

CRIMINAL PROCEDURE

CHARTER REMEDIES

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Chapter 6

Charter Remedies¹

[§6.01] Introduction

The *Canadian Charter of Rights and Freedoms* came into force in 1982. It forms part of Canada's Constitution. Section 52(1) of the *Constitution Act* proclaims the Constitution as the supreme law of Canada and "any law that is inconsistent with the provisions of the Constitution (including the *Charter*) is, to the extent of the inconsistency, of no force or effect". Section 24(1) of the *Charter* allows those whose constitutional rights have been infringed or denied to apply to "a court of competent jurisdiction" for such remedy as is "appropriate and just in the circumstances". Section 24(2) allows for the exclusion of evidence "obtained in a manner that infringed or denied any rights or freedoms" where the admission of that evidence "[could] bring the administration of justice into disrepute".

A threshold question under s. 24 of the *Charter* is whether the court from which the remedy is sought is a "court of competent jurisdiction". A court of "competent jurisdiction" is one that possesses jurisdiction over the subject matter, jurisdiction over the person, and jurisdiction to grant the remedy (*R. v. Mills*, [1986] 1 S.C.R. 863; see also *R. v. 974649 Ontario Inc.*, [2001] 3 S.C.R. 575, at para. 15). A functional and structural approach is taken: if, by its function and structure, the tribunal is an appropriate forum for ordering a *Charter* remedy, it can reasonably be inferred, in the absence of a contrary indication, that the enabling legislator intended the tribunal to have this power.

Applying this analysis, the Supreme Court of Canada has ruled that a provincial court conducting a preliminary inquiry is *not* a court of competent jurisdiction for the purpose of excluding evidence under s. 24(2) of the *Charter*. In *R. v. Hynes* (2001), 159 C.C.C. (3d) 59 (S.C.C.), the question arose as to whether a preliminary inquiry judge could exclude statements

from evidence on grounds that they were obtained in violation of a *Charter* right. The Court held that a preliminary inquiry is simply a "preliminary review to determine whether there is sufficient evidence to proceed to trial" (at para. 4), and it is the trial court that is in the best position to determine whether admitting the impugned evidence could bring the administration of justice into disrepute.

In *R. v. Menard*, 2007 BCSC 838, the court held that a provincial court judge who presides over a judicial interim release hearing is not a "court of competent jurisdiction" for the purpose of awarding costs against the Crown under s. 24(1) of the *Charter*. The "bail court is clearly not suited to grant a remedy under s. 24" (at para.16).

A criminal trial court is a "court of competent jurisdiction" for most *Charter* remedies, including the exclusion of evidence; stays of proceedings; costs against the Crown; and possible reductions of sentence. However, it may not be the appropriate forum for other remedies—for example, an award of damages in favour of the accused. When a claim for damages is made, the party against whom the claim is made ordinarily has the right to make full answer and defence. In those circumstances, the procedure governing civil actions provides a more appropriate framework for the application with pleadings, discovery of the parties, and the discovery of documents (*R. v. McGillivray* (1990), 56 C.C.C. (3d) 304 (N.B.C.A.)).

The remedies that a court may grant under s. 24 of the *Charter* will vary. They include:

1. a judicial stay of proceedings resulting from an abuse of process by the Crown, or from the breach of a specific *Charter* right, such as the right to be tried within a reasonable time (s. 11(b));
2. the exclusion of evidence resulting from the breach of a *Charter* right, such as the right to be secure against an unreasonable search;
3. the granting of an adjournment in favour of the accused (*R. v. Dixon*, [1998] 1 S.C.R. 244);
4. an award of costs in favour of the accused (*R. v. 974649 Ontario Inc.*, *supra*); and
5. a reduction in sentence where a *Charter* violation was found to exist, but not considered serious enough to warrant the exclusion of evidence. For a helpful review of the jurisprudence on this latter remedy, see *R. v. Carpenter* (2002), 165 C.C.C. (3d) 159 (B.C.C.A.); leave to appeal to the Supreme Court of Canada denied, January 9, 2003. It should be noted that the Canadian appellate

¹ M. Joyce DeWitt-Van Oosten, Director, Prosecution Support for the Criminal Appeals and Special Prosecutions Office, Criminal Justice Branch, kindly revised this chapter in November 2008, July 2006, July 2005 and May 2004. Revised annually from 2001 to 2003 by Oliver Butterfield, then Deputy Regional Crown Counsel, Nelson, BC. Revised in March 1999 by Ravi R. Hira, Q.C., Watson Goepel Maledy. Revised in March 1998 by Ravi R. Hira, Q.C. and David M. Towill, both of Watson Goepel Maledy. Revised in January 1997 by Andrew G. Strang, Smart & Williams, Vancouver. Revised first in March 1995 and March 1996 by William B. Smart, Smart & Williams.

courts are not *ad idem* on this issue and, in British Columbia, this remedy is limited.

A constitutional exemption from the application of a mandatory, minimum sentence under the *Criminal Code* is no longer an available remedy under s. 24(1) of the *Charter*: *R. v. Ferguson*, 2008 SCC 6.

[§6.02] Challenging the Validity of Legislation

A challenge to the validity of a statutory provision or a legislative scheme is made by an application to have the provision declared to be of “no force or effect” under s. 52(1) of the *Constitution Act* (*Schachter v. Canada*, [1992] 2 S.C.R. 679).

Section 52(1) allows a court to “strike down” a provision “to the extent of the inconsistency” with the Constitution. The inconsistency may be based on a *Charter* violation, or other grounds. Finding an inconsistency can result in portions of a provision being declared to be of no force or effect, while the remainder of the legislation remains valid. For instance, in *R. v. Sharpe* (2001), 150 C.C.C. (3d) 321, the Supreme Court of Canada upheld the validity of s. 163.1 of the *Criminal Code*, prohibiting possession of child pornography, but carved out two overly broad applications. On the other hand, the court may strike down the impugned provision in its entirety. For example, in *R. v. Smith* (1987), 34 C.C.C. (3d) 97, the Supreme Court of Canada struck down the seven year minimum jail sentence for drug importation on grounds that the possible disproportionality of the provision constituted “cruel and unusual punishment” within the meaning of s. 12 of the *Charter*.

A common constitutional attack on the validity of legislation is that it is “vague” or “overbroad”. This challenge is brought under s. 7 of the *Charter*. The applicant alleges that the statute or provision does not provide “sufficient guidance for legal debate”, and/or that it reaches beyond what is necessary to accomplish its legislative objective: *Nova Scotia Pharmaceutical Society v. The Queen* (1992), 74 C.C.C. (3d) 289 (S.C.C.); *R. v. Canadian Pacific Ltd.* (1995), 99 C.C.C. (3d) 97 (S.C.C.). If overbreadth has been established, the offending words can be severed from the provision (*R. v. Hall* (2002), 167 C.C.C. (3d) 449 (S.C.C.)).

A two-stage process is involved before legislation is declared to be “of no force or effect” based on an alleged infringement of the *Charter*. First, the court must determine whether the legislation is inconsistent with, or infringes upon, a *Charter* right or freedom. When it does, the court will then embark upon an analysis under s.1 of the *Charter* to determine whether the infringement or denial of the right or freedom is “a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society”.

In the first inquiry, the onus is on the applicant to show, on a balance of probabilities, that a *Charter* right or freedom has been infringed or denied: *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)* (2004), 180 C.C.C. (3d) 353 (S.C.C.), para. 3. Once this has been established, the onus shifts to the Crown to demonstrate that the legislation is nonetheless justified under s. 1. Again, the standard is a balance of probabilities.

The framework for a s. 1 analysis is set out in *R. v. Oakes* (1986), 24 C.C.C. (3d) 321 at 348-350 (S.C.C.). To “save” a provision under s. 1, the Crown must first demonstrate that the objective of the legislation is “of sufficient importance to warrant overriding a constitutionally protected right or freedom”. Second, it must show that the means chosen to achieve the objective are reasonable and demonstrably justified. This requires that they be rationally connected to the objective and impair the right or freedom “as little as possible”. The court will also look to proportionality between the effects of the impugned provision and the importance of the objective.

In *R. v. Sharpe, supra*, the test under s. 1 was described this way:

The goal must be pressing and substantial, and the law enacted to achieve that goal must be proportionate in the sense of furthering the goal, being carefully tailored to avoid excessive impairment of the right, and productive of benefits that outweigh the detriment (at p. 361).

There are a number of general principles that guide the s. 1 analysis. First, the *Oakes* test must be applied in a flexible manner, and the factual and social context within which the law is applied is a legitimate factor to consider (*RJR-MacDonald Inc. v. Canada (Attorney General)* (1995), 100 C.C.C. (3d) 449 at 538 (S.C.C.)). Second, common sense and inferential reasoning may supplement the evidence tendered in support of justification (*R. v. Sharpe, supra* at 360). There may be cases in which certain aspects of the s. 1 analysis are self-evident, such as the importance of a legislative objective. Third, the *Charter* does not demand perfection. The legislature need not adopt the least restrictive means of achieving its objective. It is sufficient if “the means adopted fall within a range of reasonable solutions to the problem confronted” (*R. v. Sharpe, supra* at 366).

Under s. 8 of the *Constitutional Question Act*, R.S.B.C. 1996, c. 68, a person challenging the constitutional validity or applicability of legislation, or seeking an individualized remedy under s. 24(1) of the *Charter*, must give 14 days notice of the challenge to both the Attorney General of British Columbia and the Attorney General of Canada (unless the court authorizes a shorter

time frame). Service of notice on the Attorney General of British Columbia may be accomplished by delivering/ mailing a copy of the Notice to the Ministry of Attorney General, Legal Services Branch, Constitutional and Administrative Law, 6th Floor, 1001 Douglas Street, P.O. Box 9280, Stn Prov. Govt., Victoria, B.C., V8W 9J7. In criminal matters, a copy of the notice should also be given to Crown Counsel or to the federal prosecutor that has conduct of the case. The Attorney General of Canada may be served at the Department of Justice, 900-840 Howe Street, Vancouver, B.C., V6Z 2S9.

Applications for the exclusion of evidence under s. 24(2) of the *Charter* do not require formal notice under the *Constitutional Question Act*. However, the prosecution must still be given notice of the intent to seek exclusion, with particulars, and this should occur before the evidence is tendered. For a discussion of the relevant principles, see *R. v. Sipes*, 2008 BCSC 1257; *R. v. Kutynec* (1992), 70 C.C.C. (3d) 289 (Ont. C.A.); *R. v. Feldman* (1994), 91 C.C.C. (3d) 256 (B.C.C.A.), affirmed (1994), 93 C.C.C. (3d) 575 (S.C.C.); and *R. v. Dwernychuk* (1992), 77 C.C.C. (3d) 385 (Alta. C.A.).

In British Columbia, the *Criminal Caseflow Management Rules* govern prosecutions in Provincial Court. A trial confirmation hearing is held prior to trial. Rule 9 requires that counsel for the accused file a Trial Readiness Report with the court and provide a copy to the Crown. The Report includes a section in which counsel is expected to indicate whether an application will be made under the *Charter* to challenge the constitutionality of legislation.

[§6.03] Judicial Stays for Abuse of Process

A court of competent jurisdiction has the power under s. 24(1) to terminate proceedings by way of a judicial stay of proceedings. Granting a judicial stay is “the most sweeping and drastic remedy in the arsenal of remedies” and should be limited to the “clearest of cases” (*R. v. Regan* (2002), 161 C.C.C. (3d) 97 (S.C.C.)).

Stays of proceeding are sometimes sought on grounds of abuse of process. There are essentially two categories of abuse: (1) an abuse of process that is said to result in trial unfairness (i.e. irreparable damage to the ability to make full answer and defence); and (2) a “residual” category of abuse of process, where the conduct of the Crown “so contravenes the notions of justice, as to undermine the integrity of the judicial process” (*R. v. Arcand*, 2008 ONCA 595, at para.67; *R. v. Taillefer*, [2003] 3 S.C.R. 307, at para.118; *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391; *R. v. O’Connor* (1995), 103 C.C.C. (3d) 1 (S.C.C.)). Irrespective of whether the abuse is said to impact trial fairness or falls within the “residual”

category, the test for a stay of proceedings under s. 24(1) is the same. A stay is only available where:

- (1) the prejudice caused by the abuse in question will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome; and
- (2) no other remedy is reasonably capable of removing that prejudice (*R. v. Taillefer, supra*, at para. 118).

[§6.04] Judicial Stays for Unreasonable Delay

One of the common circumstances in which a judicial stay of proceedings is sought arises out of an alleged violation of s. 11(b) of the *Charter*—unreasonable delay in getting to trial. These applications are usually made pre-trial. The accused must provide the Crown with advance notice of the application. In *R. v. Fagan* (1998), 115 B.C.A.C. 106, the Court recommended that the accused not only provide reasonable notice of the application but supply both the Crown and the court with written material in support of the application. Reasonable notice will “often be a period measured in weeks rather than days” (at para. 53). Section 8 of the *Constitutional Question Act* applies, requiring at least 14 days written notice to the Attorneys General (see *R. v. Mitchell* (1998), 123 C.C.C. (3d) 521 (B.C.C.A.) for a contrary view, expressed in *obiter*).

Applications for a judicial stay on grounds of unreasonable delay are made to the trial court. The motion should be supported by affidavit evidence setting out the delays and the reasons for them, with specific reference to transcripts of the proceedings at which adjournments were spoken to. It may be, depending on the circumstances, that the parties can agree on the reasons for the delay and the history of the file can be put before the Court by way of an agreed statement of facts.

Particular attention must be paid to the issue of prejudice. This results from two decisions of the Supreme Court of Canada: *R. v. Morin* (1992), 71 C.C.C. (3d) 1 and *R. v. Sharma* (1992), 71 C.C.C. (3d) 184, which reconsidered principles that the Court set out in *R. v. Askov* (1990), 59 C.C.C. (3d) 449.

In *Morin*, Sopinka J. noted at 13:

The general approach to a determination as to whether the right [to be tried within a reasonable time] has been denied is not by the application of a mathematical or administrative formula but rather by a judicial determination balancing the interests which the section is designed to protect against factors which either inevitably lead to delay or are otherwise the cause of delay.

The factors to be considered and weighed on a s.11(b) application include: (1) the length of the delay (calculated from the date the charge was laid to the anticipated end of the trial); (2) whether any of the delay was clearly and unequivocally waived by the accused; (3) the reasons for the delay (including – the inherent time requirements necessitated by the nature of the case; the procedural actions of the accused; the procedural actions of the Crown; limits on institutional resources); and (4) prejudice to the accused. The presence or absence of prejudice is an important factor in determining whether the delay was unreasonable (*R. v. McPherson*, [1999] B.C.J. 1675 (B.C.C.A.)).

Section 11(b) of the *Charter* applies to sentencing proceedings. The accused has a right to be sentenced within a reasonable period of time (see *R. v. McDougall* (1998), 128 C.C.C. (3d) 483 (S.C.C.)).

Section 11(b) does *not* apply to delay that occurs between commencement of the criminal investigation and the laying of charges: *R. v. Kalanj*, [1989] 1 S.C.R. 1594. Rather, prejudice that arises through this form of delay is typically addressed under s. 7 of the *Charter*. The accused must prove on a balance of probabilities that the pre-charge delay so adversely affected the fairness of the trial or the ability to make full answer and defence, that it offends the principles of fundamental justice to continue with the prosecution: *R. v. L.J.H.*, [1997] M.J. No.450 (Man. C.A.); leave to appeal refused, [1997] S.C.C.A. No. 569.

[§6.05] Exclusion of Evidence

Applications to exclude evidence based on an alleged breach of the *Charter* are brought under s. 24(2). As noted earlier, formal notice of the application is not required under the *Constitutional Question Act*. However, the Crown is nonetheless entitled to reasonable notice in advance of the application. As observed in *R. v. Lee* (1987), 37 C.C.C. (3d) 407 at 415 (B.C.S.C.), “[t]he Crown is as much entitled to make full answer to an allegation of infringement of rights as the accused is to the offence charged. It cannot do so if the accused can pop up at the end of the Crown’s case and assert, for the first time, a failure to prove a lawful arrest”.

The court is entitled to know the defence position on possible *Charter* issues either before or at the outset of the trial. Further, the court is entitled to a summary of the anticipated evidentiary basis for the exclusion application, where possible. In the event that the preliminary offer of proof, whatever its form, does not disclose a basis for exclusion, no evidentiary hearing need be convened (*R. v. Kutynec*, *supra* at 301). In *R. v. Garofoli*, [1990] 2 S.C.R. 1421, for example, the Court held that on an application made under s. 8 of the *Charter* to exclude evidence obtained through a wiretap

authorization, cross-examination of the affiant who obtained the authorization should not be allowed unless the defence can first show that it will elicit testimony tending to discredit the existence of one of the statutory prerequisites for the authorization (at 1465). See also *R. v. Pires* and *R. v. Lising* (2005), 201 C.C.C. (3d) 449 (S.C.C.).

If appropriate notice is not given, the trial judge may refuse to entertain the application for exclusion (*R. v. Loveman* (1992), 71 C.C.C. (3d) 123 (Ont. C.A.)). Nevertheless, procedural requirements will generally give way to constitutional rights, particularly in the absence of demonstrated prejudice to the party entitled to notice (*R. v. Russell*, [1999] B.C.J. No. 2245 (B.C.S.C.)). Consequently, in cases of inadequate notice, rather than precluding an applicant from pursuing the exclusion application, the court may find that the more appropriate remedy is to grant an adjournment to the other side to allow for adequate preparation.

Only a trial court can exclude evidence under s. 24(2) of the *Charter*. The procedure employed to establish a violation of the *Charter* and entitlement to a remedy, is for the court to declare a *voir dire*. The applicant bears the burden of persuading the court, on the balance of probabilities, that a *Charter* right has been infringed. The applicant also has the burden of presenting evidence in support of the alleged breach, unless the breach arises from the prosecution’s case alone. Once a breach has been established, the analysis moves to the question of exclusion. To claim the benefit of this remedy, the applicant must show that the evidence was “obtained in a manner that infringed or denied” a right. In other words, there must be a causal, temporal or contextual connection between the breach and the evidence (*R. v. Goldhart* (1996), 107 C.C.C. (3d) 481 (S.C.C.); *R. v. Wittwer*, 2008 SCC 33).

The applicant carries the further onus of establishing that the admission of the impugned evidence *could* bring the administration of justice into disrepute (*R. v. Collins* (1987), 56 C.R. (3d) 193 at 205 (S.C.C.)). This process applies to both adults and young persons who are prosecuted under the *Youth Criminal Justice Act*, S.C. 2002, c. 1.

Sometimes there is a temptation to present evidence on the *voir dire* in summary form or on the basis of an agreed statement of facts. Counsel must be careful that doing so does not leave important considerations unexplored. In *R. v. Leng* (1993), 13 C.R.R. (2d) 152 (B.C.C.A.), Gibbs J.A. commented as follows (at 11):

...the judgment on this case was given following a *voir dire* based upon an agreed statement of facts. In my opinion, proceeding in this kind of case on agreed facts is most unsatisfactory. Without the benefit of direct examination and cross-examination of witnesses, there is a very

real risk of prejudice to the accused. The practice of finding guilt or innocence on an agreed statement of facts should be discouraged except where the facts are such that viva voce evidence would not have the potential of affecting the outcome.

When deciding whether the admission of evidence *could* bring the administration of justice into disrepute, the court must first classify the evidence as “conscriptive” or “non-conscriptive”. Evidence is “conscriptive” if the accused was compelled by the state to participate in the creation or discovery of the evidence in violation of a *Charter* right (for example, the accused provides a breath sample in response to a demand for same by police, or a statement confessing to an offence in response to a police interrogation). Evidence is “non-conscriptive” if it exists independent of the accused. The introduction of conscriptive evidence is generally seen to have an adverse impact on trial fairness and as a result, this kind of evidence is often excluded under s. 24(2): *R. v. Stillman* (1997), 113 C.C.C. (3d) 321 (S.C.C.). Having said that, s. 24(2) is not an automatic exclusionary rule for conscriptive evidence (*R. v. Buhay* (2003), 174 C.C.C. (3d) 97 (S.C.C.)). In *R. v. Orbanski*; *R. v. Elias* 2005 SCC 37, LeBel J. observed that the mere presence of “conscriptive” evidence should not be determinative. Rather, other s. 24(2) factors may need to be considered on the question of admissibility. See also *R. v. Grant* (2006), 209 C.C.C. (3d) 250 (Ont.C.A.); currently under appeal to the Supreme Court of Canada, SCC 31892 (at the time of writing this chapter, judgment was reserved).

The admission of “non-conscriptive” evidence (for example, real property) will rarely operate to render the trial unfair and the court will move on to consider the seriousness of the violation and the effect of exclusion on the repute of the administration of justice (*R. v. Stillman, supra*; *R. v. Law* (2002), 160 C.C.C. (3d) 449 (S.C.C.)). In some circumstances, the exclusion of reliable evidence that is essential to the prosecution of a serious criminal offence can adversely affect the administration of justice (*R. v. Belnavis* (1997), 118 C.C.C. (3d) 405 (S.C.C.)).

The scope of s. 24(2) may extend to the exclusion of “derivative” evidence. In *R. v. Burlingham* (1995), 97 C.C.C. (3d) 385 (S.C.C.), the Court not only excluded statements made by the appellant that were obtained in violation of his right to counsel, but also excluded real evidence (the murder weapon), which was discovered as a result of those statements.

It is only in exceptional cases that a *Charter* application can be brought for the first time on appeal. Appellate courts are reluctant to make *Charter* pronouncements or

rulings without an evidentiary foundation addressing the relevant issues (*R. v. Vidulich*, [1989] B.C.J. No.1124 (B.C.C.A.); *R. v. Olson*, [1993] B.C.J. No.1344 (B.C.C.A.); *R. v. Blair*, [1988] B.C.J. No.1191 (B.C.C.A.); *R. v. Ubhi*, [1996] B.C.J. No.934 (B.C.C.A.)).

[§6.06] Unreasonable Searches

One of the more common examples of an application to exclude evidence is when the accused alleges a violation of the right to be secure against unreasonable search or seizure under s. 8 of the *Charter*. In *R. v. Collins, supra*, the Supreme Court of Canada set out the approach to be followed when considering a breach of s. 8. A search will be reasonable only if: (1) it is authorized at law (by reason of statute, the common law or as a result of prior judicial authorization); and (2) it is carried out in a reasonable manner (*R. v. Caslake* (1998), 121 C.C.C. (3d) 97 (S.C.C.)).

A search will be “authorized by law” if:

- the state representative conducting the search can point to a specific statute or common law rule that authorizes the search;
- the search was carried out in accordance with the requirements that the statute or common law rule provides for; and,
- the scope of the search is limited to the area and those items provided for by the statute, the common law or the warrant itself (*R. v. Caslake, supra*, at p.105-106).

Examples of “laws” that authorize searches are statutory provisions such as s. 487(1) of the *Criminal Code* and s. 11 of the *Controlled Drug and Substances Act*, both of which allow for the issuance of a search warrant. The police also have common law powers that they can rely upon to conduct searches, including the power to search incidental to a lawful arrest (*Caslake, supra*), and the power to detain and search where there are reasonable grounds to suspect that the person is connected to a particular crime, and detention is necessary to investigate that crime. In the latter circumstances, if there are reasonable grounds to believe that the officer’s safety or the safety of others is at risk, a pat-down search is warranted (*R. v. Mann* (2004), 185 C.C.C. (3d) 308 (S.C.C.); *R. v. Clayton*, [2007] 2 S.C.R. 725).

The fact that a search is conducted pursuant to a warrant does not end the inquiry. These searches can be attacked by focusing on defects on the face of the warrant or on problems associated with the manner in which it was obtained. It is also open to the defence to show that there were insufficient grounds for the justice of the peace to issue the warrant, even though this goes behind a warrant valid on its face (*R. v. Williams* (1987), 38 C.C.C. (3d) 319 (Y.T.C.A.)). As this will involve

examining the “Information to Obtain” that was put before the justice in support of the warrant, steps must be taken to either subpoena (or have the Crown produce on the *voir dire*) the officer who swore the Information to Obtain. The document itself will also be needed. Insufficient grounds for the search warrant will result in the warrant being ruled invalid, thereby establishing a breach of the s. 8 right. Warrantless searches are *prima facie* unreasonable.

Material non-disclosure by the officer who swore the Information to Obtain, or deliberate misrepresentation, can also invalidate a warrant. However, the mere presence of non-disclosure or fraud is not fatal. Rather, the judge who reviews the warrant must ask him or herself whether, putting aside the erroneous or fraudulent information, there remains a sufficient basis for issuance of the warrant. If such is the case, the warrant may survive scrutiny under s. 8 of the *Charter*, notwithstanding the errors associated with obtaining it (*R. v. Bisson*, [1994] 3 S.C.R. 1097; *R. v. Garofoli*, [1990] 2 S.C.R. 1421).

Even if a search was authorized by law, it must be conducted in a reasonable manner. For example, *R. v. Golden* (2001), 159 C.C.C. (3d) 449 (S.C.C.) dealt with “strip searches” and searches of private bodily cavities. Such searches, even when incidental to a lawful arrest, must not be carried out routinely. They must meet the constitutional standard of reasonableness; for instance, they must usually be carried out in a police station, in privacy, should be supervised by a senior officer, must ensure the health and safety of the suspect, and involve minimal force.

Showing that a search was unreasonable within the meaning of s. 8 is only the first hurdle facing the defence. The second hurdle is showing, again on a balance of probabilities, that because of the breach, the evidence should be excluded under s. 24(2) on grounds that its admission could bring the administration of justice into disrepute. As stated, the admission of real or non-conscriptive evidence will rarely operate unfairly, and the defence may have to show, in those circumstances, that the breach was a particularly serious one characterized by deliberateness and lack of good faith on the part of the police.

A further issue in an application involving s. 8 of the *Charter* is that of “standing”.

Section 8 protects “reasonable expectations of privacy”. To seek the exclusion of evidence on the basis of a breach of s. 8, the applicant must demonstrate a constitutionally recognized privacy interest in the place or the property that was searched. In *R. v. Fraser* (1990), 55 C.C.C. (3d) 551 at 554 (B.C.C.A.), Seaton J.A. stated “...the language of s. 24(1) [of the *Charter*] makes it clear that the applicant for relief must be the person whose rights were infringed”. The Supreme Court of Canada in *R. v. Edwards*, [1996] 1 S.C.R. 128, ruled that

the appellant had no privacy interest to challenge the admissibility of his drugs that were found in his girlfriend’s apartment because he was “just a visitor” who stayed over occasionally. To the same effect is the case of *R. v. Khuc* (2000), 142 C.C.C. (3d) 276, where the British Columbia Court of Appeal ruled that two accused who claimed to be babysitters on the premises did not have standing to challenge the search warrant because they did not show that they had a reasonable expectation of privacy.

Whether there exists a reasonable expectation of privacy will be determined on the basis of the totality of the circumstances. The factors to consider were discussed in *R. v. Edwards*, *supra*, and include:

- (1) the accused’s presence at the time of the search;
- (2) whether the accused had possession or control of the property or place searched;
- (3) ownership of the property or place;
- (4) historical use of the property or item;
- (5) the ability to regulate access; and
- (6) the existence of a subjective expectation.

It is also important to note, as indicated earlier, that to use the exclusion remedy under s. 24(2), the defence must show the evidence was obtained “in a manner” that infringed a *Charter* right. In other words, even if the accused has a reasonable expectation of privacy in the place searched, the impugned evidence should only be excluded under s. 24(2) if its discovery or availability was temporally, causally or contextually connected to the search. The entirety of the circumstances will be considered. In *R. v. Goldhart* (1996), 107 C.C.C. (3d) 481 (S.C.C.), for example, the police searched a house and discovered a marijuana grow operation. The house had three occupants, of which the accused was one. All three were arrested. One occupant subsequently pleaded guilty and testified at the trial of the accused. The latter sought to have this testimony excluded under s. 24(2) on grounds that it was the product of an illegal search. The Supreme Court of Canada held that s. 24(2) did not apply. The nexus between the illegal search of the house and the eventual testimony of one of the occupants was too remote. There were too many intervening events between the search and the testimony, including the witness’ voluntary decision to co-operate with police, plead guilty and testify (at para. [45]). See also, *R. v. Hyatt and Pawluk* (2003), 171 C.C.C. (3d) 409 (B.C.C.A.).

An important area of the law of search and seizure deals with searches of law offices and seizure from lawyers of material that may be protected by solicitor-client privilege. All lawyers should be familiar with the rules set out by the Supreme Court of Canada in *A.G. Canada v. Lavallee, et.al.* (2002), 167 C.C.C. (3d) 1. In this case the Court struck down s. 488.1 of the *Criminal Code* as

unconstitutional and substituted judge-made rules to protect the privacy interests of both lawyers and their clients. The theme of these rules is to ensure that privileged material is sealed and not viewed by the authorities of the state prematurely, as well as to provide avenues for lawyers, their clients, and other interested parties, to claim privilege and have the issue adjudicated by a judge before investigators or the Attorney General view the relevant material. If the court finds the documents to be privileged, they are to be returned to the holder of the privilege, or to a person designated by the court. If materials in your office become the subject of a search and seizure by police or other state authorities, you should assert any privilege promptly, seek advice from the Law Society, and reread the *Lavallee* decision.

A last issue to be examined under this heading concerns probation orders that are imposed at sentence. Section 732.1 of the *Criminal Code* provides that as part of a probation order, a court may direct that an offender comply with “such other reasonable conditions as the court considers desirable” for protecting society or facilitating reintegration into the community. For a long time, it was not unusual to see a probation order that not only prohibited the offender from consuming alcohol and/or non-prescription drugs, but directed the offender to provide samples of breath, blood or urine upon request by a peace officer for the purpose of analysis, so as to monitor compliance with the abstinence clause. In *R. v. Shoker* (2004), 192 C.C.C. (3d) 176 (B.C.C.A.), the Court held that this latter term, when imposed without the consent of the offender, violates s. 8 of the *Charter* because it does not require reasonable and probable grounds for the sample request, and the legislation does not delineate standards or safeguards for the protection of the offender’s safety and privacy. The ruling was affirmed on appeal (*R. v. Shoker* (2006), 41 C.R. (6th) 1 (S.C.C.)).

[§6.07] Right to Counsel

Applications to exclude evidence under s. 24(2) are often based on an alleged infringement of the right to counsel. Section 10(b) of the *Charter* gives a person the right on arrest or detention to retain and instruct counsel without delay and to be informed of that right. There are many cases that canvass the meaning of “detention” within the context of s. 10(b).

Essentially, there are three ways in which a detention for *Charter* purposes might arise. They are discussed in *R. v. Johns* (1998), 123 C.C.C. (3d) 190 at 196 (Ont. C.A.):

- (1) when the accused is physically confined or restrained;
- (2) when a state authority assumes control over the movement of a person by way of a demand or direction which may have significant legal

consequences (such as a demand for a breath sample), and

- (3) when the person interacting with police acquiesces in a deprivation of his or her liberty, reasonably believing that the choice to do otherwise does not exist.

To establish a detention, the accused must demonstrate an element of compulsion or coercion in the state’s interaction with him or her (*R. v. C.R.H.* (2003), 174 C.C.C. (3d) 67 at para. [21] (Man. C.A.); *R. v. Therens*, [1985] 1 S.C.R. 640). Not every conversation, or even physical interaction, between police and a suspect will amount to a detention within the meaning of the *Charter*. It is up to the claimant to show that a detention exists on the evidence, with reference to the circumstances as a whole.

When someone is arrested or detained, s. 10(b) imposes certain obligations on police that they must comply with (in the absence of the accused unequivocally waiving the right to counsel). First, police are required to inform the person of the right to counsel. This is called the “informational duty”. Normally this is done from a card that the officer carries with him or her. Detainees must be told of the right. They must also be told that immediate and free legal advice is available (assuming such a program is in place), and the means by which to access the advice (*R. v. Brydges* (1990), 53 C.C.C. (3d) 330 (S.C.C.)). The purpose of s. 10(b) is to ensure that those under investigation who are in the control of the state are given a meaningful opportunity to seek preliminary legal advice on issues such as disclosure, judicial interim release and the right to silence (*R. v. Bartle* (1994), 92 C.C.C. (3d) 289 (S.C.C.)).

A second set of duties that are imposed on police are called the “implementation duties”. Police are required to provide a detainee who asserts the right to counsel with a reasonable opportunity to exercise it, “except in urgent and dangerous circumstances”. Police must furthermore refrain from eliciting evidence from the detainee until the right has been exercised (*R. v. Prosper* (1994), 92 C.C.C. (3d) 353 (S.C.C.); *R. v. Bartle, supra*).

Detainees who assert the right to counsel must be diligent in exercising it, or police may continue their investigation against him or her (*R. v. Tremblay* (1987), 60 C.R. (3d) 59 (S.C.C.); *R. v. Smith* (1989), 50 C.C.C. (3d) 308 (S.C.C.)). However, the detained accused should be allowed a reasonable time to consider exercising the right before questioning begins (*R. v. Hollis* (1992), 76 C.C.C. (3d) 421 (B.C.C.A.)). In *R. v. Baig* (1987), 37 C.C.C. (3d) 181, the Supreme Court of Canada ruled, absent proof that the accused did not understand the right to retain counsel when informed of it, that the onus is on the accused to show that he or she asked for the right but it was denied, or that the accused was denied the opportunity to even ask for it.

In *R. v. Black* (1989), 50 C.C.C. (3d) 1, the Supreme Court of Canada held that the right to counsel as guaranteed by s. 10(b) must be interpreted in a purposive manner and in light of s. 10(a), which requires the police to advise a detained or arrested person of the reasons for detention or arrest. A detainee can only exercise the s. 10(b) right in a meaningful way if the extent of jeopardy is known. If the jeopardy changes in the course of the police investigation, in the sense that the detainee now faces an offence that is significantly more serious or a different, unrelated offence, he or she should again be afforded both the informational and implementation components of the right to counsel. See also *R. v. Evans* (1991) 63 C.C.C. (3d) 289 (S.C.C.) and *R. v. Chartrand* (1992), 74 C.C.C. (3d) 409 (Man. C.A.).

Not every shift in investigative focus will trigger a second opportunity to exercise the right to counsel. If, based on the circumstances as a whole, the accused would have been able to appreciate the extent of his or her jeopardy, or the shift involves something that arises out of or is easily envisaged as part and parcel of the initial investigation, a new s. 10(b) advisement may not be required (*R. v. Boomer* (2001), 153 C.C.C. (3d) 425 (B.C.C.A.); *R. v. Nesheim*, [1998] B.C.J. No. 1202 (B.C.C.A.) and *R. v. O'Donnell* (1991), 66 C.C.C. (3d) 56 (N.B.C.A.)).

Once an accused asserts the right to counsel, the accused is entitled to contact the lawyer of his or her choice. It is only if the lawyer of choice is not available within a reasonable time that the accused should be expected to exercise the right by calling someone else (*R. v. LeClair and Ross* (1989), 46 C.C.C. (3d) 129 at 135 (S.C.C.)). If the accused is unable to reach the lawyer of choice, police must give him or her a reasonable opportunity to consult with someone else before proceeding to gather evidence from the accused. Facilitating contact with the lawyer of choice assists in ensuring that the right to counsel is exercised in a “meaningful” way (*R. v. Badgerow*, [2008] O.J. No.3416 (Ont.C.A.)).

Finally, the accused can waive the right to counsel, as long as the waiver is informed and made with full knowledge of the s. 10(b) rights. The courts will scrutinize waivers closely, particularly if the accused is vulnerable as a result of age, mental capacity or extreme intoxication. A waiver that is said to come after an initial assertion of the right will be given special attention. In these circumstances, police must remind the accused of the right to a reasonable opportunity to contact counsel, and further, tell the accused that police must hold off on gathering evidence until the reasonable opportunity has been given (*R. v. Smith* (1999), 134 C.C.C. (3d) 453 (Ont. C.A.)). The Crown bears the onus of establishing a waiver on a balance of probabilities (*R. v. Bartle, supra*).

The Supreme Court of Canada has ruled, generally, that when there has been a denial of the right to counsel, any

“conscriptive” evidence that is subsequently obtained by police from the accused is likely to be excluded pursuant to s. 24(2) of the *Charter* because its admission would adversely impact trial fairness: see, for example, *R. v. Elshaw* (1992), 67 C.C.C. (3d) 97, *R. v. Evans* (1991), 63 C.C.C. (3d) 289 and *Burlingham, supra*. However, as mentioned, it is important to remember that there is no automatic exclusionary rule. Each case must be assessed independently and counsel should not assume that because there was a breach, the admissibility of “conscriptive” evidence becomes a non-issue (*R. v. Orbanski; R. v. Elias, supra*).

[§6.08] Disclosure

The right to full disclosure represents an important component of every accused's right to make full answer and defence pursuant to s. 7 of the *Charter*.

The general principles governing the prosecution’s duty to make full disclosure are discussed by the Supreme Court of Canada in *R. v. Stinchcombe*, [1991] 3 S.C.R. 326. Writing for the unanimous Court, Mr. Justice Sopinka held that the Crown has a continuing duty to disclose all relevant information to the accused that it has in its control or possession. This obligation applies to both inculpatory and exculpatory evidence. It matters not whether the Crown plans on tendering the evidence at trial. Relevant information is not limited to actual evidence, but includes the production of information that can reasonably be used by the accused in meeting the case for the Crown, advancing a defence, or otherwise in making a decision which may affect the conduct of the defence. If the Crown has a doubt as to relevance, the Crown must exercise its discretion in favour of the accused. Only that which is clearly irrelevant or privileged may be withheld.

The accused may not be entirely passive in relying upon the right to full disclosure from the Crown. In *R. v. Dixon*, [1998] 1 S.C.R. 244, the Court held that defence counsel must exercise diligence in pursuing disclosure from the Crown. The Court further stated that a lack of due diligence should be a factor in determining whether or not the Crown’s non-disclosure affected the fairness of the trial process should this issue arise.

In *R. v. Carosella*, [1997] 1 S.C.R. 80, the Court ruled that the Crown's duty to disclose is not limited to information actually in the physical possession of the prosecution, but extends to relevant information possessed by government agencies or government funded organizations.

There may be cases in which potentially relevant material is in the hands of a third party (such as a counseling agency) and its disclosure raises privacy concerns. For certain enumerated offences, including sexual assault, sections 278.1-278.9 of the *Criminal Code* govern the procedure for disclosure of records to

which a reasonable expectation of privacy may attach. Before disclosure can be made, a court must determine that the records are likely relevant to an issue at trial or the competence of a witness to testify. If so, the court must also determine whether, amongst other things, the need for disclosure to make full answer and defence outweighs the detrimental impact on privacy. For non-enumerated offences, a similar balancing process is provided for in *R. v. O'Connor*, *supra*.

Section 24(1) of the *Charter* governs the remedies available to an accused for an infringement of the right to full disclosure (a principle of fundamental justice). Under s. 24(1), the court may order production of the information, adjourn the trial for further disclosure (with or without an order for costs against the Crown) or, in the most egregious examples, enter a judicial stay of proceedings. In determining the remedy available to the accused, the court will balance all relevant factors.

In a recent Supreme Court of Canada decision—*R. v. Illes*, 2008 SCC 57—the Court noted that a new trial may be the appropriate remedy for cases where disclosure of relevant evidence is not made until after the verdict has been entered. To obtain a new trial, the accused must show either a reasonable possibility that the non-disclosure could have affected the outcome at trial (i.e. it could have created a reasonable doubt in the mind of the trier of fact), or that it affected the overall fairness of the trial process.

It is important to note that the loss or destruction of information that would otherwise be disclosable under *Stinchcombe* does not automatically result in a finding that there was a breach of the *Charter* right to disclosure. If the Crown satisfies the court that the evidence has not been lost or destroyed owing to *unacceptable negligence*, the duty to disclose has not been breached. The main considerations in this regard are: a) whether the Crown (or police) took reasonable steps in the circumstances to preserve the evidence, and b) the perceived relevance of the evidence at the time. If the trial judge concludes the evidence *has* been lost or destroyed due to unacceptable negligence, the Crown will have failed to meet its disclosure obligations, and there will be a breach of s. 7 (*R. v. La* (1997), 116 C.C.C. (3d) 97 (S.C.C.)).

[§6.09] Rowbotham Applications

Since provincial legal aid programs have become increasingly restrained in terms of funding, it is not uncommon for indigent accused persons to apply to court for the appointment of counsel to be paid for by the state. Such applications are called “Rowbotham Applications”, after the name of a case in which the Ontario Court of Appeal dealt with this issue—*R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1.

The *Charter* does not expressly guarantee the right of an indigent accused to be provided with funded counsel. Nevertheless, in cases not falling within the provincial legal aid plan, ss. 7 and 11(d) of the *Charter* require funded counsel to be provided if the accused wants to be represented but cannot pay a lawyer, and representation of the accused by counsel is essential to a fair trial. The accused’s financial ability, the complexity of the legal and factual issues, and the possibility of a jail sentence in the event of a conviction, are factors the court may consider.

If the application is successful, the judge will direct a stay of proceedings against the accused until the government provides the necessary funding for counsel. Such an order may sometimes result in the Crown discontinuing the prosecution. The Crown has a right of appeal from the stay of proceedings.

The priority of the court will be to ensure that the accused has a fair trial and if this cannot be achieved in the absence of legal representation, the court will want to explore every reasonable opportunity in that regard before proceeding. In *R. v. Williams*, 2004 BCCA 522, a new trial was ordered in a case where the accused unsuccessfully defended himself on a trial involving historical sex offences. He applied for legal aid, but was refused. He then applied for court-appointed counsel under *Rowbotham*. His application failed. Ultimately, based on the circumstances of the case, the Court of Appeal found that Mr. Williams could not have had a fair trial without counsel. The Court opined that the trial judge should have entertained a fresh *Rowbotham* application or requested the Attorney General to appoint *amicus curiae*.

[§6.10] Effective Assistance of Counsel

In *R. v. G.B.D.* (2000), 143 C.C.C. (3d) 289, the Supreme Court of Canada recognized a convicted appellant's right to a new trial where the appellant had received ineffective representation by defence counsel. The right to the "effective assistance of counsel" is seen as a principle of fundamental justice, derived from the evolution of the common law and ss. 7 and 11(d) of the *Charter*. An appeal based on an allegation of ineffective assistance will generally require putting evidence before the Court of Appeal to substantiate the allegation. The application must first demonstrate that counsel's acts or omissions constituted incompetence, and second, that a miscarriage of justice resulted. In determining competence, the conduct of counsel is assessed against a reasonableness standard and there is a presumption in favour of competence. Reasonable minds may disagree on strategies to employ in conducting a defence and it is not enough to simply say, in hindsight, that counsel should have handled the case differently. See, *R. v. Moore* (2002), 163 C.C.C. (3d) 343 (Sask. C.A.); *R. v. P.T.* (2002), 165 C.C.C. (3d) 281 (Ont. C.A.); *R. v. Dunbar, Pollard, Leiding and Kravit* 2003 BCCA 667; *R. v. Jim* 2003 BCCA 411.

In February 2005, the British Columbia Court of Appeal issued a *Criminal Practice Directive* that addresses appeals in which the ineffective assistance of trial counsel is raised as a ground of appeal. Amongst other things, the *Directive* provides that trial counsel be notified of the appeal. This allows trial counsel an opportunity to respond to the allegation of ineffective assistance, if need be.

[§6.11] Bans on Publication

Trial judges issue bans on publication of evidence in a variety of circumstances. If a ban is imposed to ensure a fair trial for the accused, the accused's rights to a fair hearing under s. 11(d) of the *Charter* must be balanced against the right of the press and the public to freedom of expression and freedom of the press under s. 2(b) of the *Charter*. The test for the propriety of the ban examines the necessity for the ban and the proportionality between the ban's salutary and deleterious effects (*Dagenais v. CBC* (1994), 94 C.C.C. (3d) 289 (S.C.C.)).

The test is broader in cases where orders are sought to protect other crucial aspects of the administration of justice (for example, the secrecy of police investigative techniques). In such cases, a court should order a publication ban when (*R. v. Mentuck*, [2001] 3 S.C.R. 442; (2001), 158 C.C.C. (3d) 449 (S.C.C.))

- (a) it is necessary to prevent a serious risk to the proper administration of justice because reasonable alternative measures will not prevent the risk;
- (b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.