2013 CarswellOnt 3996, 2013 ONSC 1823

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R. v. White

Her Majesty the Queen, Respondent and Merith White, Applicant

Ontario Superior Court of Justice

Paul F. Lalonde J.

Heard: February 19, **2013**; February 20, **2013**; February 21, **2013**
Judgment: April 5, **2013**
Docket: 11-5242

Counsel: Malcolm Lindsay, for Respondent

Mark Ertel, for Applicant

Subject: Constitutional; Criminal; Evidence

Criminal law

***Paul F. Lalonde J.*:**

1 This application is brought pursuant to ss. 8 and 24(2) of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11 [the "*Charter*"]. The Applicant, Merith White, sought exclusion of all evidence seized in the search of 302-711 Churchill Avenue, Ottawa, Ontario, on January 21, 2011.

2 The grounds for the application, as alleged by the Applicant, are:

> 1. Prior to obtaining the search warrant, police trespassed on the property at 711 Churchill Avenue to gather information, contrary to s. 8 of the *Charter*.

2. The trespasses occurred by a police officer to the common areas of the building and storage units at 711 Churchill Avenue. These were not in an area ordinarily frequented by the public.

3. 711 Churchill Avenue is an access-controlled building and the common areas are accessible only with the consent of the unit holders. These unit-holders own and exercise control over the common areas.

4. The police did not just trespass on the common areas but used those common areas to investigate the Applicant and his apartment.

5. A reviewing court considering the validity of a search warrant does not substitute its opinion for the opinion of the issuing justice. However where the record, as amplified on review, discloses that the warrant could not have been issued, the search will be deemed warrantless. A warrantless search is *prima facie* unreasonable.

6. Excising illegally-obtained evidence and evidence obtained in breach of *Charter* guarantees will inevitably result in a conclusion that this warrant could not possibly have been issued. In the absence of the excised evidence, there would have been no grounds to believe that any offence was committed at 711 Churchill Avenue or that any evidence of an offence would have been found there. It is further alleged that there would not have been reasonable grounds to believe in either of the requirements for an issuance of a warrant pursuant to the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19, s. 11.

7. The appropriate and just remedy, pursuant to s. 24(2) of the *Charter*, is to exclude all evidence obtained in the search of 711 Churchill Avenue on January 21, 2011. The s. 8 *Charter* breaches were hardly inadvertent or technical. They were committed in a cavalier fashion by officers who failed to turn their minds to well-settled law. The breaches impacted on the *Charter* in a serious way. The private property and dwelling house of the Applicant attract a high expectation of privacy. Although there is a public interest in trying cases on their merits, the long term impact of allowing into evidence the fruits of warrantless searches conducted in flagrant and wilful violation of the right to privacy would be to bring the administration of justice into disrepute.

8. The Applicant presented no evidence on his application.

9. The Crown called Zoë Gillespie. She is on the board of directors of the **Condominium Corporation** where the Applicant resides and her testimony was entered into the record.

10. Detectives Douglas Hill and Norman Redmond, of the Ottawa Police Service, also testified.

3 Several admissions were made exempting many officers from the obligation to testify. The items were made exhibits and include:

Exhibit #1: The search warrant and information to obtain;

Exhibit #2: A book of photographs of exhibits seized;

Exhibit #3: A book of photographs with relevant photographs commencing at photograph #7 pertaining to unit 302;

Exhibit #4: A book of photographs showing exhibits;

Exhibit #5: A list of exhibits compiled by exhibit custodian Detective Grenier;

Exhibit #6: The absolute vodka carton box seized in the 'Labelle vehicle' which was stopped later in the investigation and was carrying various illicit drugs; the value of these drugs is in dispute;

Exhibit #7: Illicit drugs found in unit 302; the value of these drugs is in dispute;

Exhibit #8: Health Canada certificates on the illicit drugs seized;

Exhibit #9: Two plastic bags with keys;

Exhibit #10: Documents found in unit 302;

Exhibit #11: Condominium ownership documents showing Merith White, a joint owner with both his parents;

Exhibit #12: An expert report and curriculum vitae of Detective Jamie Foley;

Exhibit #13: Physical surveillance reports; and

Exhibit #14: A list of admissions.

Background

4 This case is part of project Upsilon that began in 2009 and ended in 2011. It culminated into several individuals being charged with trafficking illicit drugs. Merith White, who is one such individual, is charged with possession of cocaine for the purpose of trafficking, possession of cannabis marijuana for the purposes of trafficking, possession of cocaine simpliciter and being in possession of money, being the proceeds obtained from crime, not exceeding $5,000.00.

The Evidence of Zoë Gillespie

5 Zoë Gillespie (Ms. Gillespie) is a toxicologist with Health Canada's Food Directorate and is a member of the

board of directors of the Condominium building located at 711 Churchill Avenue. She testified that she owns a unit in the building. She said that there is inadequate insulation in the building. This allows her to hear voices from adjacent hallways and other apartments from inside her unit.

6 Ms. Gillespie described the access to the building. The main entrance faces North on Robyn Lane and there are two side doors on the East and West side of the building that can be used by the building's residents. The doors giving access to the building are supposed to be locked at all times but, as they are old, they become stiff in the winter which prevents them from latching properly. As a result, they often are not closed properly by the residents. She recalled that in April 2012, Detective Norman Redmond had met the board of directors and that, following the meeting, the residents of the Condominium had authorized their board of directors to sign an authorization pursuant to the *Trespass to Property Act*, R.S.O. 1990, c T.21 allowing police to enter into the building in the future.

7 Until Detective Hill advised Ms. Gillespie that he had entered 711 Churchill Avenue on three occasions in the past, Ms. Gillespie said that she had not been aware that he had done so. There were no reactions by the residents once they were apprised that the police had been in their building without their consent. She recalled that Detective Hill had told her that he had entered into the building as part of an ongoing police investigation. She also recalled that he was worried that alerting residents could have compromised his investigation.

8 Ms. Gillespie confirmed that Yanni Papadolias is not an owner of a unit in the building. Yanni Papadolias was the person the police had originally targeted in their surveillance. The police suspected that he was trafficking in drugs. Ms. Gillespie stated that the doors giving access to the building are supposed to be shut and locked at all times for security reasons, mainly to prevent members of the public with no business in the building to wander in and out. During cross-examination, Ms. Gillespie stated that, had the police requested permission to enter the building, it would have been granted.

Evidence of Detective Douglas Hill

9 Detective Hill has been a member of the Ottawa Police Service since 2003. Since 2009, he has been part of the drug unit investigations section. He confirmed that he has taken courses on drug detection and that he is familiar with the properties of illicit drugs such as cocaine and marijuana drug paraphernalia.

10 Detective Hill testified that he had been involved in the drug investigation involving Mr. White since September 1, 2009. Referring to Exhibit #13, the surveillance reports, he said that he had been the scribe officer for the event of January 20, 2011 the day prior to Mr. White's arrest.

11 On September 1, 2009, Detective Hill had watched an interaction between Yanni Papadolias and Mr. White at 711 Churchill Avenue. Surveillance was performed on Mr. Papadolias as a confidential informer had advised the police that Mr. Papadolias was involved in selling drugs. Specifically, Detective Hill had been advised that Mr. Papadolias was the owner and manager of 'The Brig' pub in the Byward market and that Mr. White was employed there as a bouncer.

12 The Upsilon project was interrupted for almost a year as the officers involved in the project were tasked

elsewhere.

13 Detective Hill said that his next involvement with the Papadolias case took place on September 2, 2010 and that it solely concerned Mr. Papadolias. During that month, a tracker warrant had been obtained and had been successfully installed on Mr. Papadolias' vehicle.

14 This tracking of Mr. Papadolias' vehicle led Detective Hill to 711 Churchill Avenue on December 10, 2010. He testified that he had been briefed by the investigative team that Mr. Papadolias was suspected of keeping his stash of illicit drugs in the building at 711 Churchill Avenue.

15 Detective Hill entered the main door of the 10 unit condominium building by following a postal employee that was entering the building to deliver mail to mail boxes next to the entrance. Detective Hill walked through the corridors of the building and entered a door that led to the basement that housed caged lockers identified by tags identifying unit members. He found a locker for unit 302 that he suspected was Mr. White's unit. He could see through the fenced locker that there was a 3.5 feet cylindrical filter, blower fan, hoses and suitcases. These were items that Detective Hill felt, from his experience in dealing with drug investigations, could be used in a grow-op operation. Detective Hill stated that he did not touch anything, took no photographs and did not install any technical devices whatsoever. He spent approximately 20 minutes in the building. He said that he had not obtained permission for his walk through.

16 He stated that entering buildings without permission is often done in his experience performing illicit drug investigations.

17 The next time Detective Hill entered the building was on January 6, 2011. He said he watched Mr. Papadolias leave the building empty-handed.

18 On January 20, 20111, Detective Hill testified that while tracking Mr. Papadolias and suspecting that he was going to 711 Churchill Avenue, he had raced ahead and entered the building, again without permission. He hid in the south stairwell at the third floor level and saw Mr. Papadolias enter unit 302. Detective Hill was then called out by the investigative unit.

19 On January 21, 2011, the day the investigation ended, Detective Hill stated that he had entered the building at 13:50, again through a side door that was not properly closed. He said that he saw Mr. Papadolias enter unit 302 through a window on the fire door outside the third floor where he was hiding. He said that he heard screeching sounds similar to the sounds made by packing tape being pulled off a roll. He recalled thinking that there was poor insulation in the building as he could hear voices through the fire door. Although he could not hear all the conversation, he stated that he felt that a drug deal was being discussed.

20 Detective Hill remained in the building until Mr. Papadolias departed at 14:10 carrying a white and blue box. He stated that he had had no conscious thought about the legality of what he was doing. He did not consider that he was trespassing as he was simply doing what he has done on many other occasions in the course of his investigations. He claimed that his purpose for entering the building was to find out if Mr. Papadolias was taking in or removing some

object. He stated that drug traffickers often use more than one unit in a building.

21 Detective Hill testified that, after he left the building, he followed Mr. Papadolias' vehicle as did other members of the surveillance team. They followed him to Carlingwood Mall where Mr. Papadolias unloaded the box from his vehicle into a minivan. This minivan was followed to a point on Highway 417 and was then pulled over. He explained that the blue and white box taken out of the minivan was the same box he had seen Mr. Papadolias remove earlier from 711 Churchill and then removed again from his car to the minivan at Carlingwood Mall.

22 Detective Hill testified that he cut open the packing tape on the box, which was removed from the minivan, and found marijuana and cocaine rolled in paper towel inside the box. The box was identified by means of photographs police had taken on their return to the station.

23 Detective Hill testified that he helped Detective Norman Redmond, the lead officer for the investigative team, prepare an information to obtain a search warrant while surveillance was being maintained at 711 Churchill by another police officer. A warrant was obtained for three locations, namely:

- 2104 Benjamin, suspected of being Mr. Papadolias' residence;

- 302-711 Churchill Avenue, the known residence of Mr. White; and

- 23 York Street, where "The Brig" pub is located.

24 As Mr. White was also arrested at the Westgate Shopping Centre on January 21, 2011, Detective Hill attended at 711 Churchill and entered unit 302. He conducted a search inside the unit and found cardboard boxes with packing slips addressed to 2104 Benjamin Avenue (Mr. Papadolias' residence), a passport, $100 in a shirt pocket, gloves with lead built in over the knuckles, Ziploc vacuum sealed bags, a large working digital scale and a sentry safe taped with carbon paper (the carbon paper interferes with X-rays of the box when drugs are in transit.)

25 Detective Hill testified that the sentry safe was opened at the police station. It contained 19 packs of cocaine wrapped in a brown towel, a Ziploc bag containing crack cocaine wrapped in tin foil, 52 grams of cocaine wrapped in a brown towel and a further Ziploc bag with a white towel wrapper containing cocaine. All of the contents were photographed in the presence of Detective Hill. The sentry safe, the drugs, the packing slips, the absolute vodka cardboard box, and the rolls of packing tapes found inside unit 302 were all entered as exhibits. Some keys recovered from Mr. Papadolias were entered as exhibits as well, as described above. Detective Hill stated that in the presence of Detective Redmond, the keys entered as an exhibit had been used to open the door at unit 302. The door was immediately closed without the officers entering.

26 During cross-examination, Detective Hill acknowledged that the law does not allow him to enter a private property without permission. He agreed that even a perimeter search is not allowed on private property without permission from the owner. However, Detective Hill was adamant that he could enter in furtherance of a police investigation. Detective Hill could not explain why he could not trespass on the premises of a single family dwelling but

maintained that he could trespass on the common elements of a condominium in a multiple unit building.

27 Detective Hill testified that he did not consciously address whether or not he was trespassing when he entered the condominium at 711 Churchill Avenue. During cross-examination, he was reminded that he had been asked the same question at the preliminary hearing on May 1, 2012. He replied that he had not taken the time to study the trespass question since that time. Detective Hill felt that as long as he did not interfere physically with a property, then he is entitled to enter and make a recognizance survey of same. He added that this tactic was in furtherance of a criminal investigation and that the entry was needed for security reasons. He also claimed that for effective policing, he needs to know how many exits there are in a building. He also stated that he was investigating a possible stash house for Mr. Papadolias' drugs.

28 Detective Hill's evidence is credible and honest when he described his entries at 711 Churchill Avenue. However, it was clear to me during trial, that he had not addressed the limits imposed on a police officer by the *Trespass to Property Act*. In fact, I find that he completely ignored the limits imposed by the *Act*.

The Evidence of Detective Norman Redmond

29 Detective Redmond has been a member of the Ottawa Police Service since March 1999 and was the team leader in the project Upsilon ("the Project"). He, in effect, dictated the direction of this investigation. He reviewed the entries in Exhibit #1, namely the information to obtain ("I.T.O.") and he was the affiant setting out the evidence to acquire the search warrant to enter unit 302-711 Churchill Avenue. As the team leader for "the Project", it was also his duty to review and analyse the 11 surveillance reports.

30 As a result of confidential information received in 2009, Detective Redmond acknowledged that Mr. Papadolias was the target of the investigation for "the Project." He confirmed that not much was accomplished between July 27, 2009 and September 1, 2010 because the investigation was suspended. On December 10, 2010, Mr. Papadolias had been followed to 711 Churchill and had been seen meeting an unknown dark male, who was later identified as Merith White, a bouncer at "the Brig" pub who had previously been involved in the trafficking of illicit drugs.

31 The investigation was started up again on August 16, 2010. Detective Redmond testified that police had had 29 previous contacts with Mr. White and that, in years past, a search warrant had been issued for unit 302-711 Churchill Avenue. He recalled that his confidential informer had told him that Mr. Papadolias often travelled to his stash house but that he believed the stash house to be located in the Elgin Street area. Detective Redmond acknowledged that such a lead was investigated and was proven partially wrong. Once a tracking device was attached to Mr. Papadolias' vehicle, it became obvious that he was attending at 711 Churchill Avenue quite frequently.

32 A surveillance report dated October 13, 2010 showed that Mr. Papadolias had approached a parked vehicle at the building and had thrown a bag inside the opened driver's side window before walking off. This was interpreted by Detective Redmond as abnormal and that it pointed to a drug deal.

33 Detective Redmond stated that he was aware that Detective Hill had gained access without permission at 711

Churchill Avenue and that he had walked the corridors and checked a basement locker area. He confirmed that he had obtained a full report from Detective Hill as to the contents of the caged locker belonging to unit 302. He believed that Detective Hill was entitled to do a recognizance survey of the building as part of the investigation he led. He also testified that, on January 6, 2011, Mr. Papadolias had been seen leaving the building and then enter his vehicle parked nearby.

34 On January 20, 2011, Detective Redmond testified that he was present at 711 Churchill Avenue and observed Mr. Papadolias enter the building at 13:47 p.m. using a key. He left the building at 13:55 p.m. carrying a box. By that date, Detective Redmond recalled that Constable Luc Grenier had obtained the Land Registry Office Record for the condominium of 302-711 Churchill Avenue and the documents showed that Merith White was a joint owner of unit 302, along with his parents. Detective Redmond stated that prior to January 20, 2011, he knew that Merith White lived in unit 302. That information was placed in his I.T.O. at paragraph 504.

35 Detective Redmond acknowledged that he knew Detective Hill had entered 711 Churchill Avenue on January 20, 2011 and on a previous occasion, without permission from anyone. He said that he had not given Detective Hill any specific instructions and that Detective Hill had only entered to confirm the location of the unit Mr. Papadolias was entering when he attended the building.

36 On January 21, 2011, Detective Redmond confirmed that Detective Hill had deliberately positioned himself in the building and watched Mr. Papadolias' actions. Mr. Papadolias had been seen the previous day carrying a box out of unit 302 and this was the purpose of re-entering the building. Detective Redmond explained that the investigation could not be compromised by going door to door in the 10 unit condominium to find out who was in each unit. Detective Redmond said that, at that point of time, he was not convinced that Mr. Papadolias was using unit 302 and that he thought that Mr. Papadolias was possibly using another unit.

37 Detective Redmond testified that he did not believe that Mr. White owned anything in the common areas of the building, meaning the hallways, the lobby and the stairwells. He reiterated that Mr. Papadolias' average stay when attending the condominium was a mere 20 minutes and that he had no information concerning overnight stays by Mr. Papadolias. Detective Redmond said that the police conduct was reasonable throughout. For instance, the police had not held a stethoscope to Mr. Papadolias' unit door. This would be an example of unreasonable conduct. Detective Hill was engaged in the execution of his duties and as such, had the same right as a pizza delivery person or a repair contractor to enter the common area without entering any units.

38 Detective Redmond confirmed that he was at the building under surveillance on January 21, 2011. He also confirmed the evidence given by Detective Hill as outlined above as far as following Mr. Papadolias' vehicle to Carlingwood Mall, suspicions that a box containing illegal drugs had been transferred at this Mall to Mr. Labelle's minivan and the subsequent step of pulling over the Labelle minivan on Highway 417 and the discovery of the illicit drugs inside the van.

39 The events of January 21, 2011 were added by Detective Redmond, in his affidavit, to the information to obtain a search warrant (paras. 503 and 504, Exhibit #1). He said that the entry into the building by Detective Hill on December 20, 2010 was included in paragraph 410 of the I.T.O and the entry by Detective Hill on January 20, 2011 was

also included. The *Controlled Drugs and Substances Act* warrant sought was for:

- 2104 Benjamin, suspected of being Mr. Papadolias' residence;
- 302-711 Churchill Avenue, the known residence of Mr. White; and
- 23 York Street, where "The Brig" pub is located.

40 Detective Redmond obtained a search warrant from Alder J., a member of the Ontario Court of Justice, during the evening of January 21, 2011 and the warrant was executed immediately at unit 302-711 Churchill Avenue. As noted previously, Mr. White had been arrested that same evening at the Westgate Shopping Centre, as was Mr. Papadolias. Mr. Papadolias had cocaine on his person and Mr. White was busy completing an illicit drug transaction.

41 The illicit drugs seized from unit 302, and filed as Exhibits, yielded the following:

- Grey sentry safe
- Royal Sovereign cash counter
- Large square tube steel cocaine press
- Blue and black gym bag containing tools and press parts
- Blackberry phone device
- Fusion digital scale with white powder residue and cheese knife
- Box of plastic freezer bags and Playtex baby bottle liner bag containing white powder

The illicit drugs obtained during the course of the seizures at unit 302, on highway 417 in the Labelle minivan and at 2104 Benjamin Avenue (the Papadolias home) were outlined in Detective Hill's evidence and totalled an impressive amount of cocaine, cannabis marijuana, drug paraphernalia and cash.

42 After obtaining a general warrant, Detective Redmond stated that Mr. Papadolias' Ford Explorer was searched on the premises of Ottawa Towing. A set of keys was found in the vehicle and Detective Redmond said that the keys were tried on the door lock to unit 302 and that they were able to open the door to the unit (Exhibit #9). Health Canada certificates were filed (Exhibit #8). The certificates confirm that the brown substances found in unit 302 and in the Labelle minivan were cannabis marijuana, and the white powder, also found in both locations, was cocaine. The substances found at other locations also tested positive for cocaine and marijuana. These results were not contested on the *voir dire*.

43 During cross-examination, Detective Redmond admitted that some information he had received from the confidential informer was stale. He agreed that the information received did not give him reasonable and probable grounds to obtain a search warrant. He also agreed that it was confusing to find out that Mr. Papadolias kept cocaine in his house where his parents resided and that the drugs were "stepped on" (made ready for sale) whereas cocaine with a higher percentage of purity, and were thus not "stepped on", were kept at Mr. White's residence.

44 Detective Redmond acknowledged that, in a situation concerning a private residence, it is wrong to step on the perimeter of the house as the perimeter is under the exclusive control of the owners. He also said that he believes that everything he presented in his I.T.O. to Alder J. was fair and frank. He acknowledged that he required, objectively, reasonable and probable grounds to obtain a search warrant.

45 Detective Redmond testified that if his officer did not break a door for entry, but used a door improperly latched to enter the building, he was not doing "anything wrong". He agreed that a condominium unit is different than an apartment, in that the owner of the condominium has a proprietary interest in the common elements. He also agreed that to install a camera in a hallway of a condominium building he needed a general warrant, but he felt that he did not need a general warrant to sneak into the building.

46 There was a need to see the layout of the building according to Detective Redmond. Until Detective Hill made his recognizance walk through the building, Detective Redmond said that all he had was a lot of surveillance but he was unsure that he had enough evidence to obtain a search warrant. He said that he needed the evidence whereby Mr. Papadolias came out of the building carrying a box and then made a drug transaction witnessed by the officers of his team. He recalled that prior to January 20 and 21, 2011, the surveillance team had only seen Mr. White at the building once or twice and that Mr. White was not the target of the surveillance.

47 Defence counsel pointed out to Detective Redmond that a contractor or a pizza delivery boy would be on the premises by invitation and that was not Detective Hill's situation. Detective Redmond did not want to answer the example given by defence counsel namely, whether he (defence counsel) walked into the building uninvited and without consent of an owner, he would be a trespasser. Detective Redmond's answer was: "I don't believe it's an offence for Detective Hill's entry in the building without permission and that's my answer."

48 Detective Redmond was asked why he omitted to flag to Alder J. that Detective Hill had entered a condominium and trespassed on common elements without permission. He replied that common elements are not within the sole control of an owner and an owner could not prevent another unit holder from using the common elements. Detective Redmond was then asked why he had bothered, after Mr. White's arrest, to have the **condominium corporation** sign an agreement allowing police to enter the building in pursuit of an investigation (Exhibit #5). He replied that it was to clarify the situation and prevent a trial such as the one that is ongoing. He also said that for security reasons, police officers need to enter the common elements of a condominium.

49 The above evidence was all evidence heard on the *voir dire* that counsel agreed can be used as evidence for the trial.

Issues

1) Was Mr. White's s. 8 *Charter* right breached?

a. Did the accused have a reasonable expectation of privacy to the common areas of the condominium building?

b. Was the search by Detective Hill an unreasonable intrusion on the accused's right to privacy?

2) If an infringement of s. 8 is found, is the evidence admissible under s. 24(2) of the Charter?

Defence's Position

50 The Applicant, Merith White, was charged with various offences pursuant to the *Controlled Drugs and Substances Act*. Most of the evidence that was obtained, leading to the charges, was seized after a search warrant was executed at the Applicant's residence at 711 Churchill Avenue North, Apartment 302, in Ottawa, and the search of a Dodge Caravan. An absolute vodka box containing a quantity of drugs was seized. The box had previously been in the Applicant's residence.

51 In this Application, the Applicant takes issue with the fact that, prior to obtaining the search warrant, the police trespassed onto the Applicant's property at 711 Churchill Avenue to gather information, contrary to s. 8 of the *Charter*. According to the Applicant, the trespasses were on the real property at 711 Churchill, as well as the common areas of the building and the storage units. The Applicant submits that all information obtained about 711 Churchill Avenue prior to the execution of the search warrant was unlawfully obtained and in violation of s. 8 of the *Charter*. The Applicant further submits that in the absence of the excised evidence, there would have been no ground to believe that any offence was committed at 302-711 Churchill Avenue or that any evidence of an offence would have been found at 302-711 Churchill Avenue, let alone reasonable grounds to believe in either of the requirements for the issuance of a warrant pursuant to s. 11 of the *Controlled Drugs and Substances Act*.

52 According to the Applicant, pursuant to s. 24(2) of the *Charter*, the appropriate and just remedy is to exclude all the evidence obtained in the search of 302-711 Churchill Avenue on January 21, 2011. The Applicant submits that his s. 8 *Charter* breaches were hardly inadvertent or technical. Rather, they were committed in a cavalier fashion by officers who failed to turn their minds to well-settled law.

53 The relief sought by the Applicant is an order allowing the application and granting the exclusion of all evidence seized in the search of 302-711 Churchill Avenue, Ottawa, on January 21, 2011, pursuant to sections 8 and 24 of the *Charter*

Crown's Position

54 The Crown's position is that in furtherance of their drug investigation, the police officers were entitled to make

a recognizance of the building as they were in pursuit of Mr. Papadolias and not Mr. White. As such, they were not trespassing.

55 The entrance by Detective Hill was also legitimate as it was done to identify the number of doors in the building and thus enhance their security.

56 In the event that the police officers were trespassing, the evidence should not be excluded as the officers were acting in good faith. The officers momentarily forgot the distinction between a condominium building and an apartment building.

Analysis

1) Was Mr. White's s. 8 Charter right breached?

57 In *R. v. Edwards*, [1996] 1 S.C.R. 128 at para. 33, the Supreme Court of Canada set out the two distinct questions that must be answered in any s. 8 *Charter* challenge: "The first is whether the accused had a reasonable expectation of privacy. The second is whether the search was an unreasonable intrusion on that right to privacy."

58 In *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, the Supreme Court of Canada affirmed that s. 8 of the *Charter* acts as a limitation on the powers of search and seizure set out in the *Criminal Code*, R.S.C. 1985, c C-46. Referring to *Hunter v. Southam* and the guarantee under s. 8 of the *Charter*, Cory J. in *R. v. Edwards* stated that:

> While Dickson J. advocated a broad general right to be secure from unreasonable search and seizure, he stressed that it only protected a "reasonable expectation of privacy". He stated at pp. 159-60 that the limiting term "reasonable" implied that:
>
> > ...an assessment must be made as to whether in a particular situation the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy in order to advance its goals, notably those of law enforcement.

59 Cory J., in *R. v. Edwards* observed, at para. 34, that: "[i]n any determination of a s. 8 challenge, it is of fundamental importance to remember that the privacy right allegedly infringed must, as a general rule, be that of the accused person who makes the challenge."

a. Did the accused have a reasonable expectation of privacy to the common areas of the condominium building?

60 The Crown submits that the Applicant did not have any reasonable expectation of privacy with respect to the common areas of the condominium building. While the Applicant had the ability to enter the common property, he had virtually no ability to restrict entry by others. With regards to allowing access to non-residents, the Crown submits that the Applicant did not have any control over what other residents of the building might do with the common property. The Crown further submits that the Applicant had almost no control over the common property and his possession of

it was only in common with many other people. As the Applicant did not have any reasonable expectation of privacy with respect to the common property, the Crown submits that the information obtained through the surveillance was not obtained in a manner that infringed the Applicant's s. 8 *Charter* rights.

61 The Crown relies on *R. v. Nguyen*, 2008 ABQB 721. In *Nguyen*, the accused argued that police surveillance at the condominium building breached his s. 8 *Charter* rights. The court found that Mr. Nguyen did not have a reasonable expectation of privacy in the condominium and had no standing to argue a *Charter* violation with respect to the surveillance. The court found there was no evidence that Mr. Nguyen had any ownership interest in the complex or the unit, nor was title in Mr. Nguyen's name. It was this latter factor that led the court to find that Mr. Nguyen had no reasonable expectation of privacy. The court stated, at para. 148:

> Considering all the factors here, **I find that it is not objectively reasonable to conclude that one has a reasonable expectation of privacy with respect to a place in which he has no ownership interest, which he does not use as a residence (temporary or otherwise) but rather merely has an ability to enter and leave.** One might have a key to a neighbour's house — and come and go to bring in the mail, water the plants, or do security checks. While the neighbour is absent, the person might even take things over there. **But absent the ability to control access by others, and with no ownership interest or residency, it is difficult to find an objective expectation of privacy.**
>
> [Emphasis added]

62 The court concluded, at para. 150, on the issue of surveillance at the condominium complex: "I conclude that Nguyen has no reasonable expectation of privacy with respect to Unit [...]. As a result, Nguyen cannot complain about the surveillance from within the condominium complex."

63 *R. v. Nguyen* can be differentiated as the Applicant in this case, as compared to Mr. Nguyen, had an ownership interest in the complex or Unit. Title was in his name. Graesser J., in *Nguyen*, found that Mr. Nguyen could not have had any reasonable expectation of privacy with respect to a place in which he has no ownership interest and with which he does not use as a residence. In this case, the property on which the police conducted surveillance was one in which the Applicant had an ownership interest and residency. Thus, it would be objectively reasonable to conclude that the Applicant would have had a reasonable expectation of privacy of the condominium and its common areas.

64 The court in *Nguyen*, at para. 161, also found that residents of the condominium also did not enjoy have any reasonable expectation of privacy with respect to the common property. The court stated that, at paras. 161-162:

> [T]hey had no control over what the hundreds of other residents might do with the common property in terms of allowing access to non-residents. There were no rules or regulations limiting access by third parties. ...
>
> They had almost no control over the common property; they had possession of it only in common with hundreds of other people. **They had no apparent ownership interest, as title to the property was in another name, and they were described only as residents.**

[Emphasis added]

65 Again, the court in *Nguyen* found that the residents did not have any reasonable expectation of privacy because they were merely residents and did not have an ownership interest or title to the property. However, it is important to note that apart from the lack of ownership interest, *Nguyen* does state that the residents did not have any reasonable expectation of privacy with respect to the common property due to "the size of the condominium complex, the number of residents, and the ease of access to the common property by residents and their guests" as explained at para. 167.

Apartment building corridors and hallway searches

66 This issue of expectation of privacy with respect to common property has also been addressed by this court. Two notable cases are *R. v. Piasentini*, [2000] O.J. No. 3319 (Sup. Ct.) and *R. v. Thomsen*, [2005] O.J. No. 6303 (Sup. Ct.).

67 In *R. v. Piasentini*, the court considered the power of a police officer to enter on to the common hallway of an apartment building in order to investigate information received from confidential information, prior to obtaining a search warrant. The issue raised by the applicant was whether the police's investigative techniques in obtaining information used to secure the search warrant breached s. 8 of the *Charter* and whether the warrant subsequently obtained was accordingly invalid. Wein J., at para. 35, found that there was no s. 8 *Charter* breach in the circumstances of this case, affirming that:

> There could not be said to be any right of possession or control of the hallway by the applicant and no ownership of the hallway. There was no history of use of the hallway that would have excluded others, such as police officers, and, while there was a right to admit others to the hallway, there was no overall right to regulate access since invitees of other tenants or the landlord could not be excluded by the applicant.

68 Further, it was because the applicant's subjective expectation of privacy, as evidenced by his testimony, revealed that he had no real expectation of exclusive privacy that led the court to find that there was no s. 8 *Charter* breach. Regarding the applicant's testimony, the court in *Piasentini* at para. 36, held:

> He did expect that the lock and buzzer system at the front door would prevent undesirable persons from being present in the halls, which had occurred in other buildings where no such lock existed. However, he frankly admitted that the police would have the right to attend as invitees of other tenants, and that might be a useful thing. There was no sense in which he suggested that the hallway was a place for any private activity free from the scrutiny of others, nor could there be said to be any objective reasonableness of any expectation of privacy.

69 Lastly, in *R. v. Piasentini*, there was an implied invitation to attend at the premises based on the information given to the police (para. 45) by way of a tip from a confidential informant who indicated that the applicant was growing and selling marijuana in his apartment.

70 In *R. v. Thomsen*, a case also considering whether there was a s. 8 *Charter* breach, the police made observations while in the hallway and outside an apartment door. As in *Piasentini*, the court in *Thomsen* found that the applicant did not have a reasonable expectation of privacy in the common hallway of the apartment. The court stated, at para. 35:

> As in *Piasentini*, it cannot be said that Mr. Thomsen had any right of possession or control or ownership of the hallway. There is no evidence of any history of use of the hallway that would have excluded others, such as police officers. And, although a tenant would obviously have the right to admit others to the hallway, there was no overall right to regulate access since invitees of other tenants or the landlord could not be excluded by Mr. Thomsen.

71 Therefore, in making my determination of whether the Applicant had a reasonable expectation of privacy, I should consider the following factors: what was the Applicant's subjective expectation of privacy, as well as whether there was an implied invitation to attend at the premises.

Storage unit area can be likened to underground garages

72 The Applicant contends that the police trespassed onto the property at 711 Churchill Avenue when they attended at the common area of the building, as well as the storage units. These are areas that are not ordinarily frequented by the public.

73 The storage units can be likened to an underground garage or secured parkade for the tenants of a building. In *R. v. Clarke* (2005), 196 C.C.C. (3d) 426 (Ont. C.A.), the accused failed to stop his vehicle and the police followed the accused's vehicle into his underground garage. The court in *Clarke* cited *R. v. Tricker* (1995), 96 C.C.C. (3d) 198 (Ont. C.A.), which discusses the doctrine of implied invitation. Sharpe J.A. in *Clarke* stated, at para. 28, that the doctrine of implied invitation holds that, "members of the public are given an implied license to pass over private property leading up to the point of access or entry (typically the front door) of a dwelling where they have a lawful reason to seek the consent from a resident to enter the dwelling."

74 The Supreme Court in *R. v. Evans*, [1996] 1 S.C.R. 8, applied the implied invitation doctrine to a dwelling. Sopinka J stated, at para. 13:

> [T]he occupier of a residential dwelling is deemed to grant the public permission to approach the door and knock. Where the police act in accordance with this implied invitation, they cannot be said to intrude upon the privacy of the occupant. The implied invitation, unless rebutted by a clear expression of intent, effectively waives the privacy interest that an individual might otherwise have in the approach to the door of his or her dwelling.

75 As a result, in determining whether the police had unlawfully entered the parking garage, the Ontario Court of Appeal in *Clarke* stated: "I agree with the respondent that *by entering the garage, the police went beyond the limit of private property leading up to the respondent's door*" (emphasis added).

76 In *Clarke*, the court found that it was open to the trial judge to find that the police had an implied invitation to

enter the garage as, according to the accused's evidence, the accused had indicated to the police that he was going to enter the garage. Therefore, the police lawfully entered the parking garage as there was an implied invitation to enter it. Furthermore, even without an implied invitation, the police were entitled to enter the garage as they were in pursuit of the accused and the accused "could not thwart their demand [the police's demand that the accused stop] by escaping to the sanctuary of his garage" (para. 29).

77 The Alberta Provincial Court, in *R. v. Chomik*, 2011 ABPC 152, 234 C.R.R. (2d) 109, also dealt with the issue of the police following an accused into a private parking structure, and the accused's resultant allegation of a breach of her s. 8 *Charter* right. As in *Clarke*, the court held, at para. 48: "I find that the entry into the secured/locked underground garage/parkade by the 3 officers was not justified in law, either by statute or common law. The interaction and seizures that follow were improper searches and seizures in violation of the *Charter*."

78 A parallel can be drawn between the secured parking garage and the storage units in the condominium building as these are both areas that are secured for unit owners and require a key or some type of access card, to enter. Therefore, it is evident that by entering the storage unit in this instance, the police went beyond the limit of private property leading up to the respondent's door.

79 Akin to the Ontario Court of Appeal's conclusion in *Clarke*, at para. 29, that "the parking garage was an element of the respondent's dwelling," so, too, are the storage units a part of the Applicant's dwelling. As the police did not have an implied invitation to enter the storage units' area of the building nor were the police in pursuit of the Applicant at the time, the police entered the storage units unlawfully.

Commercial storage lockers

80 In the discussion of the Applicant's reasonable expectation of privacy of the storage units in the Applicant's condominium building, the court's approach to allegations of s. 8 *Charter* breaches with respect to commercial storage lockers is worth noting.

81 In *R. v. Talbot*, [1996] B.C.J. No. 1162 (B.C.S.C.), the court considered the admissibility of items of evidence obtained as a result of surveillance by the police of a commercial storage locker. The court observed the spectrum of an individual's privacy expectations, from a residence to an open field. The court stated, at para. 59: "[t]hus Courts have accepted that at the 'residence' or high end of the spectrum, there is in the average person, a high expectation that he or she will be left alone, whereas in the open field or low end no such expectations arise."

82 With respect to the commercial storage locker and an individual's expectation of privacy, the court in *Talbot*, at paras. 63-64, stated:

> If items are stored in a manner that would permit a view without physical intervention of some kind, particularly in the context of a commercial area to which the public has access, then the accused can have no reasonable expectation of privacy.

. . . . .

> In the result I can see no basis to conclude that the accused had a reasonable expectation of privacy and I find that the observations of [Constable] Pitman were not "unreasonable" and did not offend s. 8.

83 In the case at bar, the expectation of privacy of a storage unit in a condominium, a residence, according to *Talbot*, would likely fall on the middle of the spectrum. The storage unit in this case, as compared to that in *Talbot* at para. 63, was *not* in "a commercial area to which the public has access." As such, it cannot be said that the police's observations at the Applicant's storage units were reasonable as the Applicant would have had a reasonable expectation of privacy.

84 I find that the accused had a reasonable expectation of privacy to the common areas of the condominium building.

b. Was the search by Detective Hill an unreasonable intrusion on the accused's right to privacy?

85 The accused's rights under s. 8 of the *Charter* were violated by the warrantless search conducted by the police of the common areas of the accused's condominium building. The police had no statutory authority to conduct that search. In the absence of lawful authority, the search must be found unreasonable (*R. v. Kokesch*, [1990] 3 S.C.R. 3, at para. 22; *R. v. Debot*, [1989] 2 S.C.R. 1140, at p. 1147). Further, the police had no constitutionally unrestricted right to trespass upon private property to conduct the search. As such, the s. 8 *Charter* rights of the accused have been violated by the warrantless search conducted by the police of the common areas of the accused's condominium building.

86 I find that Detective Hill's search was an unreasonable intrusion on the accused's right to privacy.

2. Should the evidence be excluded?

87 In *Kokesch*, at para. 25, the Supreme Court of Canada found that a nexus existed between the warrantless and unconstitutional search of the perimeter of the accused's dwelling-house and the subsequent discovery of evidence obtained pursuant to a valid search warrant. In approaching the threshold issue in s. 24(2), the Supreme Court in *Kokesch*, at para. 25, cited *R. v. Strachan*, [1988] 2 S.C.R. 980, at p. 1005. The latter case outlined the following general principle: "the first inquiry under s. 24(2) would be to determine whether a *Charter* violation occurred in the course of obtaining the evidence. A temporal link between the infringement of the *Charter* and the discovery of the evidence figures prominently in this assessment."

88 In *Kokesch*, at para. 25, the Supreme Court found that the police officer's observations during an unconstitutional search formed the foundation for a search warrant obtained the following day to search the observed premises, and that a temporal link was not broken by any intervening event. As such, it followed that the evidence was obtained in a manner that violated the accused's constitutional rights, thus prompting an inquiry, pursuant to s. 24(2) of the *Charter*, to determine whether the evidence obtained during the subsequent constitutional search is admissible.

89 The case at bar is akin to *Kokesch*: the threshold issue in s. 24(2) is met as it was Detective Hill's unconstitutional search of the common areas of the accused's condominium building that formed the foundation for the search warranted that was obtained to search the observed premises. It cannot be said that any temporal link was broken by any intervening event. As such, an inquiry pursuant to s. 24(2) of the *Charter* is required to determine whether the evidence obtained following the non-constitutional search is admissible, given that the evidence in the case at bar was obtained in a manner that violated the accused's constitutional rights.

Admissibility of the Evidence (s. 24(2) Charter Analysis)

90 Citing *R. v. Colarusso*, [1994] 1 S.C.R. 20, and *R. v. Wong*, [1990] 3 S.C.R. 36, the Supreme Court of Canada in *R. v. Edwards*, at para. 45, stated that: "[a] reasonable expectation of privacy is to be determined on the basis of the totality of the circumstances." Further, citing *United States v. Gomez*, 16 F.3d 254 (8th Cir. 1994), at p. 256, the Supreme Court in *R. v. Edwards*, at para. 45, stated that in assessing the totality of the circumstances, the factors to be considered include, but are not restricted to:

(i) presence at the time of the search;

(ii) possession or control of the property or place searched;

(iii) ownership of the property or place;

(iv) historical use of the property or item;

(v) the ability to regulate access, including the right to admit or exclude others from the place;

(vi) the existence of a subjective expectation of privacy; and

(vii) the objective reasonableness of the expectation.

91 As I have found that the accused's s. 8 *Charter* rights were infringed by the warrantless search, I must conduct a s. 24(2) analysis to determine whether the administration of justice would be brought into disrepute by admitting evidence obtained through the police's subsequent search that was undertaken pursuant to a valid search warrant. Section 24(2) of the *Charter* provides as follows:

> 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.

92 The Supreme Court of Canada in *R. v. Edwards*, at para. 45, citing *R. v. Rahey*, [1987] 1 S.C.R. 588, at p. 619, stated that: "A claim for relief under s. 24(2) can only be made by the person whose *Charter* rights have been in-

fringed.

93 The Supreme Court of Canada in *R. v. Grant*, [2009] 2 S.C.R. 353, at paras. 72-86, defined the relevant criteria in determining when, in all the circumstances, admitting evidence obtained by way of a *Charter* breach would bring the administration of justice into disrepute. The three lines of inquiry that the judge conducting a s. 24(2) analysis must consider in assessing the effect of the admission of evidence on the repute of the administration of justice are:

(i) the seriousness of the *Charter* infringing state conduct;

(ii) the impact of the breach on *Charter* protected interests of the accused; and

(iii) the societal interest in adjudication on the merits.

(i) The seriousness of the Charter infringing state conduct

94 *R. v. Grant* defined the first line of inquiry, at paras. 73-74:

> The concern of this inquiry is not to punish the police or to deter *Charter* breaches, although deterrence of *Charter* breaches may be a happy consequence. The main concern is to preserve public confidence in the rule of law and its processes. In order to determine the effect of admission of the evidence on public confidence in the justice system, the court on a s. 24(2) application must consider the seriousness of the violation, viewed in terms of the gravity of the offending conduct by state authorities whom the rule of law requires to uphold the rights guaranteed by the *Charter*.
>
> State conduct resulting in *Charter* violations varies in seriousness. At one end of the spectrum, admission of evidence obtained through inadvertent or minor violations of the *Charter* may minimally undermine public confidence in the rule of law. At the other end of the spectrum, admitting evidence obtained through a wilful or reckless disregard of *Charter* rights will inevitably have a negative effect on the public confidence in the rule of law, and risk bringing the administration of justice into disrepute.

95 In this line of inquiry, I am to consider whether the police took into account their right to enter the property. As in *R. v. Chomik*, at para. 52, was this a case where the police knew that grounds for the required warrant were not met, yet entry into the private property nevertheless occurred? If the police's actions were deliberate while knowing a citizen's rights would be ignored, it would be a serious *Charter* breach.

96 I agree with Defence counsel's submissions in stating:

> The searches of the common areas of the condominium unit were clearly done without anyone's consent. If the police are not aware of the *Trespass to Property Act*, that cannot be equated with good faith.

Following the preliminary hearing in this matter when this matter was brought to their attention, both officers did not

bother to find out what the *Trespass to Property Act* meant. The officers chose to remain wilfully blind even though, due to their experience, they should have known that covert entries can be made into buildings, even in dwelling houses if warrants are obtained under the general warrant provisions of the *Criminal Code*.

97 It is not good enough for the police officers to say that they did not direct their minds to the issue. I find that there was some bad faith on their part and my conclusion is also confirmed by the manner in which they refused to answer Crown counsel's questions during cross-examination.

98 This is reinforced by the fact that, unlike in other situations, there was no urgency in this matter: the first entry was made on December 10 and the second entry occurred more than one month later.

99 I also believe the evidence of Zoë Gillespie, in her capacity as a board of director of the **condominium corporation**. She testified that, *subsequent* to the arrests, Detective Redmond asked her to bring a consent to trespass under the *Trespass to Property Act*. This was done under the pretence that the Police did not want to be liable if they ever had to come back to investigate a crime. Ms. Gillespie gave her evidence in a straight forward manner and had no interest in falsifying her conversation with Detective Redmond. She expressed a desire to be very cooperative with the police officers during trial and also, according to Detective Redmond, following the arrest of the accused.

100 During cross-examination, I did not find officers Hill and Redmond to have been candid in responding to questions about being trespassers at 711 Churchill. The question was put to Detective Redmond about eight times and he refused to admit he had made a mistake. Both Detectives Hill and Redmond gave similar answers in an attempt to justify their conduct. I find that their egregious investigatory conduct was done in bad faith. As I said at trial, I found both officers to be ignorant about a law they should know without hesitation.

101 Considering the affidavit given to Alder J. to obtain a warrant, Detective Redmond did not fare much better. In considering the test for excision, all evidence that was illegally obtained must be excised from the affidavit. I have found that the accused had a privacy interest in the common areas of his condominium and it gives him standing to exclude the evidence obtained by the police in entering the accused's apartment. Once the illegal entries are excised from the affidavit, there are no objective, or subjective, grounds for the issuance of the warrant. As such, I find that the search of unit 302 was warrantless. Detective Redmond admitted in evidence that if the unlawful entries were excised from his affidavit, there would not be reasonable and probable grounds to obtain the warrant for either of the two requirements: that Mr. White is committing an offence or that there is evidence of an offence in Mr. White's apartment.

(ii) The impact of the breach on accused's Charter protected interests

102 The Supreme Court in *R. v. Grant* defined the second line of inquiry, at paras. 76-78:

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

> citizen, breeding public cynicism and bringing the administration of justice into disrepute.
>
> To determine the seriousness of the infringement from this perspective, we look to the interests engaged by the infringed right and examine the degree to which the violation impacted on those interests. For example, the interests engaged in the case of a statement to the authorities obtained in breach of the *Charter* include the s. 7 right to silence, or to choose whether or not to speak to authorities (*Hebert*) - all stemming from the principle against self-incrimination: *R. v. White*, [1999] 2 S.C.R. 417, at para. 44. The more serious the incursion on these interests, the greater the risk that admission of the evidence would bring the administration of justice into disrepute.
>
> Similarly, an unreasonable search contrary to s. 8 of the *Charter* may impact on the protected interests of privacy, and more broadly, human dignity. An unreasonable search that intrudes on an area in which the individual reasonably enjoys a high expectation of privacy, or that demeans his or her dignity, is more serious than one that does not.

103 This line of inquiry determines the danger that admitting such evidence may bring the administration of justice into disrepute. I am to examine the degree to which the search and seizure actually intruded upon the Applicant's privacy, bodily integrity and human dignity.

104 In *R. v. Chomik*, the court stated, at para. 54, that:

> [T]he act of two police vehicles...driving into an underground, secured and locked garage/parkade by waiting for an authorized user of the garage/parkade to either enter or exit seems initially benign, but the result is seriousness. **It is an unauthorized entry into a portion of dwelling-house that is subject to an expectation of privacy albeit a somewhat diminished expectation of privacy.** The purpose of the entry was for the investigation of a suspected crime. The Supreme Court of Canada has held that an individual's privacy interests in the dwelling-house outweighs the interests of police....This is a serious breach of a *Charter* protected interests of the Accused. Failure to exclude the evidence would send a message that individual rights count for little and therefore on this phase of the inquiry only, would bring the administration of justice into disrepute.
>
> [Emphasis added].

105 I find that, in this instance as previously explained, there was a serious impact on the accused's *Charter* protected right.

(iii) The societal interest in adjudication on the merits

106 The Supreme Court in *R. v. Grant* defined the third line of inquiry, at paras. 79-80, 82-84:

> [T]he third line of inquiry relevant to the s. 24(2) analysis asks whether the truth-seeking function of the criminal trial process would be better served by admission of the evidence, or by its exclusion. This inquiry reflects society's "collective interest in ensuring that those who transgress the law are brought to trial and dealt with according

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

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

. . . . .

The fact that the evidence obtained in breach of the *Charter* may facilitate the discovery of the truth and the adjudication of a case on its merits must therefore be weighed against factors pointing to exclusion, in order to "balance the interests of truth with the integrity of the justice system": *Mann*, at para. 57, *per* Iacobucci J. The court must ask "whether the vindication of the specific Charter violation through the exclusion of evidence extracts too great a toll on the truth-seeking goal of the criminal trial": *R. v. Kitaitchik* (2002), 166 C.C.C. (3d) 14 (Ont. C.A.), at para. 47, *per* Doherty J.A.

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

It has been suggested that the judge should also, under this line of inquiry, consider the seriousness of the offence at issue. Indeed, Deschamps J. views this factor as very important, arguing that the more serious the offence, the greater society's interest in its prosecution (para. 226). In our view, while the seriousness of the alleged offence may be a valid consideration, it has the potential to cut both ways. Failure to effectively prosecute a serious charge due to excluded evidence may have an immediate impact on how people view the justice system. Yet, as discussed, it is the long-term repute of the justice system that is s. 24(2)'s focus. As pointed out in *Burlingham*, the goals furthered by s. 24(2) "operate independently of the type of crime for which the individual stands accused" (para. 51). And as Lamer J. observed in *Collins*, "[t]he *Charter* is designed to protect the accused from the majority, so the enforcement of the *Charter* must not be left to that majority" (p. 282). The short-term public clamour for a conviction in a particular case must not deafen the s. 24(2) judge to the longer-term 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.

107 In sum, this third line of inquiry requires that I determine the negative impact associated with admitting the evidence on the repute of the administration of justice, as well as the impact of failing to admit the evidence.

108 At the end of my analysis of the three lines of inquiry, I, as indicated by *Grant*, at para. 82, must weigh the fact that admitting the evidence obtained in breach of the *Charter* may facilitate the discovery of the truth, and ensuring the adjudication of the case on its merits, against the integrity of the justice system.

109 In *R. v. Chomik*, the garage/parkade case, at para. 61, the court held that the balance fell in favour of excluding all of the evidence obtained after the police made the entry into the garage/parkade. That court found that inclusion of such evidence would bring the administration of justice into disrepute, and in the long run, would contribute to erosion of public respect and confidence in the administration of justice.

110 I find that the long-term impact on the administration of justice, by letting in evidence found in a search of a dwelling house with a warrant devoid of legally obtained grounds, would bring the administration of justice into dispute. The evidence is therefore excluded.

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