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Prohibited Methods of Obtaining and Presenting Evidence

Canada Report

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Obtaining Evidence

1. Describe briefly the legal rules in your country that restrain persons from obtaining evidence in breach of fundamental rights, such as physical and moral integrity, privacy

SOURCES OF LAW

There are four distinct sources of law in Canada: the common law (in all but Quebec), the civil law (Quebec), legislation and the constitution. The rules of evidence in Quebec are governed by civil law and are codified (since 1994). While the analytical approach is different, the objective of evidence law is very similar. The common law applies to the rest of the country and is the foundation of the rules of evidence in criminal cases throughout Canada. The country has a unitary court system with the Supreme Court of Canada at its apex. As the final appeal court, the Supreme Court of Canada resolves any conflicts in the lower courts to ensure the common law is uniform. Canadian courts have either general or limited jurisdiction, but every court applies all laws necessary to resolve a matter within its jurisdiction. Judges decide the law in all disputes.

Canada is a federation of 10 provinces and 3 territories. Each of these regions has its own government which can enact legislation that alters the common law. In addition, there is a federal government whose laws apply across the country. As a result of the terms of the union embodied in the *Constitution Act, 1867* (UK), the federal and provincial governments legislate on different subject matters.[1] For instance, only the federal government can legislate on banking, criminal law or citizenship and only the provincial governments can pass laws in relation to contracts, hospitals, liability for negligence, or procedure in civil lawsuits. Both levels of government are equally constrained by the *Canadian Charter of Rights and Freedoms*,[2] which was constitutionally enshrined in 1982.

SOURCES OF RIGHTS

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[1] The division of legislative authority between the two equal levels of government is the subject of case law since 1867 and listed for the most part in ss 91-92 of the *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3.

[2] Part I of the Constitution Act, 1982, being Schedule B of the Canada Act 1982 (UK), 1982, c 11. [*Charter*]

Canadians hold rights under all sources of law and each source may accord similar protection to a particular right, for example, many laws protect the individual interest in preserving physical security and in maintaining privacy). The strongest protection of fundamental rights, and from the admission of evidence obtained in breach of them, is the *Charter*. Legislation can change the common law in a manner that is rights enhancing or rights detracting but no law, whether legislation or common law, can be inconsistent with the *Charter*.

The rights contained in the *Charter* range from collective rights like minority language education,[3] to classic individual rights such as freedom of expression and assembly,[4] to familiar legal rights that are triggered by police and prosecutorial action.[5] The *Constitution* is the supreme law of Canada and no law that limits a right or freedom contained in the *Charter* will be enforced by a court unless that limitation is "demonstrably justified in a free and democratic society."[6] Critically, the *Charter* only applies to the state and not to private citizens or institutions.[7] Any statute or common law power relied on by the state to obtain and admit evidence can be challenged for compliance with the *Charter*. Many of the laws and practices regulating search and seizure of evidence by the state, for instance, have been successfully challenged for non-conformity with the *Charter*.[8]

SOURCES OF EVIDENCE RULES

The vast majority of the rules of evidence applicable in Canada are common law in origin, although some have been altered or overridden by statute. Each level of government can legislate on the rules of evidence for the subject matters that are within their respective jurisdictions. The legislation may be general, as in the federal *Canada Evidence Act*,[9] or

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[3] *Ibid* at s 23.

[4] *Ibid* at s 2. The fundamental freedoms are: freedom of conscience and religion [s 2(a)]; freedom of thought, belief, opinion and expression [s 2(b)]; freedom of peaceful assembly [s 2(c)]; and freedom of association [s 2(d)].

[5] *Ibid* at ss 7-14. These are: the right to life, liberty, and security of the person [s 7]; the right to be free from unreasonable search and seizure [s 8]; the right not to be arbitrarily detained or imprisoned [s 9]; upon arrest or detention, the rights to be informed of the reasons therefor [s 10(a)], to retain and instruct counsel [s 10(b)], and have the validity of the detention determined by way of habeus corpus [s 10(c)]; when charged with an offence, the rights to be informed of the specific offence [s 11(a)], to have it tried within a reasonable time [s 11(b)], to not be conscripted as a witness against him or herself [s 11(c)], to be presumed innocent [s 11(d)], to not be denied reasonable bail without just cause [s 11(e)], to trial by jury when the potential jail time is greater than five years [s 11(f)], to not be found guilty unless the act or omission was a crime in Canadian or international law when performed [s 11(g)], if finally acquitted or found guilty, not to be tried for the same offence again [s 11(h)], and a right to the benefit of the lesser sentence if the punishment for the offence has been varied between the time of the commission and the time of sentencing [s 11(i)]; the right to be free from cruel and unusual punishment [s 12]; the right against self-incrimination [s 13]; and the right of any party or witness to an interpreter when necessary [s 14].

[6] *Ibid* at s 1. The test is formulated in *R v Oakes*, [1986] 1 SCR 103 at paras 69-71, 26 DLR (4th) 200.

[7] *Supra* note 2 at s 32. See also *RWDSU v Dolphin Delivery*, [1986] 2 SCR 573, 33 DLR (4th) 174; *McKinney v University of Guelph*, [1990] 3 SCR 229, 76 DLR (4th) 545.

[8] See, most recently: *R v Campbell*, 2011 SCC 32, [2011] SCJ No 32, *R v Morelli*, 2010 SCC 8, [2010] 1 SCR 253. The leading authority is *Hunter et al v Southam Inc*, [1984] 2 SCR 145, 11 DLR (4th) 641: for a search warrant to be consistent with the *Charter*, the police must provide "reasonable and probable grounds, established upon oath, to believe that an offence has been committed and that there is evidence to be found at the place of the search." (at page 168)

[9] RSC 1985, c C-5.

specific, as in particular sections of the *Criminal Code*[10] that control the type of evidence admissible at different stages of criminal proceedings (such as bail, trial, and sentencing). Most civil disputes are regulated by provincial evidence rules.[11]

EVIDENCE LAW IN COURT[12]

The fundamental principle underlying Canadian evidence rules is that all relevant evidence is admissible in court unless it is excluded by a clear ground of law or policy.[13] Relevance is easily established: any evidence that has any tendency to prove or disprove a fact in issue is relevant.[14] Similar to many other common law jurisdictions, Canadian law recognizes a power or residual discretion in the trial judge to exclude otherwise admissible evidence on the basis that its probative value is outweighed by the prejudice that may flow from it.[15] In a criminal case, this discretion is exercised differently when it is the defence seeking to admit evidence: the prejudice at issue must substantially outweigh the value of the evidence before a judge will exclude it.[16]

The trial judge will determine what is relevant and admissible as a question of law. Legal errors can be appealed to a higher court. If there is a jury, the jury decides what weight or probative value, if any, to attach to the evidence. If there is no jury, the trial judge performs the role of both trier of fact and trier of law. Factual errors can be appealed only if the error is palpable and overriding. With respect to criminal cases, it is more difficult for the state to appeal an acquittal than for an accused to appeal a conviction.[17]

RELATIONSHIPS BETWEEN LAWS ON RIGHTS AND EVIDENCE RULES: COERCED CONFESSIONS

To illustrate the interplay between the various sources of law and their impact on rights and evidence rules, consider the individual's interest in not being assaulted and thereby forced to confess to a crime. Freedom from an unlawful assault is protected in all three sources of Canadian law. At common law, an assault attracts civil liability; by legislation, it is a crime

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[10] RSC 1985, c C-46.

[11] For example: *Evidence Act*, RSNS 1989, c 154; *Evidence Act*, RSO 1990, c E-23; *Evidence Act*, RSBC 1996, c 124; etc...

[12] A few of the leading textbooks on Evidence Law in Canada are:

> David Paciocco & Lee Steuser, *The Law of Evidence*, Revised 5th ed (Toronto: Irwin Law, 2010).
> Alan Bryant, Sidney Lederman & Michelle Fuerst, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, 3d ed (Toronto: LexisNexis, 2009).
> S Casey Hill, David Tanovich & Louis Strezos, eds, *McWilliams' Canadian Criminal Evidence*, 4th ed looseleaf (Aurora: Canada Law Book, 2003).

[13] *R v Morris*, [1983] 2 SCR 190, 7 CCC (3d) 97 at 98-99

[14] *R v Watson* (1996), 30 OR (3d) 161, 108 CCC (3d) 310 (CA)

[15] *R v Seaboyer*, [1991] 2 SCR 577, [1991] SCJ No 62.

[16] *Ibid*

[17] The state (in Canada, the "Crown") has a limited right of appeal from an acquittal in a criminal case ("a question of law alone," *Criminal Code*, *supra* note 10 at s 676(1)(*a*)) in contrast to the broader right of appeal given by to an accused from a conviction. The Crown has no right to appeal what it regards as an "unreasonable acquittal": *R v Kent*, [1994] 3 SCR 133, 117 DLR (4th) 345; *R v Morin*, [1988] 2 SCR 345, 44 CCC (3d) 193; and *R v Biniaris*, 2000 SCC 15, [2000] 1 SCR 381, 184 DLR (4th) 193 at para 33.

prohibited under the *Criminal Code*; and finally, as a human right that can be pressed against the state it is manifested in section 7 of the *Charter* which provides: "[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." The common law prevents admission of accused statements obtained "by fear of prejudice or hope of advantage" but only when "exercised or held out by a person in authority."[18] Statements coerced from an accused by someone who is not a person in authority are, by contrast, admissible at common law.[19] Private individuals acting in their private capacity are not usually persons in authority. The Supreme Court of Canada refused to eliminate the "person in authority" requirement because, in their opinion, such a "significant change … could bring about complex and unforeseeable consequences."[20]

2. What are the legal/procedural consequences of such breaches?

The *Charter* has had a profound impact on criminal law and procedure in Canada, not the least of which is because section 24 expressly authorizes the awarding of remedies for individuals whose rights and freedoms have been breached. Individuals against whom illegally gathered evidence is tendered can apply to a trial judge for the exclusion of that evidence notwithstanding that it may be very reliable and highly probative of guilt. The *Charter* has no application, however, in litigation among non-state actors – which is the vast majority of civil proceedings. Where the *Charter* is inapplicable, the common law prevails, unless a statute dictates otherwise.

COMMON LAW CONSEQUENCES PRE-CHARTER

Canadian common law follows the English common law: "[i]t matters not how you get it; if you steal it even it would be admissible in evidence."[21] Of course theft is theft and anyone who commits a crime or breaches a civil law in the course of obtaining evidence is liable for their wrongful conduct, independently of the rules of evidence. There is limited recourse for a violation of individual rights at under common law rules of evidence. Two exceptions dominate: the confessions rule and the residual discretion of the trial judge to reject evidence that is otherwise admissible. The confessions rule requires the prosecution to establish beyond a reasonable doubt statements made by an accused to a person in authority are voluntary. Involuntary statements are inadmissible. Disturbingly, however, the rule does not reach derivative evidence that is discovered only as a result of the involuntary statements. Derivative evidence can also produce the counter-intuitive (from a rights-respecting point of view) result of

[18] *Ibrahim v The King*, [1914] AC 599 (PC). The adoption of this principle and its subsequent development is traced most recently in *R v Oickle,* 2000 SCC 38, [2000] 2 SCR 3, 190 DLR (4th) 257.

[19] *R v Hodgson,* [1998] 2 SCR 449, 163 DLR (4th) 577. Another example is *R v Wells* [1998] 2 SCR 517, 163 DLR (4th) 628. In both cases, the accused was violently confronted by the family members of young sexual assault complainants. In both cases the Supreme Court of Canada noted it is quite proper to advise the trier of facts that such statements, while admissible, may be given little or no weight by the trier of fact in determining whether to convict the accused.

[20] *Hodgson, ibid* at para 29. It urged instead legislative reform to preclude admission of accused statements obtained as a result of violence by private individuals. None has been passed or proposed.

[21] *R v Leathham* (1861), 8 Cox C C 498 at 501, cited in Alan Bryant, Sidney Lederman & Michelle Fuerst, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, 3d ed (Toronto: LexisNexis, 2009).

making involuntary statements newly admissible. This happens if the statements are made reliable by virtue of the discovered derivative evidence.[22] The limits of the confessions rule make clear that the rule as traditionally conceived is concerned with reliability and not condemnation of improper police conduct as such.

The second basis is the recognition at common law of a very limited discretion in the trial judge to exclude otherwise relevant and admissible evidence where it would operate unfairly. "Unfair" in this context does not mean likely to lead to a conviction. There is nothing unfair about a conviction so long as the legal proceedings are fair. Rather, unfair means the evidence will: not be understood properly (character evidence carries this risk); take too long (credibility evidence of non-accused witnesses is often of little moment in resolving the main conflict and so limited by the collateral fact rule); or create confusion (some expert evidence can have this effect and thus it is only admissible where it is necessary to achieve a correct result). This restricted discretion was acknowledged in the infamous 1970 decision of a majority of the Supreme Court of Canada, *R v Wray*:

> The allowance of admissible evidence relevant to the issue before the court and of substantial probative value may operate unfortunately for the accused, but not unfairly. It is only the allowance of evidence gravely prejudicial to the accused, the admissibility of which is tenuous, and whose probative force in relation to the main issue before the court is trifling, which can be said to operate unfairly.[23]

Wray is one of the most heavily criticized decisions of the Supreme Court of Canada[24] and it was only recently condemned by that same Court in *R v Harrison*,[25] discussed *infra*. Dissatisfaction with limited scope for judicial discretion allowed for in *Wray* did however generate demand within Canada for an America-inspired constitutional right to the exclusion of evidence obtained by improper state action, regardless of whether that conduct has any impact on the probative value of the evidence.

THE IMPACT OF THE CHARTER

To appreciate the current law on exclusion of evidence in Canada, it is necessary to first note the *Charter* rights that relate to evidence in criminal cases. The *Charter* contains many rights designed to ensure fair investigations and trials. Those rights (to a fair trial,[26] to be free from arbitrary arrest[27] and unreasonable search and seizure,[28] to be promptly advised of the right

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[22] *R v St Lawrence* (1949), 93 CCC 376 at 391, [1949] OR 215, 7 CR 464 (discovery of the fact confirms the confession). See also the discussion in Hamish Stewart, "Section 24(2): Before and After Grant" (2011) 15 Can Crim L Rev 253 at 263-264, and see the example of the majority decision in: *R v Wray* (1970), [1971] SCR 272 at 293, Martland J [*Wray*].

[23] *Ibid* at 293.

[24] *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, *supra* note 21 at 550.

[25] 2009 SCC 34, [2009] 2 SCR 494, 309 DLR (4th) 87 [*Harrison*].

[26] *Supra* note 2 at s 11.

[27] *Supra* note 2 at s 9.

[28] *Supra* note 2 at s 8.

to counsel on detention or arrest,[29] etc…) may be affected by statutes, by police practices, and above all, by the courts' interpretations. As a general matter, Canadian courts will interpret statutory provisions affecting the collection and admission of evidence to include a discretionary power on the part of judges to exclude evidence where they determine the right to a fair trial requires it. The threshold for exclusion by virtue of this discretion is much less demanding than was advanced at common law: evidence may be excluded when its probative value is outweighed by its prejudicial effect. For example, section 12 of the *Canada Evidence Act*[30] allows an accused who chooses to testify to be confronted with his record of prior convictions, but only for the limited purpose of assessing credibility.[31] Absent recognition of a trial judge's discretion to edit or exclude the record, an accused with prior convictions may not get a fair trial. This risk arises when the past crimes have little to do with credibility and are more serious than the charged crime.[32]

The most important provision in Canadian law with respect to improper gathering of evidence is section 24 of the *Charter*. That section provides:

> (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
> (2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.[33]

Section 24 of the *Charter* requires the accused to first establish a violation of her rights. In most cases involving exclusion of evidence, the rights at issue are those triggered by investigation, detention, and prosecution, and involve the rights to counsel, to be silent, and to a fair hearing.[34] The content of any particular right is informed by statutes and the common law powers and rights, and is developed on a largely case-by-case basis with judicial articulation of the inevitable debate on the meaning of the specific right at issue. The rights protected by the *Charter* are subject to section 1 of the Charter, which allows for "such reasonable limits prescribed by law as

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[29] *Supra* note 2 at s 10(b).

[30] *Supra* note 9, s 12

[31] Upheld in *R v Corbett*, [1988] 1 SCR 670, 41 CCC (3d) 385.

[32] The concern is always to avoid wrongful convictions. There have been several; see:

> Geoff Howe, "Canada's Wrongful Convictions" *CBC News* (14 October 2010), online: Canadian Broadcasting Corporation <http://www.cbc.ca/news/canada/story/2009/08/06/f-wrongfully-convicted.html>.
>
> "AIDWYC: Exonerations: Individual Cases", online: Association in Defence of the Wrongly Convicted http://www.aidwyc.org/Exonerations.html.
>
> *The Osgoode Hall Law School Innocence Project*, online: <http://www.innocenceproject.ca/>.

Indeed, in situations involving evidence sought to be admitted by the defence, trial judges may only exercise the discretion to exclude if the probative value of the evidence is *substantially* outweighed by the prejudicial effect.

[33] *Supra* note 2 at s 24.

[34] *Supra* note 5.

can be demonstrably justified in a free and democratic society."[35] Because of the wording of some of the rights, section 1 may be of no import. It is virtually impossible to justify an "unreasonable search and seizure" (protected in section 8), or a proceeding that deprives someone of "life, liberty and security of the person" in a manner that is not "consistent with the principles of fundamental justice" (protected in section 7).[36] Only after a right is found to be violated and that violation is not justified under section 1, does the question of exclusion arise. It is important to see the difference between common law protections and the much more potent *Charter* rights, and yet to also grasp the limits of each. Under the common law confessions rule, police are allowed to use undercover agents to subvert an accused's declared right to be silent.[37] They cannot do so after the Charter because such conduct violates the constitutionally protected right of the accused to be silent.[38] Canada's section 24(2) has been called a half-way house between what is perceived as an "automatic" exclusionary rule in American constitutional law and the traditional common law approach of indifference to the manner in which evidence arrives in a legal proceeding.[39]

If a new decision of the Supreme Court of Canada alters the meaning of a key component of the criminal justice system (for example - "detention"), then that new law will in turn have a significant impact on the frequency and likelihood of success of future applications for the exclusion of evidence under the *Charter*.[40] If rights are interpreted very narrowly, the exclusionary remedy in section 24(2) will rarely arise and only catch the worst of cases. If rights are interpreted very broadly, the exclusionary remedy will be constantly invoked. Neither outcome is desirable; too few rights allows for police abuse and social fear, jeopardizing democracy, but if evidence is frequently excluded, then the judiciary will be condemned for allowing criminal behavior to go unpunished. That jeopardizes the equality of power between the three branches of governance in our constitutional democracy and risks community safety. Judges understand that they must get the balance right but it has been an arduous journey. Section 24(2) has given rise to very complex jurisprudence reflective of a continued debate over how best to identify and respond to improper state conduct with respect to evidence. Moreover, it is not yet clear whether exclusion in a criminal case has any impact on subsequent civil proceedings that involve the accused but do not involve the state.[41]

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[35] *Supra* note 2 at s 1. The section reads:

> The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[36] But see a counter example with respect to s 9 (arrest and detention) and s 10(b) (right to counsel) in the context of impaired driving: *R v Orbanski; R v Elias*, [2005] 2 SCR 3, 253 DLR (4th) 385.

[37] *Wray*, *supra* note 22; *Rothman v R*, [1981] 1 SCR 640, 121 DLR (3d) 578.

[38] *R v Hebert*, [1990] 2 SCR 151, 57 CCC (3d) 1; *R v Broyles*, [1991] 3 SCR 595, [1992] 1 WWR 289.

[39] *R v Simmons*, [1988] 2 SCR 495 at 532, 67 OR (2d) 63. There are many exceptions to the American exclusionary rule, so many that it is now longer clear whether it is as powerful or as automatic as it is commonly believed to be.

[40] The issue of detention and the right to counsel was revisited in *R v Suberu*, 2009 SCC 33, [2009] 2 SCR 460, 309 DLR (4th) 114. The right to silence was revisited in *R v Sinclair*, 2010 SCC 35, [2009] 2 SCR 460, 309 DLR (4th) 114.The Court decline to adopt the US law allowing for presence of defence counsel during custodial interrogation.

[41] This issue is the subject of interesting debate in a series of lower court decisions.See: *Motorola Inc v Or*, 2010 ONSC 487, [2010] OJ No 198; *Chrysler Credit Canada Ltd v Arnold*, [2006] OJ No 1568 (SC); *Luckov v Taylor*, 2008 ONCJ 795, [2008] OJ No 5911. One Appeal Court has suggested that in the absence of criminal law consequences and a state actor, evidence should be admitted in subsequent civil cases but the comments are obiter on this point: *DP v Wagg* (2004), 71 OR (3d) 229, 239 DLR (4th) 501.

EXCLUSION UNDER S. 24(1), S. 24(2) AND REVISED COMMON LAW

Although section 24(2) is the key clause, evidence has also been excluded under section 24(1).[42] Further, the Supreme Court of Canada has held that the traditional common law trial judges' discretion can be relied upon to exclude evidence if that is required to ensure the fair trial rights expressly protected in section 11(d)'s "fair and public hearing" guarantee and as one of the section 7 "principles of fundamental justice". These two additional sources of remedial jurisdiction – section 24(1) and the common law discretion – come into play if the state conduct complained of does not (a) constitute a breach or denial of an accused's *Charter* rights (i.e. the evidence was gathered by a different state and passed to Canada); or (b) relate to how evidence is gathered or "obtained."[43] Therefore, in any given case, an accused may rely upon section 24(2), section 24(1), or post-*Charter* common law discretion. In all, the common concern is the admission of particular evidence which may cause an unfair trial or jeopardize society's confidence in the integrity of the Canadian justice system. In these application, the Court has commanded a holistic understanding of what is meant by the concept of a "fair trial", one that reflects the perspective of the accused and society more broadly:

> At base, a fair trial is a trial that appears fair, both from the perspective of the accused and the perspective of the community. A fair trial must not be confused with the most advantageous trial possible from the accused's point of view...Nor must it be conflated with the perfect trial; in the real world, perfection is seldom attained. A fair trial is one which satisfies the public interest in getting at the truth, while preserving basic procedural fairness for the accused.[44]

S. 24(2) JURISPRUDENCE

In order to claim an exclusion of evidence remedy under the main clause, s. 24(2), it is the applicant's rights that have to be infringed by improper state action, and not that of a third party or a hypothetical accused. The evidence at issue must bear a relationship to the breach. The relationship can be temporal, causal or contextual in nature and the test is not strict.[45] The standard of proof is the civil one – on a balance of probabilities. The applicant under section 24(2) bears the burden of establishing that: "having regard to all the circumstances," the exclusion of evidence is the appropriate remedy for a rights violation.

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[42] The Supreme Court of Canada initially held that section 24(1), the more general clause, cannot be invoked to exclude evidence in *R v Therans*, [1985] 1 SCR 613, 18 DLR (4th) 655.

[43]Supreme Court of Canada cases discussing this issue are: *R v Harrer*, [1995] 3 SCR 562, 128 DLR (4th) [Harrer]98(can exclude an out-of-country statement that doesn't attract Charter rights if admission of it would otherwise make the trial unfair under s 24(1) or common law); *R v White*, [1999] 2 SCR 417, 174 DLR (4th) 111 (statutorily compelled statement does not violate the *Charter* but must be excluded in subsequent criminal proceeding under s 24(1) or common law); *R v Bjelland*, 2009 SCC 38, [2009] 2 SCR 651, 309 DLR (4th) 257 (late disclosure of Crown evidence to the accused can be remedied by adjournment and disclosure order but exclusion of the evidence is a possible remedy is it is the only means to protect administration of justice under s. 24(1) or common law.)

[44] *R v Harrer*, *ibid*, McLachlin J. (now Chief Justice)

[45] See for example, *R v Wittwer*, 2008 SCC 33, [2008] 2 SCR 235, 294 DLR (4th) 133.

The first major ruling was *R v Collins*[46] in 1987. It outlined an approach to section 24(2) in which the application judge, in the eyes of a dispassionate and fully informed member of the public, asks: "[w]ould the admission [or exclusion] of the evidence [obtained as a result of the breach] bring the administration of justice into disrepute?"[47] In answering this question, the judge considered three factors: (1) the impact of the evidence on the fairness of the trial; (2) the seriousness of the violation of *Charter* rights; and, (3) the effect of the exclusion of the evidence on the administration of justice.[48] The first factor responds to a situation where, as a result of the interaction between the accused and the state, the accused generates, provides, or is the source of evidence that can be used against him by the state. This is called "conscriptive" evidence. Because the state bears the entire burden of proof to establish guilt beyond a reasonable doubt, and an accused is entitled to the presumption of innocence and need not participate in the case in any way, the Court in *Collins* reasoned that it is unfair to admit such "conscriptive" evidence in a trial. An unfair trial, the Court held, necessarily imperils the administration of justice. The classic example is an accused denied access to counsel who confesses to the charged crime after that deprivation. The Court explained that conscriptive evidence of this nature should usually be excluded.[49] The Court also commented that the opposite would generally be the case with respect to real evidence (i.e. physical objects such as guns or drugs):

> Real evidence that was obtained in a manner that violated the *Charter* will rarely operate unfairly for that reason alone. The real evidence existed irrespective of the violation of the *Charter* and its use does not render the trial unfair. However, the situation is very different with respect to cases where, after a violation of the *Charter*, the accused is conscripted against himself through a confession or other evidence emanating from him. The use of such evidence would render the trial unfair, for it did not exist prior to the violation and it strikes at one of the fundamental tenets of a fair trial, the right against self incrimination.[50]

In *R v Stillman*, the next major opinion, the Court concluded bodily samples – blood, DNA, saliva, fingerprints, etc…, should also be treated as conscriptive evidence.[51] Keeping the focus on the obligation of the state to prove its case, and the right of the accused to be free from self-incrimination, the Court insisted that the key concern under section 24(2) was whether the accused was compelled by the state to participate in the creation or discovery of incriminating evidence in violation of his rights.[52] *Stillman* also grappled with further evidence that was obtained as a consequence of conscriptive evidence. It concluded that such further evidence is also "conscriptive" and generally inadmissible unless it exists in a form usable by the state and would have been otherwise discoverable independent of the breach of the accused's right. If, for example, the accused tells the police the gun used in the charged crime is in freezer in the

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[46] [1987] 1 SCR 265, 38 DLR (4th) 508 [*Collins*].

[47] *Ibid* at para 33.

[48] *Ibid* at paras 36-39.

[49] *Ibid* at para 36: "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."

[50] *Ibid* at para 37.

[51] [1997] 1 SCR 607, 144 DLR (4th) 193 [*Stillman*].

[52] *Ibid* at para 86.

basement of his house, and it is, this is discoverable non-conscriptive evidence because the police would have been entitled to obtain, and would have sought, a warrant to search and seize evidence from the house. By contrast, if the accused's rights were violated and confessed that he threw the gun in a large lake that is now frozen, then the gun will usually be excluded because it is not "discoverable". The police would not have searched a frozen lake.

After *Collins* and *Stillman*, the case law devolved into a fairly simplistic exercise of identifying evidence as either "conscriptive" or "real." Evidence was admitted or excluded based on that initial classification, despite the obvious fact that the text of the Charter commanded attention to "all the circumstances" and not only the type of evidence at issue. It begged the question: Why ought breath samples obtained in violation of a right be treated differently, and garner more regard, than the contents of a laptop from a bedroom seized in violation of a right?

Eventually, in 2009,[53] the Court responded to the criticism[54] of the singular analytical attention on categorization and whether evidence was conscriptive or not. It adopted a new three part test which considerably enlarges the frame of reference for the section 24(2) inquiry and is oriented to maintenance of the good repute of the administration of justice (the processes by which those who break the law are investigated, charged and tried) as well as the rule of law and *Charter* rights. The key phrase in s.24(2), "bring the administration of justice into disrepute" must be now similarly understood as referring to a "long-term sense of maintaining the integrity of, and public confidence in, the justice system" and not short term immediate criticism of exclusion of evidence in an individual case.[55] The Court also confirmed that section 24(2) is not animated by the goal of punishing the police or providing compensation or a benefit to the accused, but rather focused on systemic and societal concerns and prospective long term damage. In this regard it held: "[t]he fact of the *Charter* breach means damage has already been done to the administration of justice. Section 24(2) starts from that proposition and seeks to ensure that evidence obtained through that breach does not do further damage to the repute of the justice system."[56] The new test was stated as follows:

> A review of the authorities suggests that whether the admission of evidence obtained in breach of the *Charter* would bring the administration of justice into disrepute engages three avenues of inquiry, each rooted in the public interests engaged by s. 24(2), viewed in a long-term, forward-looking and societal perspective. When faced with an application for exclusion under s. 24(2), a court must assess and balance the effect of admitting the evidence on society's confidence in the justice system having regard to: (1) the seriousness of the *Charter*-infringing state conduct (admission may send the message the justice system condones serious state misconduct), (2) the impact of the breach on the *Charter*-protected interests of the accused (admission may send the message that individual rights count for little), and (3) society's interest in the adjudication of the case on its merits. The court's role on a s. 24(2) application is to balance the assessments

[53] *R v Grant*, 2009 SCC 32, [2009] 2 SCR 353, 309 DLR (4th) 1 [*Grant*] – The opinion was not delivered until 15 months after oral argument.

[54] This includes criticism from within the Court itself: *R v Orbanski*; *R v Elias*, *supra* note 36 at paras 92-104 (minority opinion of Justices Fish and LeBel).

[55] *Supra* note 53 at paras 67-68

[56] *Ibid* at para 69.

> under each of these lines of inquiry to determine whether, considering all the circumstances, admission of the evidence would bring the administration of justice into disrepute. These concerns, while not precisely tracking the categories of considerations set out in *Collins*, capture the factors relevant to the s. 24(2) determination as enunciated in *Collins* and subsequent jurisprudence.[57]

The change is significant and unfolding. Trial fairness does not determine the outcome any longer but instead is treated as an overarching systemic goal.[58] In *Grant* itself, conscriptive non-discoverable real evidence was admissible.[59] In another 10 years, the Court can take stock of the impact of Grant on the administration of justice. The analysis is different but it is not clear if the outcomes will be, over time. It will be interesting to observe how courts "balance the interests of truth with the integrity of the justice system.[60] Again.[61]

3. Do the consequences vary with the gravity of the matter (*eg*, are there special rules for serious crimes)?

The seriousness of the offence is often mentioned in the cases interpreting section 24(2) and failure to protect the community against criminal conduct causing significant harm is a pervasive systemic concern in the justice system. In *Grant*, the Supreme Court identified offence gravity as a factor under the third step in the trial judge's assessment of the application for exclusion, i.e. the social interest in securing a determination of the case on its merits. Surprisingly, however, the Court commented that the gravity of a crime may in fact cut in both directions, for and against admission of the evidence:

> Failure to effectively prosecute a serious charge due to excluded evidence may have an immediate impact on how people view the justice system. Yet, as discussed, it is the long-term repute of the justice system that is s. 24(2)'s focus. [...] the goals furthered by s. 24(2) "operate independently of the type of crime for which the individual stands accused" [and] "[t]he *Charter* is designed to protect the accused from the majority, so the enforcement of the *Charter* must not be left to that majority" [...]. The short-term public clamour for a conviction in a particular case must not deafen the s. 24(2) judge to the

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[57] *Ibid* at para 71. This point has also been made in cases where the Court rejects accused appeals based on the argument a post-*Grant* analysis would result in exclusion of evidence; see *R v Beaulieu*, 2010 SCC 7. [2010] 1 SCR 248.

[58] *Grant*, *ibid* at paras 65 and 121

[59] Compare *Harrison*, *supra* note 25, a companion case where non-conscriptive real evidence (35 kgs of cocaine) was excluded because of a serious violation of the right to be free from arbitrary detention.

[60] *R v Mann*, 2004 SCC 52, [2004] 3 SCR 59 at para 57, 241 DLR (4th) 214, cited in *Grant*, *supra* note 53 at para 82.

[61] See:

> Hamish Stewart, *supra* note 22.
>
> Mike Madden, "Marshalling the Data: An Empirical Analysis of Canada's Section 24(2) Case Law in the Wake of R. v. Grant" (2011) 15 Can Crim L Rev 229.
>
> Robert J Currie, "The Evolution of the Law of Evidence: Plus Ça change ...?" (2011) 15 Can Crim L Rev 213
>
> Don Stuart "Welcome Flexibility and Better Criteria for Section 24(2)" (2009) 66 C.R. (6th) 82.
>
> Paciocco and Stresser, *The Law Of Evidence*, 5th ed (Toronto: Irwin Law 2008, rev'd 2010), online: Canada Law Books <www.irwinlaw.com/content/assets/content-commons/521/LE%rev_09.pdf>.

> longer-term repute of the administration of justice. Moreover, while the public has a heightened interest in seeing a determination on the merits where the offence charged is serious, it also has a vital interest in having a justice system that is above reproach, particularly where the penal stakes for the accused are high.[62]

A more powerful version of this point was made by the Court in the companion case of *Harrison*, where the majority opinion of the Chief Justice reminds readers that a focus on the offence or on the reliability of the evidence inevitably diminishes rights on the basis of who is claiming them, and what they are alleged to have done. The law now commands otherwise,[63] she stated, making clear that in the post-*Grant* context, the major focus is the seriousness of the impact of the state conduct on individual rights and freedoms, and not the type of evidence at issue.

4. Do the rules that apply to evidence obtained by the prosecution differ from those that apply to the defense?

It is only the defence in criminal cases that seeks to exclude evidence on the basis of a rights violation. As noted above, the common law discretion to exclude evidence of the defence is limited to cases where the prejudicial effect of such evidence substantially outweighs the probative significance of it.[64]

5. Describe the practical effect of these rules and how they are applied by the courts.

There is very little empirical study of the exclusion of evidence under the *Charter* but recently one author published two articles studying the post-*Grant* decisions.[65] He has reached the conclusion that the predictions of academic commentators as to post-*Grant* case law are inaccurate and some of the results are at significant variance from common assumptions both pre and post-*Grant*.[66] In addition, a truly comprehensive picture would need to take into account the cases that do not reach a trial judge but are rather withdrawn by the Crown or the subject of a guilty plea and bargain between the accused and the Crown.

Presenting Evidence

6. Does the law in your country prohibit certain means of presenting evidence (*eg*, hearsay testimony) due concerns about its probative value?

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[62] *Grant*, *supra* note 53 at para 15; also, see the interesting treatment of this issue in Hamish Stewart, *supra* note 22 at 261-63

[63] *Harrison*, *supra* note 25 at para 40.

[64] *R v Seaboyer*, *supra* note 15

[65] Mike Madden, "Empirical Data on Section 24(2) under R v Grant" (2010), 78 CR (6th) 278 (physical evidence is excluded at the rate of 69%, statements at the rate of 74%); Mike Madden, *supra* note 61. The author notes a pre-Grant study, using a different methodology, found the global exclusion rate to be 51%: Nathan JS Gorham, "Eight Plus Twenty-Four Two Equals Zero Point Five" (2003) 6 CR (6th) 257 at 259.

[66] Mike Madden, *supra* note 61 at 250.

As is true of other common law jurisdictions, Canada's evidence law is dense and difficult, characterized by "exceptions to the exceptions" to the rules.[67] Things have changed significantly in the last two decades. Led by the Supreme Court of Canada, the judiciary is engaged in a systematic effort to rationalize and reassess the underlying logic and policy of various rules. There are many examples: similar fact evidence,[68] expert opinion evidence, judicial notice and privilege among others,[69] Typically the Court revises the rules to ensure they are coherent and consistent with contemporary values – both constitutional[70] and cultural[71] – and capable of ensuring a proper foundation for a finding of legal consequences.

Hearsay law affords an excellent example of this development. Hearsay evidence (an out of court statement tendered for the truth of its contents in the absence of contemporaneous cross-examination of the declarant) is presumptively inadmissible.[72] There are many common law exceptions and several statutory exceptions to the hearsay rule, but these mostly relate to public documents and business records. Since at least 1990,[73] the Supreme Court of Canada began what is now characterized as the "hearsay revolution."[74] By virtue of a series of decisions, it has created "the principled approach" to hearsay admissibility. Whether hearsay evidence will be admitted now depends on whether the particular evidence meets the conditions of (i) reasonable necessity and (ii) threshold reliability. Common law exceptions are presumptive valid but now tested to determine whether they allow for evidence that is necessary and reliable. If they do not, then the court will revise the common law exception to better meet the needs of the community in achieving accurate and efficient dispute resolution.

The Court's development of the principled approach is driven in part by underlying constitutional considerations. In a criminal context, there is a constitutional dimension because "difficulties in testing the evidence, or conversely the inability to present reliable evidence, may

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[67] *Graat v R*, [1982] 2 SCR 819 at 835, 144 DLR (3d) 267, Dickson J (as he then was).

[68] *R v Handy*, 2002 SCC 56, [2002] 2 SCR 908, 213 DLR (4th) 385.

[69] *R v Marquard*, [1993] 4 SCR 223, 108 DLR (4th) 47.

[70] For example, the Court discusses gender equality principles in articulating the law governing access to the prior sexual and psychiatric records of sexual assault complaints in civil and criminal cases:, *M(A) v Ryan*, [1997] 1 SCR 157, 143 DLR (4th) 1; *R v Mills*, [1998] 3 SCR 668, [2000] 2 WWR 181; *R v O'Conner*, [1995] 4 SCR 411, 130 DLR (4th) 235.

[71] Oral testimony from aboriginal elders is admissible despite traditional exclusion. See:*Delgamuukw v British Columbia*, [1997] 3 SCR 1010, [1999] 10 WWR 34;*R v NS*, 2010 ONCA 670, 102 OR (3d) 161, 326 DLR (4th) 526. In the latter case, leave to appeal to the Supreme Court has been granted: [2010] SCCA No 494. Also see: Robert J Currie, "The Bounds of the Permissible: Using 'Cultural Evidence' in Civil Jury Cases" (2005) 20.1 CJLS 75.

[72] *R v Khelawon*, 2006 SCC 57, [2006] 2 SCR 787 at para 35, 274 DLR (4th) 385: "Our adversary system puts a premium on the calling of witnesses, who testify under oath or solemn affirmation, whose demeanour can be observed by the trier of fact, and whose testimony can be tested by cross-examination."

[73] The first real break with the tradition rules was the decision in *Ares v Venner*, [1970] SCR 608, 73 WWR (NS) 347, which held that notes made contemporaneously by someone with personal knowledge of what is recorded and under a duty to do so is admissible as evidence of the truth of the information recorded. Contrary to English law at that time, the Supreme Court of Canada held that the hearsay declarant does not need to be dead or unavailable to trigger the common law business records exception.

[74] Bruce Archibald, "The Canadian Hearsay Revolution: Is Half a Loaf Better Than No Loaf at All?" (1999) 25 Queen's LJ 1.

impact on an accused's ability to make full answer and defence."[75] That said, the Court has also held that the *Charter* does not guarantee the right to cross-examine in and of itself; it is just one means to the end of trial fairness (which also includes a consideration of the societal interest in arriving at the truth.)[76]

The "reasonable necessity" part of the principled approach to hearsay evidence is responsive to society's interest in getting at the truth. The applicant must establish that admitting the hearsay evidence is reasonably necessary on the basis that the hearsay declarant is unavailable or because the applicant is unable to obtain evidence of a similar quality from another source (for example, a prior statement of a recanting witness) . Necessity seeks to ensure evidence is presented in the best available form.[77] A witness' fear or disinclination does not, on its own, constitute necessity but age, trauma or hardship may.[78] The requirement of "reliability", by contrast, is concerned with the integrity of the trial process, which is maintained by only admitting hearsay that is sufficiently reliable to overcome the dangers of not being tested through cross-examination.

There are essentially two methods of demonstrating threshold reliability for the purposes of seeking admission under this new principled approach to hearsay.[79] The first is "substantive" reliability. The trial judge asks whether the circumstances of the making of the statement tend to negate inaccuracy or fabrication; in other words, are the circumstances in which the statement came about such that the contents are trustworthy? If it is a highly reliable spontaneous statement, there may be is no real concern about whether the statement is true, and thus it is likely crucial that it be tested by cross-examination to test it. Factors that have been identified in the cases as useful to consider include:

- possibility of inaccuracy in respect of the hearsay statement
- content of the statement
- motive to lie
- relationship between the hearsay declarant and the witness
- mental capacity
- ability to perceive, recall and recount accurately
- a child's demeanour, personality, intelligence and understanding
- social or formal context of statement
- declarant's reputation for truthfulness

The second method is "procedural" reliability. The trial judge asks whether the circumstances of the making of the statement provide the trier of fact with a satisfactory basis for evaluating the truth of the statement, specifically, whether there are adequate substitutes for testing the truth and accuracy of the evidence? Questions include: was it made under oath? Is

[75] *R v Khelawon*, *supra* note 72 at paras 47-49

[76] *R v Potvin*, [1989] 1 SCR 525, 47 CCC (3d) 289.

[77] *R v Couture*, 2007 SCC 28, [2007] 2 SCR 517 at para 79, [2007] 8 WWR 579, Charron J.

[78] See generally: *R v F (WJ)*, [1999] 3 SCR 569, 138 CCC (3d) 1; Shalin Sugunasiri & Ronalda Murphy, "R. v. F. (W.J.): Hearsay Evidence and the Necessity of Necessity", Case Comment, (2000) 43 Crim LQ 181.

[79] *Khelawon*, *supra* note 72 at para 61: *Couture*, *supra* note 77 at paras 80, 87)

available for viewing on videotape? Was there an opportunity to cross examine the declarant at the time it was made? The more the circumstances match what would happen in a courtroom, the more likely it can be admitted into evidence. The two methods are not mutually exclusive. Factors relevant to one can complement the other.[80]

The principled approach has radicalized evidence law. It is the key to prosecution of assault cases against children and of domestic violence cases. But is a double-edged sword; it may result in the admission of evidence that would not be admissible under the traditional exceptions, or it may result in the exclusion of evidence that meets the requirements of the traditional exceptions but does not meet the requirements of necessity and reliability.[81] The evidence must also be otherwise admissible; the principled approach does not override other policy reasons for exclusion and cannot be used to undermine them.[82] Finally, it remains subject to the residual discretion of the trial judge to exclude hearsay evidence where its probative value is outweighed by its prejudicial effect (subject to the lower threshold for exclusion where it is tendered by defence counsel).[83] It is rather complex and while the law is more normatively secure, it is also intellectually demanding and uncertain.

7. What are the legal/procedural consequences of presenting evidence by such means?

Disputes about admissibility of evidence are resolved by the trial judge at trial or after submissions before or during the trial.[84] Disputes over major issues such as similar fact evidence, hearsay, or a confession, will typically be determined prior to trial in the form of a *voir dire*, or a mini-trial. Evidence can be called on the *voir dire* and the judge will make a ruling after submissions by counsel on whether the test for admission has been met. The onus is generally on the party seeking to introduce the evidence and generally on a balance of probabilities. If admitted, it will be up to the trier of fact to determine what weight, if any, to give to the evidence. Failure to object at this stage may have an impact on the ability of counsel to raise the issue on appeal; if the appeal court is of the view that the failure was the product of a considered strategic decision, it will not address the claim on appeal (though this is not always followed in criminal cases where there is a risk of wrongful conviction). The appeal on the evidence issue is only taken after the trial is concluded as it is usually not possible to appeal against an interlocutory order. Discretionary rulings on the admissibility of evidence are accorded deference.[85]

8. Do the consequences vary with the reliability of the evidence and its necessity for the record?

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[80] For example, see: *R v U (FJ)*, [1995] 3 SCR 764, 101 CCC (3d) 97.

[81] In *R v Starr*, 2000 SCC 40, [2000] 2 SCR 144, 147 CCC (3d) 449, the traditional "state of mind" exception was modified to require an additional element – that the statement must not be made "under circumstances of suspicion." As such, a spontaneous statement will not suffice. By contrast, in *R v Mapara*, 2005 SCC 23, [2005] 1 SCR 358, 251 DLR (4th) 385, the co-conspirators' exception to the hearsay rule met the requirements of threshold reliability and necessity.

[82] *R v Couture*, *supra* note 77 at para 63.

[83] *R v Seaboyer*, *supra* note 15.

[84] See generally the discussion in *Sopinka, Lederman and Bryant*, *supra*, note 12 at 74-82.

[85] See generally *Grant*, *supra* note 53.

Evidence that is neither necessary nor reliable is inadmissible. The degree of necessity or reliability is a function of the work the evidence is being asked to do and the possibility of prejudice that can result from admission. Some types of evidence have a very low threshold for admission and no dispute will arise. This is true, for example, of eye witness testimony. By contrast, there is an extremely strict test that applies to the admission of Crown-led expert evidence regarding an accused's psychiatric disposition.[86]

9. Do different rules apply to the evidence relevant to the claim or the defence?

Generally, evidential rules apply equally to prosecution and defence but there are many exceptions (alibi, mental disorder, self-incrimination, character evidence, right to silence, confessions), most of which relate to the special status of an accused in a criminal trial and the overriding need to ensure a fair trial and avoid conviction of the innocent.

10. Describe the practical effect of these rules and how they are applied by the courts.

There is almost no empirical analysis of evidence law in Canada, and significant studies would be very demanding.[87] It is difficult to see how the rules play out in the overwhelming majority of cases which are resolved by plea bargain and which themselves are done in the shadow of what can and cannot be proven by the Crown and the defence in the particular case. As a result, accounts of the rules are largely based on careful readings of the cases and anecdotal understandings from participants in the legal system.

[86] *R v Morin*, [1988] 2 SCR 345, 44 CCC (3d) 193; *R v J-LJ*, 2000 SCC 51, [2000] 2 SCR 600, 148 CCC (3d) 487.

[87] One exception is the Mike Madden study on section 24(2), *supra* note 61.