

Section 24(2) of the *Charter* in the Manitoban Court of Appeal

David Deutscher*

En examinant l'art. 24(2) de la Charte et son application par la Cour d'Appel du Manitoba, avant et après la décision de la Cour Suprême du Canada dans R. c. Collins, on constate qu'il n'y a pas de nouvelle tendance cohérente manitobaine.

Through an examination of the Charter's s. 24(2) and its application in the Manitoban Court of Appeal both before and after the Supreme Court of Canada's decision in R. v. Collins, no consistent Manitoban trends are found to have emerged.

INTRODUCTION

ONE OF THE MOST COMMON *Charter of Rights*¹ issues to arise in criminal trials is whether or not evidence obtained as a result of a *Charter* violation ought to be admitted into evidence at that trial. In many cases, the admission or exclusion of the contested evidence will determine the outcome of the trial. In *R. v. Therens*,² the Supreme Court of Canada held that the admissibility of evidence obtained in this manner will be governed exclusively by the provisions of s. 24(2) of the *Charter*.

The purpose of this paper is to examine the application of s. 24(2) in the Manitoban courts in 1988. The Supreme Court of Canada has recently stated that, unless there has been an error in principle, it will not interfere in decisions made by the provincial appellate courts.³ As a result, it is of some importance to determine if there are any discernable trends in these courts in favour of exclusion or admission of evidence. In effect, in this province, the Manitoban Court of Appeal is the court of last resort on this issue. In order to attempt to make this determination, I propose to firstly examine the provisions of s. 24(2) of the *Charter*.

* Professor, Faculty of Law in the University of Manitoba.

1 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982 (U.K.)*, 1982, c. 11; hereinafter referred to as the *Charter*.

2 [1985] 1 S.C.R. 613.

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

This will be followed by an examination of the Manitoban Court of Appeal cases decided prior to the decision of the Supreme Court of Canada in *R. v. Collins*,⁴ the leading case in the area. This will be followed by an examination of the *Collins* decision. Lastly, I will review some of the cases decided in Manitoba in 1988, with particular reference to decisions made by the Court of Appeal.

I. SECTION 24(2) OF THE CHARTER

SECTION 24(2) of the *Charter* states:

Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this *Charter*, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

The key words in this section are "would bring the administration of justice into disrepute". These words are nebulous and capable of many meanings. On one hand, it could be said that admitting evidence obtained "in a manner that infringed or denied" constitutional rights would result in the court effectively countenancing the violation of those constitutional rights. This result would almost automatically bring the administration of justice into disrepute. Use of this kind of analysis would result in a system where exclusion would be the rule rather than the exception. On the other hand, it could be argued that to exclude otherwise admissible and often important evidence, would lead to guilt or innocence being determined without all the facts being before the court. Would a reputable system of justice permit this result? Use of this kind of analysis would lead to a system where evidence would rarely be excluded. In the early days of the *Charter*, some courts leaned one way and some the other. I submit that the results were often dependant on the views of the individual judge on the effect of the *Charter* on the legal system. This *ad hoc* decision-making process made it difficult to formulate and establish principles for the application of this section.

An examination of the reported judgments of the Manitoban Court of Appeal prior to the *Collins*⁵ case is an example of this type of decision-making. There did not seem to be any consistent principles applied. However, except in one instance, the result was the same, the evidence was admitted.

4 [1987] 1 S.C.R. 265.

5 *Ibid.*

II. THE MANITOBAN COURT OF APPEAL BEFORE COLLINS

A. *R. v. Esau*⁶

Decided in 1983, *R. v. Esau* was the first case on s. 24(2) that the Manitoba Court of Appeal considered. The facts were relatively simple. The accused's automobile was searched without warrant and a quantity of marijuana was found. As a result of this event, a search warrant was obtained, and a search of the accused's home resulted in a further quantity of the drug being found. The trial judge found that the evidence was obtained as a result of an unreasonable search contrary to the provisions of s. 8 of the *Charter*. He further held that to admit such evidence would bring the administration of justice into disrepute and excluded the evidence. As a result, the accused was acquitted.

On appeal, Huband J.A. reviewed the factual circumstances and held that the search was a reasonable one. Therefore, it was not necessary to deal with the question of the admissibility of the evidence. However, Huband J.A. went on to deal with this issue. One might have thought that he would provide some guidance for lower courts. Undoubtedly, in the early days of the *Charter*, this was an issue that would come before the courts on a regular basis. A clear statement from the Court of Appeal on the principles to be applied would have been welcome. However, the reasoning provided was somewhat elliptical. Huband J.A. referred to the common law principle that illegally obtained evidence was admissible except in cases where it was of slight probative value and where it is highly prejudicial to the accused. He then went on to state:

I do not find it necessary to attempt to define what is meant by "bringing the administration of justice into disrepute". Dealing solely with the case at hand, I would say that the admission of the drugs... does not bring the administration of justice into disrepute.... There was no trickery, no forced confession, and no situation where the evidence sought to be admitted is highly prejudicial but of tenuous probative value.⁷

Although not dealing with the issue in a principled fashion, Huband J.A. seemed to be sending the message that the *Charter* had not significantly changed the common law position. This message was reinforced in the next case heard by the Court.

6 (1983) 4 C.C.C. (3d) 530 (Man. C.A.).

7 *Ibid.* at 537.

B. R. v. Sabourin⁸

Sabourin refused to provide a breath sample contrary to the provisions of the *Criminal Code*. He alleged that, although he was informed of his right to retain and instruct counsel by the arresting police officer, he did not understand what was said to him. It was argued that this lack of understanding resulted in a breach of Sabourin's rights under s. 10(b) of the *Charter*, and as a consequence the evidence of his refusal ought to be excluded.

The court held that in the circumstances of this case there was no *Charter* violation. However, Huband J.A. chose to deal with the issue of the admissibility of the evidence of the refusal.

He reiterated the theme that he first enunciated in *Esau*.⁹ He stated:

Section 24(2) has not suddenly made inadmissible that which was previously admissible. Section 24(2) specifically contemplates that the courts will continue to admit illegally obtained evidence, including evidence in a manner that infringed the *Charter* itself. It is only where the circumstances would bring the administration of justice into disrepute that evidence obtained in violation of the *Charter* is to be excluded.

Under s. 24(2) the Court will continue to exercise discretion to exclude evidence of trifling probative value but highly prejudicial to the accused. There will be additional cases such as *R. v. Manninen* where evidence will now be excluded. There is, however, nothing in the circumstances of this case which would bring the administration of justice into disrepute by admitting the crucial evidence of the accused's refusal to take a breathalyser test.¹⁰

It seemed that at this point the Court was enunciating the proposition, albeit in obiter, that s. 24(2) would only result in the exclusion of evidence in extremely limited circumstances. These circumstances would ordinarily be equivalent to the limited common law discretion to exclude evidence. In effect, Huband J.A. was taking the position that s. 24(2) would have a minimal impact on the admissibility of evidence. Unfortunately, no reasons are given for taking this position, nor are any reasons given for admitting evidence in both *Esau* and *Sabourin* that relate to the meaning of the words "bring the administration of justice into disrepute." The court was unwilling to give any definition to the key words of s. 24(2), but at the same time, it was prepared to say that the admission of the contested evidence would not bring the administration of justice into disrepute. Without any guidance on the meaning of this key phrase, it would be extremely difficult for a lower court to use these cases in its decision-making process. As well, counsel

8 (1984) 13 C.C.C. (3d) 68 (Man. C.A.).

9 *Supra*, note 6.

10 *Supra*, note 8 at 73. See also *R. v. Manninen* (1984) 8 C.C.C. (3d) 193 (Ont. C.A.).

preparing to argue cases involving the interpretation of s. 24(2) were not provided an adequate framework to develop their arguments.

*C. R. v. Pohoretsky*¹¹

In the case of *R. v. Pohoretsky*, Philp J.A. attempted to delineate the factors relevant to making a determination under s. 24(2). In that case, Pohoretsky and Ramage were both involved in automobile accidents. Blood samples were taken from them without their consent. It was found that taking the blood was an unreasonable search contrary to s. 8 of the *Charter*. As a result, the issue was whether the blood alcohol readings obtained from these blood samples were admissible in evidence.

In his discussion of the test to be applied, Philp J.A. accepted Seaton J.A.'s formulation in the British Columbian Court of Appeal decision in *Collins*.¹² Seaton J.A. stated:

Disrepute in whose eyes? That which would bring the administration of justice into disrepute in the eyes of a policeman might be the precise action that would be highly regarded in the eyes of a law teacher. I do not think that we are to look at this matter through the eyes of a policeman or a law teacher, or a judge for that matter. I think that it is the community at large, including the policeman and the law teacher and the judge, through whose eyes we are to see this question....

I do not suggest that the courts should respond to public clamour or opinion polls. I do suggest that the 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

Philp J.A. went on to state that disrepute was to be tested objectively. He outlined some of the matters that ought to be considered when applying this test. These are:

- 1.the nature and extent of the illegality;
- 2.the manner in which the evidence was obtained;
- 3.the good faith or lack of good faith of the persons who obtained the evidence;
- 4.whether the accused's rights under the *Charter* were knowingly infringed;
- 5.the seriousness of the charge;
- 6.the nature of the evidence obtained; and,
- 7.the public's reaction to, or attitude towards the particular offence.¹⁴

In this case, the application of the test resulted in the evidence being admitted. Philp J.A. outlined his analysis in the following terms:

11 (1985) 18 C.C.C. (3d) 104 (Man. C.A.).

12 (1983) 33 C.R. (3d) 130 (B.C.C.A.).

13 Cited in *Esau*, *supra*, note 6 at 122.

14 *Ibid.* at 123-4.

I am left with no doubt that the administration of justice would not be brought into disrepute if the challenged evidence was admitted. The seizures did not constitute gross invasions of the persons. The samples were taken at hospitals by duly qualified medical personnel. The taking of the samples involved a commonplace procedure posing virtually no risk, trauma or pain to Pohoretsky or Ramage. Time was a factor. In each case the two hour period within which a blood sample may be taken was running out. The police officers did not flagrantly abuse their power nor does their conduct amount to a gross invasion of privacy. That the police officers were acting in good faith is not questioned. The charge before the court in each case is a serious one in the eyes of the community and, in each case, the challenged evidence was relevant and important.¹⁵

By outlining the above factors, Philp J.A. provided a framework that could be used by counsel and lower courts in both argument and decision-making. However, no overview of s. 24(2) was provided; that is, although the factors to be weighed were outlined, there was no discussion of why the application of these factors would or would not result in evidence bringing the administration of justice into disrepute. This case set out the "how" but not the "why".

*D. R. v. Neufeld*¹⁶

In this case the majority of the Court held that the random stopping of the accused's vehicle violated either, or both, s. 8 and s. 9 of the *Charter*. The issue then became whether the results of a breathalyser test obtained after stopping the accused's vehicle were admissible in evidence. Hall J.A. did not discuss s. 24(2) at all. O'Sullivan J.A., who did, did not use the framework set out by Philp J.A. in *Pohoretsky*¹⁷ to determine the issue of admissibility. In fact, *Pohoretsky* was not mentioned in his judgment. Rather, he determined that this case could not be distinguished from the previously decided Supreme Court of Canada cases of

15 *Ibid.* at 124. On appeal, (1987) 75 N.R. 1, the Supreme Court of Canada reversed this finding. Lamer J. speaking for a unanimous court stated at 5:

... I consider this unreasonable search to be a very serious one. First, a violation of the sanctity of a person's body is much more serious than that of his office or even of his home. Secondly, it was wilful and deliberate, and there is no suggestion here that the police acted inadvertently or in good faith,... quite the contrary. They took advantage of the appellant's unconsciousness to obtain evidence which they had no right to obtain from him without his consent had he been conscious. The effect of their conduct was to conscript the appellant against himself. I am not unmindful of the fact that the police officers indeed had ample reasonable and probable grounds to believe that the appellant had committed the offence.... Nevertheless, given the seriousness of the violation and the clear provisions of the *Criminal Code* as it then stood, I am satisfied that the admission of the blood sample to convict the appellant would bring the administration of justice into disrepute.

16 (1986) 22 C.C.C. (3d) 65 (Man. C.A.).

17 *Supra*, note 11.

*Rahn*¹⁸ and *Trask*¹⁹ and as a result the evidence was excluded. Although both of the above cases are clearly distinguishable on the basis that they involved violations of s. 10(b) of the *Charter*, there is no discussion of what factors in the Supreme Court cases made them indistinguishable. However, of greater interest is O'Sullivan J.A.'s view of s. 24(2). He stated:

I do not understand the reasons of Estey J.A. in that case [*Therens*] suggesting that admitting illegally obtained evidence may result in impunity for police officers who violate the *Charter*. A criminal proceeding is not one between police officers and the accused, but between the Queen and the accused. She enjoys impunity by virtue of her sovereignty and by the Constitution. I do not see why she or the people should be punished by allowing guilty people to go free because of the mistakes of police officers.

I would have preferred to see *Charter* law developed by excluding evidence when the community would be shocked by its admission, as when an officer posing as a priest obtains a voluntary confession, or when a voluntary confession is given only after an unreasonable delay in bringing an accused before a justice.²⁰

It is quite clear that if he had not felt bound by higher Court decisions, O'Sullivan J.A. would have given a very narrow meaning to s. 24(2).

*E. R. v. Dairy Supplies*²¹

The last case decided by the Manitoban Court of Appeal prior to *Collins* was *R. v. Dairy Supplies Ltd.* The issue in that case was whether or not documents obtained as a result of a violation of s. 8 of the *Charter* were admissible in a prosecution under the *Combines Investigation Act*.

The trial judge had held that the violation of s. 8 was flagrant in the sense that it was a clear breach of the *Charter*. He further held that, on the basis of the Supreme Court of Canada ruling in *R. v. Therens*,²² a flagrant breach required the evidence to be excluded. O'Sullivan J.A. disagreed with this assertion and stated that

In my opinion, it is not necessary to characterize the nature of the breach in this way. A finding that the breach was flagrant is not determinative of the question of admissibility. The nature of the breach is only one, though an important factor, in considering the question: Would admitting the evidence bring the administration of justice into disrepute?²³

18 (1985) 18 C.C.C. (3d) 97 (S.C.C.).

19 (1985) 18 C.C.C. (3d) 514 (S.C.C.).

20 *Supra*, note 16 at 72.

21 [1987] 2 W.W.R. 661 (Man. C.A.).

22 *Supra*, note 2.

23 *Ibid.* at 665.

He then went on to discuss *Pohoretsky*²⁴ and the factors set out in that case. He fixed upon the nature of the evidence obtained as the key factor in the case before him. He distinguished between evidence that would not have come into existence but for the existence of an illegality, and evidence that existed prior to the illegality but was discovered as a result of the illegality. The former would not be admissible, while the latter would. He put it this way:

In my opinion, there is a clear distinction that can be made between the type of evidence that was dealt with in *Therens* and the type of evidence that is dealt with in the case before us. In *Therens*, there was a question of a breathalyser test which would not have come into existence but for the illegality. There are other cases where statements have been excluded where they would not have come into existence but for the existence of an illegality. In such cases the administration of justice may be brought into disrepute if evidence that would not exist but for illegality were admitted into evidence. On the other hand, we deal here with documents which were in existence before the illegality. They did not come into existence following an illegal and unconstitutional act. The illegal act did not in this case in any sense create or lead to self-incrimination. The documents existed before the illegal act. What the illegal act has done is to make police officers aware of what was already in existence. Certainly if, during an illegal search, a dead body were to be discovered in a car it could scarcely bring the administration of justice into disrepute to introduce evidence as to its existence. So, whether or not the breach was flagrant, the evidence was simply not of a kind to require a ruling of inadmissibility.²⁵

O'Sullivan J.A. seemingly adopted the position that admissibility is primarily dependant on the nature of the evidence and not on the nature of the violation. As will be seen, this proposition was not fully accepted by the Supreme Court of Canada in *Collins*.²⁶

F. Summary

As can be seen, prior to the *Collins* decision, the Manitoban Court of Appeal did not develop a unified philosophical perspective or approach to the application of s. 24(2) of the *Charter*. If any common denominator can be discerned from these decisions, it is that the Court took a narrow view of the section; that is, the Court generally did not want to exclude evidence. This is exemplified by Huband J.A.'s reasons

24 *Supra*, note 11.

25 *Supra*, note 21 at 668. On appeal, [1988] 1 S.C.R. 665, the Supreme Court of Canada upheld the result. The following is the entire Supreme Court decision:

This appeal comes to us as of right. Applying to the facts of this case the principles laid down by this Court in *R. v. Collins*, [1987] 1 S.C.R. 265, *R. v. Sieben*, [1987] 1 S.C.R. 295, *R. v. Hamill*, [1987] 1 S.C.R. 301, we find no error in the Court below in exercising its jurisdiction to review the judge's finding under s. 24(2) of the *Canadian Charter of Rights and Freedoms*.

26 *Supra*, note 4.

in *Esau*²⁷ and *Sabourin*.²⁸ In those cases he seemed to enunciate the position that s. 24(2) did little more than restate the common law position that evidence is only to be excluded when the evidence is marginally relevant and highly prejudicial. As well, O'Sullivan J.A. in *Neufeld*²⁹ stated a preference for an interpretation that would exclude evidence when the community would be shocked by its admission. Unfortunately, there are no reasons given for these positions. Even Philp J.A.'s analysis in *Pohoretsky*³⁰ only set up the mechanics and not the theory. What remains to be seen is whether the reasoning in *Collins* had any effect on the way in which the Court of Appeal applied s. 24(2).

IV. R. v. COLLINS³¹

Collins was the first case in which the Supreme Court of Canada extensively discussed s. 24(2). The facts as set out by Lamer J. are:

... Ruby Collins, was seated in a pub... when she was suddenly seized by the throat and pulled down to the floor by a man who said to her "police officer." The police officer, then noticing that she had her hand clenched around an object, instructed her to let go of the object. As it turned out, she had a green balloon containing heroin.

It is common knowledge that drug traffickers often keep their drugs in balloons or condoms in their mouths so that they may, when approached by the Narcotics Control Agent, swallow the drugs without harm and recoup them subsequently. The "throat hold" is used to prevent them from swallowing the drugs.³²

Ms Collins was subsequently charged with possession of heroin for the purpose of trafficking. The court assumed that for the purposes of this appeal the drugs were obtained in violation of s. 8 of the *Charter*.

Lamer J., writing for the majority,³³ first dealt with the question of onus; that is, must the accused prove that the administration of justice would be brought into disrepute by admitting the contested evidence, or must the Crown prove that it would not? He held that the person applying to have the evidence excluded has the onus of proof. The standard of persuasion required is the civil standard of the balance of probabilities.

27 *Supra*, note 6.

28 *Supra*, note 8.

29 *Supra*, note 16.

30 *Supra*, note 11.

31 *Supra*, note 4.

32 *Ibid.* at 270.

33 Lamer J. wrote on behalf of Dickson C.J., Wilson and LaForest JJ., and himself. Ledain J. wrote a separate concurrence, while McIntyre J. dissented.

He then went on to discuss the meaning of the phrase "bringing the administration of justice into disrepute." He set out the broad principles in this way:

It is whether the admission of the evidence would bring the administration of justice into disrepute that is the applicable test. Misconduct by the police in the investigatory process often has some effect on the repute of the administration of justice, but s. 24(2) is not a remedy for police misconduct, requiring the exclusion of the evidence if, because of this misconduct, the administration of justice was brought into disrepute. Section 24(2) could well have been drafted in that way, but it was not. Rather, the drafters of the Charter decided to focus on the admission of the evidence in the proceedings, and the purpose of s. 24(2) is to prevent having the administration of justice brought into further disrepute by the admission of the evidence in the proceedings. *This further disrepute will result from the admission of evidence that would deprive the accused of a fair hearing, or from judicial condonation of unacceptable conduct by the investigatory and prosecutorial agencies.* It will also be necessary to consider any disrepute that may result from the exclusion of the evidence. It would be inconsistent with the purpose of s. 24(2) to exclude evidence if its exclusion would bring the administration of justice into greater disrepute than would its admission. Finally, it must be emphasized that even though the inquiry under s. 24(2) will necessarily focus on the specific prosecution, it is the long-term consequences of regular admission or exclusion of this type of evidence on the repute of the administration of justice which must be considered....³⁴

Thus it seems that at least three questions must be asked before a court decides whether to admit or exclude evidence obtained as a result of a *Charter* violation:

1. Would the admission of the evidence result in the accused being deprived of a fair trial?
2. Would the admission of the evidence result in judicial condonation of unacceptable conduct by the police or the prosecutor?
3. Would the exclusion of the evidence result in the administration of justice being brought into greater disrepute than its admission?

If the answer to either of the first two questions is "yes" and the answer to the third question is "no," the evidence is to be excluded. Any other combination of answers would result in the evidence being admitted.

Lamer J. then stated that the question of disrepute must be looked at through the eyes of the reasonable person "dispassionate and fully apprised of the circumstances of the case."³⁵ Lamer J. was obviously aware of the fact that the use of a reasonable person test can result in a significant degree of variation in the test's application from one judge to another. What is reasonable in one person's perception may be un-

³⁴ *Supra*, note 4 at 280-1 [emphasis added].

³⁵ *Ibid.* at 282.

reasonable in another's. In order to try to limit the obvious discretion inherent in this test, he outlined the nature of the decision in the following manner:

The decision is thus not left to the untrammelled discretion of the judge. In practice, as Professor Morissette wrote, the reasonable person test is there to require of judges that they "concentrate on what they do best: finding within themselves, with cautiousness and impartiality, a basis for their own decisions, articulating their reasons carefully and accepting review by a higher court where it occurs." It serves as a reminder to each individual judge that his discretion is grounded in community values, and, in particular, long term community values. He should not render a decision that would be unacceptable to the community when that community is not being wrought with passion or otherwise under passing stress due to current events. In effect, the judge will have met this test if the judges of the Court of Appeal will decline to interfere with his decision, even though they might have decided the matter differently, using the well-known statement that they are of the view that the decision was not unreasonable.³⁶

A further limitation of the judge's discretion is Lamer J.'s holding that evidence that affects the fairness of the trial will generally be excluded. After listing a number of factors used by appellate courts in determining the issue of admissibility, Lamer J. stated:

Certain of the factors listed are relevant in determining the effect of the admission of the evidence on the fairness of the trial. The trial is a key part of the administration of justice, and the fairness of Canadian trials is a major source of the repute of the system and is now a right guaranteed by s. 11(d) of the *Charter*. *If the admission of the evidence in some way affects the fairness of the trial, then the admission of the evidence would tend to bring the administration of justice into disrepute and, subject to a consideration of the other factors, the evidence generally should be excluded.*³⁷

Lamer J. further stated that the admission of real evidence would rarely affect the fairness of the trial. He accepted the distinction between pre-existing real evidence and self-incriminatory evidence for the purposes of s. 24(2). Therefore, it seems that self-incriminating evidence obtained as a result of a *Charter* violation would ordinarily be excluded while real evidence would have to be considered in light of other factors, such as the nature of the *Charter* violation, the seriousness of the charge, and whether its exclusion would bring the administration of justice into greater disrepute than its admission.³⁸

36 *Ibid.* at 282-283. See also, Morissette, "The Exclusion of Evidence under the *Canadian Charter of Rights and Freedoms: What To Do and What Not to Do*" (1984), 29 McGill L.J. 521.

37 *Ibid.* at 284 [emphasis added].

38 Contrast this with O'Sullivan J.A.'s decision in

Based on this analysis, one would have thought that the evidence of the heroin found in Ms Collins' hand would have been admitted. However, Lamer J. took a different view of the matter. He held that the evidence ought to have been excluded for the following reasons:

The evidence obtained as a result of the search was real evidence, and, while prejudicial to the accused as evidence tendered by the Crown usually is, there is nothing to suggest that its use at the trial would render the trial unfair. In addition, it is true that the cost of excluding the evidence would be high: someone who was found guilty at trial of a relatively serious offence will evade conviction. Such a result could bring the administration of justice into disrepute. However, the administration of justice would be brought into greater disrepute, at least in my respectful view, if this Court did not exclude the evidence and dissociate itself from the conduct of the police in this case which, always on the assumption that the officer merely had suspicions, was a flagrant and serious violation of the rights of an individual. Indeed, we cannot accept that police officers take flying tackles at people and seize them by the throat when they do not have reasonable and probable grounds to believe that those people are either dangerous or handlers of drugs.³⁹

Collins sets out a philosophical framework for the application of s. 24(2). In effect, evidence that affects the fairness of the trial, usually confessions or other self-incriminatory evidence, will ordinarily be excluded. Given the number of factors to be considered, the admission or exclusion of evidence, the admission of which would condone prosecutorial or police misconduct, is the subject of a wide discretion on the part of the judge or judges deciding the issue. The philosophy behind making the fairness of the trial, the paramount consideration in determining whether or not the administration of justice is brought into disrepute by the admission of evidence, is one that accords with society's sense of justice. It is appropriate that the discretion to admit this type of evidence is limited.

Unfortunately, the same cannot be said for other types of evidence. Although a philosophy that states that the administration of justice is brought into disrepute by the judicial condonation of police or prosecutorial violations of the *Charter* is an appropriate one, the wide discretion left to the judiciary in determining the question of admissibility has the potential of leading to haphazard and sometimes inconsistent results. *Collins* is a case in point, where both the trial judge and a unanimous British Columbian Court of Appeal ruled that in spite of the *Charter* violation the evidence ought to be admitted. The Supreme Court of Canada ruled 5 to 1 that it ought to be excluded. In effect, the

Dairy Supplies, supra, note 21, where it seemed that real evidence would be admitted regardless of any other factors.

³⁹ *Supra*, note 4 at 288.

same number of judges, five, ruled that the evidence ought to be admitted, as did that it ought to be excluded. Hopefully, as more cases are decided by both the provincial appellate courts and the Supreme Court, a pattern will emerge that will lead to some level of consistency.

As discussed previously, the Manitoban Court of Appeal decisions prior to *Collins* lacked a philosophic base such as the one set out in that case. I will now examine the cases decided by the Court of Appeal in 1988 in order to determine how the *Collins* decision has been applied by Manitoba's highest court.

V. SECTION 24(2) IN 1988

THE COURT OF APPEAL dealt with the application of s. 24(2) in three written decisions in 1988. However, the judges who wrote on the issue did not clearly apply the reasoning in *Collins* in their reasons for judgement. I will deal with these cases chronologically.

A. *R. v. McLean*⁴⁰

The facts of this case are relatively simple. The accused's car was stopped by a police officer late at night. Although there was a minor aberration in his driving pattern, no traffic offence had been committed. As a result of discussion with the accused, the police officer made a demand that the accused blow into a roadside screening device (A.L.E.R.T.). Mr McLean refused. He was subsequently convicted of failing to comply with an A.L.E.R.T. demand. On the initial appeal to the Court of Queen's Bench, this conviction was reversed. Miller J. held that the accused had been arbitrarily detained contrary to s. 9 of the *Charter*, and as a consequence, the evidence of the refusal was excluded by virtue of s. 24(2). Miller J. was seemingly of the view that he was bound to exclude the evidence once a *Charter* violation took place. This was clearly in error.

In coming to its decision, the Court of Appeal held that Mr McLean was not arbitrarily detained. Therefore, there was no real need to discuss s. 24(2). However, Lyon J.A. chose to deal with the issue. He did so in the following manner:

Even if the facts could be held to support a finding of unlawful detention under s. 9, no sufficient case can be made that the evidence of the A.L.E.R.T. demand should be excluded pursuant to s. 24(2) of the *Charter*. Indeed, in the circumstances of this case, it is the exclusion of such evidence which would undoubtedly tend to bring the administration of justice into disrepute, not the opposite.⁴¹

40 (1988) 51 Man. R. (2d) 170 (Man. C.A.).

41 *Ibid.* at 172.

As can be seen there are no real reasons attached to this conclusion. In particular there is no discussion of why the criteria set out in *Collins* had not been met. Clearly the contested evidence is self-incriminatory and could be said to affect the fairness of the trial. However, this concept is not mentioned in the decision. As well, although balancing the disrepute of exclusion against the disrepute of admission is given as the reason for admission, there are no reasons given for this conclusion. As a result, it is impossible to determine the basis for Lyon J.A.'s conclusion or the factors that lead to that conclusion.

B. R. v. Spence⁴²

Peter Spence was standing at the corner of Stella and Main in the City of Winnipeg with another man. As the two bore a resemblance to persons who were involved in an earlier altercation with some off duty police officers, they were approached by two police officers and asked to produce identification. When Spence's companion was producing his identification, a police badge was seen by the police officers. The companion was arrested immediately on a charge of possession of goods obtained by crime. Although there was no evidence that Spence knew of or was in any way involved with this badge, he was arrested also. Spence was then taken to the police station and put in a locked holding room. He was left in that room for a period of over two hours. During this period, Spence was implicated in the earlier altercation by his companion. It was conceded that the arrest resulted in an arbitrary detention and that a violation of s. 9 of the *Charter* had occurred. The investigating officers then went into the holding room and re-arrested Spence on a charge of aggravated assault. He was informed, as he had been on his earlier arrest of his right to remain silent and his right to retain and instruct counsel without delay. He then made a statement admitting his participation in the earlier altercation. As a result, the issue before the Court was whether this statement was admissible.

Huband J.A., speaking for the majority,⁴³ held that the statement was inadmissible. Most of his judgment dealt with the question of whether or not the statement came about as a result of the breach of the *Charter* or was independent of it. The trial judge had held that the statement had not come about directly from the breach and the detention was not a lengthy one. These facts, together with the fact that the charge was serious and that the police were not acting in bad faith led to the statement being admitted at trial. Huband J.A. dealt with the issue of admissibility in these terms:

42 (1988) 51 Man. R. (2d) 142 (Man. C.A.).

43 O'Sullivan J.A., concurring; Lyon J.A. dissented.

I think that any substantial arbitrary detention is too long. This is not a case to which might be applied the maxim *de minimis non curat lex*. To be arrested and detained on a charge for which there is no foundation constitutes an improper exercise of police power that must have a frightening impact upon the wronged citizen. The accused was held on that improper charge for two and a half hours before an arrest on a proper foundation was made. I do not think it can be said that his confession was not affected by the demonstration of improper police power which he had experienced. Since the loss of liberty may have contributed to his willingness to incriminate himself when finally re-arrested on a proper charge, I would conclude that the admission of his confession into evidence would indeed bring the administration of justice into disrepute....⁴⁴

Again, the reasoning in the *Collins* decision is not dealt with at all. Although the confession was self-incriminating and its admission would obviously affect the fairness of the trial, that concept is not discussed at all. In fact, *Collins* is not cited by Huband J.A. in his decision. This is perplexing given that an application of the principles in *Collins* would have led to the same result.

Lyon J.A. dissented taking a significantly different view of the issue. His views of this case, and in particular his approach to s. 24(2) if followed, would result in almost no evidence obtained as a result of a *Charter* violation being excluded. He deals with Huband J.A.'s reasoning in the following manner:

In the case at bar, Peter Johnson Spence was far from being an innocent or wronged citizen. When apprehended by the police, he knew that the night previous he had participated in a brutal street assault. To be arrested on an unrelated charge was, temporarily at least, more a stroke of luck than "the demonstration of improper police power." His state of mind before he confessed was therefore not that of an innocent citizen. Spence was possessed of his guilty secret. Human nature being what it is, the most "frightening impact" he faced was that of being implicated in the crime he had committed.

To suggest however, that the impugned actions of the police are so fundamentally unacceptable as to require the exclusion of Spence's confession is, with respect, a highly disproportionate and excessive remedy. And to exclude it pursuant to s. 24(2) of the *Charter* is unjustified and does more to bring the administration of justice into disrepute than would the admission of the confession....⁴⁵

He then goes on to state that "the exclusion of evidence pursuant to s. 24(2) should occur... only in highly exceptional cases...."⁴⁶ Quite clearly, Lyon J.A. disagrees with the Supreme Court's analysis of s. 24(2) in *Collins*. For in that case, it was clearly stated that if the appropriate crite-

44 *Supra*, note 42 at 145-6.

45 *Ibid.* at 146.

46 *Ibid.* at 149.

ria are met, the evidence is to be excluded. There is no indication in that judgment that s. 24(2) is to be used in the unusual case.

It is also of interest to note that Lyon J.A. does not discuss the criteria set out in *Collins*. In particular, he comes to his conclusion without discussing the notion of the effect of the admission of the impugned evidence on the fairness of the trial. Surely, based on the Supreme Court's ruling, this is the primary issue to be decided. Based on this concept, I would submit that it would be difficult to argue that the evidence ought to be admitted.

Perhaps Lyon J.A.'s view of this case is dictated by his view of the judicial role in interpreting the *Charter* and in particular his view of the prospect of persons who are in fact guilty of criminal offences being let free due to violations of their rights under the *Charter*. This view is set out in the following passages from the *Spence* decision:

I agree that full protection for the rights of all accused was and remains a hallmark of our system of justice. With respect, however, that is only one of a number of noble purposes which the *Charter* is meant to serve. Surely the *Charter* was enacted to serve the cause of liberty in all of its aspects. If that be the case, that great cause cannot be assisted by narrowly-based interpretations which result in guilty criminals going free merely because of strained and sometimes esoteric judicially created criteria.⁴⁷

And,

In this context judicial interpretations of the *Charter* since 1982 which have resulted in the spectacle of patently guilty criminals being acquitted, accorded new trials or convicted of lesser offences have understandably not been readily understood or appreciated in the Canadian community. It is at once baffling to the public and frustrating to law enforcers to witness the Courts, in the name of the *Charter* holding the police to standards of conduct representing the acme of human perfection while turning a blind eye to gross acts of criminality by accused persons.⁴⁸

He continued:

Just as the citizen is readily able to distinguish the fireman from the arsonist, so the courts in their interpretations of the *Charter* must equally be vigilant to distinguish, in keeping with the rule of law, the law enforcer, from the criminal. In the public perception, there is no moral equivalence between the two. He who assaults, steals, breaks and enters homes and businesses and commits mayhem and murder is widely regarded as an enemy of freedom. If the courts, no matter how well intentioned, lose sight of that basic reality when interpreting the *Charter*, there will be, in the words of Lord Reid in *Attorney General v. Times Newspaper Ltd.*, ... "real prejudice to the ad-

47 *Ibid.* at 149.

48 *Ibid.* at 150.

ministration of justice...." and, I would add to the integrity and community acceptance of the *Charter* itself.⁴⁹

If this view of *Charter* generally and s. 24(2) in particular was to be accepted by a majority of the judges on the Court, the unfortunate result would be that the remedy of exclusion of evidence would become non-existent in Manitoba. However, given the encouraging result in *Spence*, hopefully this will not be the case.

*C. R. v. Carrière*⁵⁰

This is another spot-check case. It is also another breathalyser case. The police were stopping all vehicles containing persons who appeared to have been fishing near a recreational area. The purpose of stopping these vehicles was to determine if there were any violations under the *Fisheries Act*. The accused would not have been stopped for any other reason. Once he was stopped, his condition was such that a breathalyser demand was made. There was no lawful authority for stopping the accused's vehicle. He complied and his readings were over .08.

Both the trial court and the Court of Queen's Bench on appeal⁵¹ ruled that the accused was arbitrarily detained, and as a result his rights under s. 9 of the *Charter* were violated. As well, both lower courts, applying s. 24(2), excluded the evidence of the breathalyser readings.

Kennedy J. of the Court of Queen's Bench dealt with the question of admissibility in the following manner:

What, other than the exclusion of wrongfully obtained evidence will prevent encroachment into the personal lives of the public? A proper balance and proportion must be kept in mind, but in the circumstances of this case, where a conservation officer checks all vehicles of suspected fishermen without statutory authority to do so, the community interests come into conflict with the rights of the individual. Applying the reasoning in *R. v. Collins* and having regard to all of the circumstances, including the nature of the *Charter* breach, and the nature of the evidence sought to be excluded, under these circumstances the admission of the evidence would, in my opinion, bring the administration of justice into disrepute.⁵²

This was another case where self-incriminating evidence was in issue. Although Kennedy J. dealt with the issue parenthetically, the effect of the admission of the evidence on the fairness of the trial is not dealt with in his judgment. Hall J.A. speaking for a unanimous Court of Appeal dealt with the issue in this way:

49 *Ibid.* at 150-1.

50 (1989) 55 Man. R. (2d) 161 (Man. C.A.).

51 (1989) 54 Man. R. (2d) 197 (Q.B.).

52 *Ibid.* at 199-200.

In the present case, the learned justice of appeal appears to have excluded the evidence on the primary basis that only the exclusion of wrongfully obtained evidence will prevent encroachment into the personal lives of the public. With respect, that is the wrong test. On the facts of this case, it would adopting the language of Lamer, J. in *Collins* be inconsistent with the purpose of s. 24(2) to exclude the evidence, namely the results of the breathalyser test, as its exclusion would bring the administration of justice into greater disrepute than would its admission.⁵³

Hall J.A. did not deal with Kennedy J.'s assertion that he also took into account the nature of the evidence and nature of the *Charter* breach when he held that the trial judge properly excluded the evidence. As in the previous post *Collins* cases, the effect of the admission of the evidence on the fairness of the trial was not referred to at all. When self-incriminatory evidence is considered, it would seem that this issue ought to be dealt with prior to admitting the evidence. Unfortunately, the Manitoban Court of Appeal has chosen to ignore this point in the cases that came before it in 1988. As well, there were no reasons given by the Court when it determined that the administration of justice would be brought into greater disrepute by the admission of the evidence than by its exclusion. This deficiency in its reasoning process has permeated the decisions of the Court in this area.

D. Lower Court Decisions

By way of comparison, some of the lower courts in the province have considered the issue in the manner set out in *Collins*. Two examples are, *R. v. Frost* in the Court of Queen's Bench, and *R. v. Ryle* in the Provincial Court.

1. *R. v. Frost*⁵⁴

Mr Frost was a suspected drug trafficker. He had been under surveillance by the police for a period of approximately eight months. During this period he had been stopped and personally searched on three occasions. Each time no drugs were found. As well, his house was searched and a substance suspected to be hashish was found, but no charges were laid. On 8 May 1987, the police were about to set up another stake-out. Prior to the setting up of this stake-out, the accused's car was seen on the highway by the police officer supervising the investigation. Based on the supervising officer's orders, Frost's car was stopped, and both the car and he were searched. There was no other reason for stopping the car other than the fact that the police officer supervising the drug investigation had ordered it to be done. About four ounces of marijuana

53 *Supra*, note 50 at 164.

54 (1988) 53 Man. R. (2d) 180 (Q.B.).

were found when the car was searched. Not surprisingly, this search was held to be an unreasonable one, and as a result the accused's rights under s. 8 of the *Charter* were violated. De Graves J. characterized the conduct of the police in the following terms: "The decision to stop the accused and his passenger was arbitrary and impulsive. It, having regard to the previous three personal searches and the search of the home of the accused, amounted to harassment."⁵⁵

In accordance with *Collins*, he stated that the issue was whether objectively, in the circumstances, admitting the evidence would result in judicial condonation of the unconstitutional behaviour on the part of the police. After setting out the various factors to be considered, he came to the following conclusion:

The imperative of enforcing the law is respecting the law. We must start and end on the premise that police must behave lawfully. Zeal in enforcing criminal law must be balanced by the public recognition of the inviolate rights of the person.

The admission of the evidence would give "judicial condonation" to conduct which was overt and a flagrant violation of the accused's rights and would bring the administration of justice into disrepute.⁵⁶

As can be seen, De Graves J. applied the test enunciated by the Supreme Court in *Collins*. In this case, the fairness of the trial was not the issue. The only issue was whether the admission of the evidence would result in judicial condonation of police behaviour that amounted to harassment. De Graves J.'s view that this conduct could not be condoned, is a good example of the application of the test set out in *Collins*. Even though the evidence was real, and the offence was relatively serious, appropriate reasons for excluding the evidence were provided. Although one could argue with the result, it cannot be said that the decision was an unreasonable one.

2. *R. v. Ryle*⁵⁷

The accused was walking down the street in the company of several other young people at about 12:30 A.M. Most of these young people had bicycles. They were stopped by the police, and after a short conversation, the police decided to check the serial numbers of the bicycles. A computer check revealed that the bicycle in the accused's possession had been stolen about ten days earlier. As a result, he was arrested and subsequently charged with possession of goods obtained by crime.

55 *Ibid.* at 185.

56 *Ibid.* at 186.

57 (16 September 1988) (Man. Prov. Ct) [unreported].

Devine Prov.Ct.J. ruled that the search conducted by the police in this case was an unreasonable one. Therefore, the issue of admissibility had to be determined. Devine Prov.Ct.J. stated that she would be guided by *Collins* on determining the issue of admissibility. In coming to her determination, she described the police conduct in the following way: "The search of the bicycle was not a mere technical violation of rights.... It was rather a deliberate intrusion by the police on the privacy of the accused without even any pretext of legal justification."⁵⁸ She then stated that this evidence did not go to the fairness of the trial as the evidence was not of the self-incriminatory type. She further described the actions of the police as a fishing expedition.

She then dealt with the matter of "judicial condonation" in the following fashion:

The fact that evidence of a crime was discovered does not and cannot serve as a kind of retroactive justification for the illegal search. If this evidence from a blatantly illegal search is admitted into evidence, with respect to a crime of this nature, the significance of the *Charter* protection against unreasonable search and seizure will be trivialized for the community at large, as well as for the police as a special interest group in the community. Potentially, the admission of the evidence could be seen by the community and the police as judicial condonation of improper investigatory techniques by the police. If that is so, these techniques are then more likely to be continued. The potential is significant for detrimental impact on the repute of the administration of justice in the long term.⁵⁹

As directed by *Collins*, she went on to consider whether the administration of justice would be brought into greater disrepute by its exclusion than by its admission. She stated:

I must also consider whether the exclusion of the evidence would bring the administration of justice into further disrepute. In this regard I adopt the comments in *R. v. Vaughan* (1987) 33 C.C.C. (3d) 426, a decision in which the Quebec Court of Appeal approved the exclusion of evidence obtained on a charge of possession of stolen goods by an illegal search of a motor vehicle stopped for a routine highway traffic check:

No doubt, there are those who will say that this is but another instance where a criminal will go free because of the *Charter*. Perhaps it is, but I ask myself how this same person would react if his or her home were searched without a warrant, or if he or she were to be accosted on the street by a constable with the demand that he turn his pockets inside out or that she open her purse? The principle involved is greater than the case....

58 *Ibid.* at p.8.

59 *Ibid.* at 8-9.

In that light, I do not believe that further disrepute will be brought upon the administration of justice by excluding the evidence necessary to convict this young man found with a stolen bicycle.⁶⁰

Ryle is a good example of the proper application of the principles articulated by Lamer J. in *Collins*. Devine Prov.Ct.J. asks the appropriate questions and gives reasons for her answers to those questions. Although one might not agree with her conclusion, that conclusion was supported by reasoning consistent with the *Collins* decision. Unfortunately, the same cannot be said for the decisions of the Manitoban Court of Appeal in this area of the law.

VI. CONCLUSION

THE DECISIONS of the Manitoban Court of Appeal prior to the *Collins* decision revealed a lack of a philosophical basis for those decisions. As a result, it would have been difficult as counsel to formulate arguments for or against the exclusion of evidence obtained as a result of a *Charter* violation. As well, lower court judges received no guidance on the manner in which their decisions ought to be framed. Unfortunately, this state of affairs continued after *Collins* was decided by the Supreme Court of Canada. Although *Collins* provided the philosophical framework, the Court of Appeal did not employ this framework in the reasoning of its 1988 decisions. Hopefully, the Court will take notice of lower court decisions in cases such as *Frost* and *Ryle* and will decide s. 24(2) cases in a manner consistent with the principles in *Collins*. This will permit both the lower courts and counsel to be appropriately guided by those decisions. Until that happens it is impossible to determine any trend in the decisions of the Court.

60 *Ibid.* at 10.