 C.R.D. 200.30-08.

27. *Ibid.*

28. (1983), 2 C.R.D. 425.60-08.

29. *Ibid.*

30. "The rule's prime purpose is to deter future unlawful police conduct." *Per* Powell J. in *U.S. v. Calandra*, 414 U.S. 338, at 347 (1974).

31. See Gibson, "Enforcement", *supra*, n. 3, at 509, *et seq.*

deterrent effect on police, the question of deterrence should be of no assistance in deciding what to exclude.

Derivative Evidence

The fact that unconstitutionally obtained evidence will be excluded from use in the courtroom does not necessarily mean that the temptation to use unconstitutional means will disappear. A high percentage of evidence that does find its way to the courtroom is derivative in nature — evidence located as a result of a lead given by some earlier evidence.³² The wording of section 24(2) does not clearly indicate whether the unconstitutionality of one piece of evidence will also exclude other evidence derived from it. American authorities have ruled that such derivative evidence ("the fruit of a poison tree") should be excluded.³³ The Canadian cases have not yet dealt conclusively with the question.

The point of raising the question here is to take issue with a suggestion by Mr. Justice D.C. McDonald, in his book *Legal Rights in the Canadian Charter of Rights and Freedoms*,³⁴ that derivative evidence is not affected by section 24(2). Mr. Justice McDonald points to the fact that the section says "the evidence shall be excluded...", indicating that it is only the primary evidence that can be affected by the section. It is submitted, with respect, that this does not follow. The key words, so far as derivative evidence is concerned, are surely "obtained in a manner that infringed or denied any rights or freedoms". The word "the" upon which Mr. Justice McDonald places emphasis refers to whatever evidence is tendered in court. The question to be answered is whether that evidence can be said to have been "obtained" in a manner that infringed rights guaranteed by the *Charter* if it could not have been obtained without the initial breach of constitutional rights. That is certainly not an easy question, but it is submitted that the argument in favor of exclusion of the derivative evidence is much stronger than Mr. Justice McDonald's comment would indicate.

Causation

I suggested in an earlier article that the question of causation would raise difficult problems. This has proved to be the case, however, the line that some courts have taken on the question is surprising.

The causation problem is well illustrated by a decision of Berger, J., of the British Columbia Supreme Court in *R. v. Mason*.³⁵ The accused was held in custody for three hours before being informed of the reasons for detention. He subsequently made statements to the police which were the subject of an application for exclusion. Mr. Justice Berger held that although there had been a breach of the accused's constitutional rights,

32. *Ibid.*, at 518.

33. *Nardone v. U.S.*, 308 U.S. 338, at 341 (1939).

34. *Supra*, n. 3, at 135-6.

35. (1983), 9 W.C.B. 384.

that breach had not caused the statements to be made and the statements were accordingly found to be admissible.

While that decision is hard to fault, I suggested in my earlier article³⁶ that there are often situations in which although the *probability* of causation cannot be proved, there is nevertheless a significant *possibility*. I pointed to certain developments in the law of torts which might permit a court to shift the burden of proof in such circumstances to the shoulders of the wrongdoer. While the courts do not yet appear to have picked up the idea of shifting the burden of proof, some of them have seized upon the existence of a substantial *possibility* of causation as satisfactory proof that a causal link existed. In *R. v. Nott*³⁷ for example, a judge of the Ontario Provincial Court held that the failure of a constable to inform the accused of his right to counsel justified the rejection of evidence that the accused refused to comply with a breathalyzer demand. The judge commented:

... [I]t was *possible* that had the accused been informed of his right to instruct counsel he would have taken advantage of that right and learned of his obligation to comply with the demand and then done so.³⁸

In *R. v. Simmons*³⁹ Judge Kent of the Ontario County Court excluded evidence of drugs found on a woman's body because she was not informed without delay of her right to retain and instruct counsel. On the causation issue, he stated:

Her lawyer *may* have advised her that under Section 144 of the *Customs Act* she had the right to have the decision to search her reviewed. This review *may* have prevented the search.⁴⁰

An even more interesting approach was that of Judge Collins of the British Columbia Provincial Court, in *R. v. Fraser*.⁴¹ This was another case in which a demand for a breath sample was refused in circumstances where the accused was not informed of his right to retain and consult counsel. The application for exclusion of the evidence that the accused refused a demand for a breath sample was based not on section 24(2), but on the general remedies provision: section 24(1). Judge Collins held that "there need not be a causal connection between the denial or infringement of the right and the evidence sought to be excluded when the provisions of section 24(1) are relied upon, although that would be something for consideration when determining whether the admission of evidence is a just and appropriate remedy".⁴² The evidence was excluded. Assuming that evidence may be excluded under the discretionary power granted by section 24(1), as well as under the mandatory provisions of sections 24(2)

36. Gibson, "Enforcement", *supra*, n. 3, at 524, *et seq.*

37. (1982), 69 C.C.C. (2d) 135.

38. *Ibid.*, at 137 (Emphasis added).

39. (1983), 3 C.R.D. 825.30-01.

40. *Ibid.* (Emphasis added).

41. (1983), 3 C.R.D. 200.30-04.

42. *Ibid.*

(a question to be discussed below), it is not easy to understand why causation should be irrelevant simply because the judge has a discretion as to the granting of the relief. The judge would, it is respectfully submitted, have done better to rely on the existence of the possibility of causation, as the courts did in the above cases, rather than to deny the necessity of causation altogether.

Relation of s. 24(2) to s. 24(1)

As the *Fraser* case indicated, some courts have taken the position that there are two different powers to exclude unconstitutionally obtained evidence granted by the *Charter*: the *mandatory* exclusion under section 24(2) where the administration of justice would be brought into disrepute by admission of the evidence, and a *discretionary* power, as part of the general discretionary remedial authority granted by section 24(1). By this view, evidence may be excluded, on a discretionary basis, even if its admission would not bring the administration of justice into disrepute. This is a possibility that escaped the notice of most early commentators.⁴³

The most authoritative application of this approach so far is the decision of the Saskatchewan Court of Appeal in *R. v. Therens*,⁴⁴ in which it was held, by a majority of two judges to one, that evidence which, though unconstitutionally obtained, would not bring the administration of justice into disrepute, should be excluded under the courts' general discretionary power of relief pursuant to subsection 1. Brownridge J.A. dissented, holding that subsection 2 grants an exhaustive exclusion power, which may only be exercised where the administration of justice would be brought into disrepute.

This important issue is likely to divide the courts until it is ruled upon by the Supreme Court of Canada. Looking at the text of the two subsections in isolation from all other considerations, it would appear that either interpretation is equally possible. The drafting history of the section is suggestive, but inconclusive.⁴⁵ Manning argues that the specific section, s. 24(2), should take priority over the general section, s. 24(1) in this case.⁴⁶ But there are other interpretative presumptions which pull in the opposite direction, such as the principles that remedial measures should be construed in a "large and liberal" manner, and that ambiguities should be resolved in favor of the liberty of the subject. It is submitted that, on balance, the approach of the Saskatchewan Court of Appeal in *Therens* has much to recommend it, on both legal and policy grounds.

43. Manning foresaw the question, however. See *supra*, n. 3, at 489-90.

44. (1983), 5 C.C.C. (3d) 409.

45. See Gibson, "Enforcement", *supra*, n. 3, at 511-12, and Manning, *supra*, n. 3, at 490.

46. Manning, *ibid.*

