BREACHES, BARGAINS, AND EXCLUSION OF EVIDENCE: BRINGING THE ADMINISTRATION OF JUSTICE INTO DISREPUTE

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The test for both exclusion of evidence under section 24(2) of the Canadian Charter of Rights and Freedoms (Charter) *and whether a sentencing judge may divert from a joint sentencing recommendation is ostensibly the same: whether the admission of evidence or imposing the proposed sentence "would bring the administration of justice into disrepute." Despite this, jurisprudence illustrates a vast divergence in what constitutes disrepute: the onerous standard applied to divert from a joint sentencing submission is all but absent when exclusion of evidence is considered under the* Charter.

This article addresses this disparate treatment in two parts. First, we argue that courts have consistently misapplied section 24(2) since the Supreme Court of Canada's decision in R. v. Grant, *as determinations of evidence's admissibility under this section have focused almost exclusively on the factors articulated to guide the analysis, rather than the ultimate question to be determined. Moreover, courts have interpreted the phrase "bring the administration of justice into disrepute" differently depending on context — a trend that ought not to continue. We posit that the disrepute standard ought to be interpreted and applied consistently, with the recognition that "bringing the administration of justice into disrepute" is an exceptionally high bar.*

Second, we hope to provoke a broader reliance on the generous remedial powers conferred in section 24(1) of the Charter. *This shift — which the Supreme Court has hinted at in recent decisions — would significantly change the adjudication of constitutional issues in criminal proceedings. We hope that the framework we propose for interpreting section 24 will stimulate attention to the practical benefits of eschewing a one-size-fits-all approach to* Charter *remedies and instead adopting a principled method that responds to each case's individual circumstances.*

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I. INTRODUCTION

When the Supreme Court of Canada revisited the test for exclusion of evidence in *R. v. Grant*, it did so to address a particular problem: the previous test was "difficult to apply" and produced results that were "criticized as inconsistent with the language and objectives of s. 24(2)" of the *Canadian Charter of Rights and Freedoms*.[1] Chief Justice McLachlin and Justice Charron recognized that the fundamental purpose of the exclusionary provision is to maintain the long-term integrity of, and public confidence in, a criminal justice system that simultaneously embraces the rule of law and upholds individual constitutional rights. From that starting point, they reformulated the test for exclusion in a fashion designed to achieve this balance.[2] Despite this deliberate effort to take the focus off the immediate case and take a big-picture approach to the public's confidence in the administration of justice, in the years since *Grant* this realignment has not been realized.

The test for both exclusion of evidence under section 24(2) and whether a sentencing judge may divert from a joint recommendation is ostensibly the same: whether the admission of evidence or imposing the proposed sentence "would bring the administration of justice into disrepute."[3] However, in *R. v. Anthony-Cook* the Supreme Court illustrated this high bar by equating the disrepute standard with "a break down in the proper functioning of the criminal justice system" and made it clear that due to this onerous standard, it would be the exceptional case where disregard of a joint submission would be warranted.[4] The application of the disrepute standard under section 24(2) stands in stark contrast with this onerous interpretation. We are of the view that in its day-to-day application, the test for exclusion of evidence has been diluted to a far less demanding standard, with the result that reliable evidence is routinely excluded for minor or merely technical breaches. In short, exclusion of evidence is anything but exceptional, and indeed in some contexts it is the norm.

In this article, we argue that the test for exclusion of evidence under section 24(2) must be given a more stringent interpretation than what has become the standard. In our view, a proper application requires that evidence only be excluded when — similar to a stay of proceedings for abuse of process — exclusion is the minimum remedy capable of alleviating significant prejudice caused by serious state misconduct. Instead, trial judges should increasingly turn to the broad remedial authority under section 24(1) to determine the appropriate remedy for the specific circumstances raised in each case. Such an application surrounding exclusion of evidence and consideration of alternative remedies would be consistent with the Supreme Court's illustration of the high bar necessary to bring the administration of justice into disrepute, and also provides for a consistent interpretation of section 24.

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1 2009 SCC 32 at paras 3, 60 [*Grant*]; *Canadian Charter of Rights and Freedoms*, s 24, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].
2 *Grant*, *ibid* at paras 67–68.
3 *Charter*, *supra* note 1, s 24(2).
4 2016 SCC 43 at paras 5, 33 [*Anthony-Cook*], citing *R v Druken*, 2006 NLCA 67 at para 29 [*Druken*].

We present this argument in the following steps: first, we consider the wording of "bringing the administration of justice into disrepute," which we will refer to as the "disrepute standard." We contrast how courts have treated this standard in the context of joint sentence recommendations versus the exclusion of evidence under section 24(2), and will demonstrate that the onerous standard employed in the former is not reflected in the latter. Next, we confront recent jurisprudence from the Supreme Court of Canada that touches on both section 24(2) and the administration of justice more generally, from which we posit that a shift in the approach to these areas is forthcoming. Finally, we consider section 24 as a whole, and argue that while exclusion of evidence should be treated more rigidly, trial judges should be encouraged to consider less drastic remedies that directly address *Charter*-infringing conduct under section 24(1). In our view, this approach will balance the competing interests at play, as it will result in meaningful remedies that are individualized for each case, thereby preventing *Charter* rights from decaying to the point where their protection is illusory, while simultaneously upholding the truth-seeking function of a trial and ensuring ongoing public confidence in a system where accused persons face a trial on the merits.

II. BRINGING THE ADMINISTRATION OF JUSTICE INTO DISREPUTE

The plain wording of section 24(2) gives rise to two foundational principles: (1) that evidence obtained in breach of the *Charter* is presumptively admissible; and (2) rebutting that presumption requires that an accused demonstrate that its admission would bring the administration of justice into disrepute.[5] A determination of the latter is a prospective assessment: it is not intended to punish the police or compensate the accused; rather, its "focus is on the broad impact of admission of the evidence on the long-term repute of the justice system."[6]

These principles are not contentious; however, their application may lead to disparate results.[7] Reasonable people, after all, may disagree. Palma Paciocco commented that "inasmuch as reasonable people disagree about what *justice* requires, two reasonable, ethically minded Crowns, both of whom are genuinely trying to fulfill their *seek justice* mandate, may adopt wildly different stances on the same case."[8] This observation applies equally to judges who adjudicate applications for exclusion under section 24(2). The ultimate question of whether admission of evidence will bring the administration of justice into disrepute is one strongly influenced by perspective, and judges, like all justice system participants, come from a wide variety of personal and professional backgrounds. Their legal, moral, and ethical points of view have all been impacted by their experiences.[9] Perspective,

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5 *R v Collins*, [1987] 1 SCR 265 at 287–88 [*Collins*]. See also Don Stuart, *Charter Justice in Canadian Criminal Law*, 6th ed (Toronto: Carswell, 2014) at 55–56, 638–39.

6 *Grant*, *supra* note 1 at para 70.

7 While not contentious in that they are well-established in law, the presumption and onus are frequently misstated. See e.g. *R v Keith*, 2015 MBPC 67 ("[i]t is well recognized that evidence obtained in violation of the *Charter may nevertheless be admitted into evidence if* its admission does not 'bring the administration of justice into disrepute'" at para 21 [emphasis added]).

8 Palma Paciocco, "Seeking Justice by Plea: The Prosecutor's Ethical Obligations During Plea Bargaining" (2017) 63:1 McGill LJ 45 at 51 [emphasis in original].

9 For an alternative example of how perspective may impact judicial decision making, see Rowan Kunitz, "At the Mercy of the Court: Canadian Sentencing Principles and the Concept of Mercy" (2020) 25:1 Can Crim L Rev 1.

though, only permits a certain amount of discretion: the conclusion must reflect a proper consideration of the standard for exclusion.[10]

Before delving into the disrepute standard itself, we must acknowledge that there is a difference in drafting between the English and French versions of the *Charter*. Namely, although the English version is phrased, "*would* bring the administration of justice into disrepute," the French text provides, "*est susceptible de* déconsidérer l'administration de la justice."[11] In *R. v. Collins*, the Supreme Court noted that the French wording could be translated as "could" instead of "would."[12] Therefore, section 24(2) should be read as "the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings *could* bring the administration of justice into disrepute."[13] At first glance, this might appear to negate any parallel between the language used by the Supreme Court in *Anthony-Cook* and that in the English version of section 24(2). However, we must return to the source material. Although the English translation of *Anthony-Cook* states "would bring the administration of justice into disrepute,"[14] the French version of that same decision provides:

> Selon le critère de l'intérêt public, un juge du procès ne devrait pas écarter une recommandation conjointe relative à la peine, à moins que la peine proposée *soit susceptible de déconsidérer l'administration de la justice* ou qu'elle soit par ailleurs contraire à l'intérêt public.[15]

The Supreme Court mirrored the language from section 24(2) in both languages in *Anthony-Cook*. This must be presumed to be deliberate. As in *Collins*, if the Supreme Court had intended for the disrepute standard to be interpreted on the basis of the English "would" they should have used language consistent with that intent in the French version of the decision — language akin to "ternirait l'image de la justice."[16] Given that the Supreme Court did not, rather than weakening the parallel between the language in *Anthony-Cook* and the *Charter*, this in fact enhances our argument.

Whether in French or English, though, the wording in section 24(2) is "broad and imprecise."[17] This may be one reason why the disrepute standard has not been employed more frequently. It is, however, not without application outside of the *Charter* context.

A. JOINT SUBMISSIONS AS TO SENTENCE: EXPLAINING WHAT "DISREPUTE" MEANS

In *Anthony-Cook*, the Supreme Court instructed sentencing judges to apply the disrepute standard, referring to it as the "public interest test," when considering departing from a joint

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10 *Grant*, *supra* note 1 at para 86; see also *R v Farrah (D)*, 2011 MBCA 49 at para 7 ("[t]he decision on whether to exclude under s. 24(2) of the *Charter* is an admissibility of evidence issue which is a question of law"); *R v Buhay*, 2003 SCC 30 at para 42.

11 *Charter*, *supra* note 1, s 24(2) [emphasis added].

12 *Collins*, *supra* note 5 at 287.

13 *Ibid* at 288 [emphasis in original].

14 *Anthony-Cook*, *supra* note 4 at para 32

15 *Ibid* [emphasis added].

16 *Collins*, *supra* note 5 at 288 [emphasis omitted].

17 *Grant*, *supra* note 1 at para 60.

sentence recommendation.[18] In doing so, the Court clearly articulated that the standard is intended to be a stringent one.[19]

To explain what constitutes bringing the administration of justice into disrepute, the Supreme Court relied heavily on two decisions from the Newfoundland and Labrador Court of Appeal — both of which written by Justice Rowe, when he was a member of that Court.[20] In *R. v. B.O.2*, Justice Rowe explained that the term "bring the administration of justice into disrepute" denotes a far higher standard than a mere difference of opinion:

> Rather, it is whether the sentence is *seen as a breakdown of the legal system*. A judge must be content to be pilloried publicly for a decision that he or she believes is justified in law. By contrast, *it is of concern if any decision causes an informed and reasonable public to believe that our system of justice is collapsing*. To put it another way, a judge's duty is to render a proper sentencing decision even if that decision meets with public disfavour. The judge's sole concern should be to avoid rendering a decision that causes an informed and reasonable public to lose confidence in the institution of the courts.[21]

Justice Moldaver, writing for the unanimous Supreme Court in *Anthony-Cook*, agreed with Justice Rowe's interpretation and emphasized the rigorous standard for determining that the administration of justice would be brought into disrepute:

> Rejection denotes a submission *so unhinged from the circumstances* of the offence and the offender that its acceptance would lead reasonable and informed persons, aware of all the relevant circumstances, including the importance of promoting certainty in resolution discussions, *to believe that the proper functioning of the justice system had broken down. This is an undeniably high threshold*.[22]

The stringent interpretation of the public interest test is reflected in post-*Anthony-Cook* jurisprudence. Appellate courts nationwide have unhesitatingly stepped in to substitute the original jointly recommended sentence in cases where sentencing judges have treated the joint submission without due regard.[23] This has even been the case where the sentencing judge commented that they found the joint submission to be "manifestly unfit" — a characterization that would, in the normal course of events, invite appellate interference were it imposed.[24]

B. "DISREPUTE" IN A SECTION 24(2) ANALYSIS: AN INCONSISTENT APPROACH

In contrast, the rigorous and stringent standard that is applied in the context of a departure from a joint submission is omitted when courts conduct a section 24(2) analysis. We say this for two reasons. First, trial judges tend to focus their analysis on an evaluation of the three

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18 *Anthony-Cook*, *supra* note 4 at para 42.
19 *Ibid* at paras 35–44.
20 *Ibid* at para 33.
21 *R v BO2*, 2010 NLCA 19 at para 56 [*BO2*] [emphasis added]. See also *Druken*, *supra* note 4 at para 29.
22 *Anthony-Cook*, *supra* note 4 at para 34 [emphasis added]. See also *ibid* at para 33, citing *Druken*, *ibid* at para 29; *BO2*, *ibid* at para 56.
23 See e.g. *R v Fuller*, 2020 ONCA 115; *R v Cheema*, 2019 BCCA 268; *R v McInnis*, 2019 PECA 3; *R v Belakziz*, 2018 ABCA 370; *Jean-Baptiste c R*, 2017 QCCA 401.
24 *R v Kippomee*, 2019 NUCA 3 at para 18.

well-known *Grant* factors, followed by little more than a conclusory statement setting out whether the evidence is admitted or excluded — many times stating simply that the factors weighing either for admission or exclusion outweigh the other.[25] In so doing, little if any attention is paid to the proper, critical question to be answered. Justices Brown and Martin summarized this problem succinctly in *R. v. Le*: "While the judicial inquiry under s. 24(2) is often rhetorically cast as asking whether evidence should be excluded, *that is not the question to be decided*. Rather, *it is whether the administration of justice would be brought into disrepute by its admission*."[26]

The second reason this inconsistency exists is the manner in which the disrepute standard itself has been articulated in the context of a section 24(2) analysis. While the Supreme Court described in *Grant what* the disrepute standard is concerned with — the long-term reputation of the system as opposed to the public's immediate reaction to a decision — it did not consider in any detail *where* the bar for disrepute is set. As a result, it appears that the onus on an applicant to demonstrate that exclusion is warranted on a balance of probability has subsequently been confused with the question of whether the negative impacts from admitting the evidence would rise to the level of disrepute. For example, Matthew Asma and Matthew Gourlay articulated the test as being: "[t]o obtain an order excluding evidence, the applicant must prove… that the admission of the evidence would be more harmful to the long-term repute to the administration of justice than would its exclusion."[27]

The Supreme Court explained that judges must balance the three *Grant* factors to determine whether the disrepute standard is met. However, the test articulated by Asma and Gourlay suggests that such a determination is a balancing exercise on a 50-percent-plus-one scale. Proponents of such an approach would likely point to the flexibility it provides, and argue that it allows judges to make a determination that reflects each case's individual circumstances. We would reject this argument for three principled reasons.[28] First, this flexibility is already built into the analysis through the three *Grant* factors, which are designed to account for the facts of each case.[29] Second, one must bear in mind that section 24(2) is concerned with long-term, systemic impacts on the system — not individual ones. As we explain below, section 24(1) is designed to respond to individual impacts. Finally, a balancing exercise also commits the error articulated in *Le*, above, as it fails to consider the ultimate question of disrepute: simply because evidence was obtained in a manner that infringed the *Charter*, it does not follow that the harm inevitably rises to the disrepute standard.

Ultimately, to make a determination regarding disrepute is to apply a legal standard to a set of facts. We say the standard that is applied should not be a moving target. Rather, it

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25 See e.g. *R v Hebert*, 2014 ABPC 246 at para 60; *R v Cvitan*, 2019 MBPC 21 at para 78; *R v Hrabarchuk*, 2014 MBPC 3 at para 3; *R v Meyers*, 2011 BCPC 50 at para 53; *R v Gale*, 2016 ONCJ 152 at para 22. Contrast *Charles c R*, 2014 QCCQ 3365 at paras 113–29.

26 2019 SCC 34 at para 139 [*Le*] [emphasis added].

27 Matthew Asma & Matthew Gourlay, *Charter Remedies in Criminal Cases: A Practitioner's Handbook* (Toronto: Emond Montgomery, 2019) at 27.

28 We also note that the Supreme Court expressly rejected a mathematical approach to a section 24(2) analysis: see e.g. *R v Harrison*, 2009 SCC 34 at para 36 [*Harrison*].

29 *Grant*, *supra* note 1 at para 43.

should remain constant whether in the context of a joint sentencing recommendation or whether to exclude evidence under section 24(2).

C. THE EFFECTS OF INCONSISTENCY: UNWARRANTED EXCLUSION RUNS RAMPANT

Prior to the Supreme Court's decision in *Grant*, evidence was frequently excluded for relatively minor breaches. The Court recognized this, giving the example that breath sample evidence tendered on impaired driving cases often suffered from automatic exclusion even when the breach was minor.[30] The Court continued to state that the collection of breath sample evidence is relatively non-intrusive and should generally be admitted.[31]

As *Grant* did not involve breath test evidence, the choice of this specific example led to academics positing that breath test evidence would be admitted more frequently in the post-*Grant* era.[32] Nor was this expectation confined to academic circles. In one exceptionally thorough decision that prompted Don Stuart to comment that the Ontario Court of Appeal "is intent on achieving less exclusion in impaired driving cases,"[33] Justice Rosenberg relied strongly on the Supreme Court's comments to observe that the "almost automatic exclusionary rule for breath test evidence" was expressly overruled and relying on pre-*Grant* cases in a section 24(2) analysis is an error of law.[34] Shortly after, Justice Watt commented that *Grant* created a "general rule with respect to the admissibility of breath samples due to their relative non-intrusiveness."[35]

In light of the Supreme Court's clear direction and the subsequent appellate commentary, it is interesting that studies post-*Grant* have found that the courts have continued to exclude breath test evidence in the majority of cases where breaches are found.[36] This high rate of exclusion has continued despite the Supreme Court's example of breath test evidence as being minimally intrusive having been "no mere throwaway line."[37] To explain this continued rate of exclusion, one is forced to conclude either that the *Charter*-infringing state conduct has been getting progressively worse since *Grant*, or that judges are not considering the proper standard for what brings the administration of justice into disrepute. We are of the view that it is the latter.

Exclusionary rates across the country are informative. In a study that encompassed 600 trial and 176 appeal decisions from 2014-2017 where a section 24(2) analysis was performed,

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30 *Ibid* at para 106.
31 *Ibid* at para 111.
32 Justice Joseph F Kenkel, *Impaired Driving in Canada: The Charter Cases*, 3rd ed (Toronto: LexisNexis Canada, 2017) at 33, citing Tim Quigley, "Was it Worth the Wait? The Supreme Court's New Approaches to Detention and Exclusion of Evidence" (2009) 66 CR (6th) 88 at 92; Brian Eberdt, "Impaired Exclusion: Exploring the Possibility of a New Bright Line Rule of Good Faith in Impaired Driving Offences" (2011) 16 Appeal 65.
33 *R v MacMillan*, 2013 CarswellOnt 1864 (WL Can) (CA) (Annotation by Don Stuart).
34 *R v MacMillan*, 2013 ONCA 109 at paras 89–92.
35 *R v Manchulenko*, 2013 ONCA 543 at para 100.
36 Kenkel, *supra* note 32 at 33, citing Mike Madden, "Marshalling the Data: An Empirical Analysis of Canada's Section 24(2) Case Law in the Wake of *R. v. Grant*" (2011) 15:2 Can Crim L Rev 229; Thierry Nadon, "Le paragraphe 24(2) de la *Charte* au Québec depuis *Grant*: si la tendance se maintient!" (2011) 86 CR (6th) 33; Ariane Asselin, *The Exclusionary Rule in Canada: Trends and Future Directions* (LLM Thesis, Queen's University, 2013) [unpublished].
37 *R v Jennings*, 2018 ONCA 260 at para 29.

evidence was excluded in 74.5 percent of the trial decisions.[38] There was also a wide range between jurisdictions: Newfoundland judges excluded evidence in a remarkable 90 percent of the reviewed decisions, and both British Columbia and Quebec excluded evidence in 80.6 percent of cases.[39] The lowest percentage of cases where evidence was excluded was Alberta, which did so 60.6 percent of the time.[40] Interestingly, the rate of exclusion at the appellate level plummeted, with evidence being excluded in a mere 21 percent of cases nationwide.[41] While we acknowledge that statistics do not provide the factual context of these matters, we find it difficult to accept that it is necessary to exclude evidence in nearly three-quarters of criminal cases where a breach is found in order to maintain public confidence in the administration of justice. In our view, such a conclusion would indicate rampant and serious unconstitutional behaviour by the police that is simply not borne out by any evidence.

The lack of attention paid to the question of disrepute is not confined to impaired driving matters. It extends across the criminal justice system and impacts prosecutions in numerous areas, for example drugs, firearms, and child pornography. Indeed, *Charter* challenges are brought in these contexts so frequently that one plain-spoken appellate justice quipped, "'What's a drug case without a *Charter* argument?' Answer: 'A guilty plea.'"[42] This is understandable: as we discuss below, exclusion in such cases is often determinative of the result. It is, therefore, all the more vital that the proper standard be applied.

One matter worth examining is *R. v. King*.[43] The accused was charged after his wife surreptitiously accessed his cell phone and found what she believed was child pornography.[44] She looked on other electronic devices and located more.[45] She took photographs of what she found with her own cell phone, transferred the images to a USB drive, and delivered them to the police.[46] Officers viewed her photos, and based on what they saw, were granted a search warrant for the accused's home.[47] In all, child pornography was found on seven different devices.[48] The trial judge held that viewing the pictures taken by the accused's wife constituted an unlawful search and infringed section 8 of the *Charter*.[49] As the search warrants were based on the USB information, he likewise held that they were invalid and that the subsequent searches of the accused's devices were unreasonable.[50]

In separate reasons, the trial judge excluded the child pornography found on the USB drive, but admitted that found on the accused's devices.[51] Despite recognizing that the initial search of the USB drive "raised novel and complex legal issues" that did not fall neatly within section 8 jurisprudence, and in fact came at a time where there was "substantial

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38 Benjamin Johnson, Richard Jochelson & Victoria Weir, "Exclusion of Evidence Under Section 24(2) of the *Charter* Post-*Grant* in the Years 2014-2017: A Comprehensive Analysis of 600 Cases" (2019) 67:1 & 2 Crim LQ 56.

39 *Ibid*.

40 *Ibid*. Not including Nunavut, from which only one case was reviewed.

41 *Ibid*.

42 See *R v Jacobs*, 2002 BCPC 227 at para 8.

43 *R v King*, 2019 ABPC 236 [*King* breach decision].

44 *Ibid* at para 7.

45 *Ibid* at 8.

46 *Ibid* at paras 5–9.

47 *Ibid* at para 9.

48 *Ibid* at paras 10–13.

49 *Ibid* at paras 16–40.

50 *Ibid* at paras 38–49.

51 *R v King*, 2019 ABPC 309 [*King* exclusion decision].

uncertainty in the law in relation to searching an item belonging to the person surrendering it," the trial judge held that the police conduct was serious because they did not turn their minds to obtaining a warrant.[52] He similarly found that the impact of the breach weighed against admission, even though the search "was at a far lower end of the intrusiveness spectrum than most electronic device searches.… [I]ts seriousness should not be equated with other instances where the state has exercised unrestrained freedom to root through a device."[53] In a conclusory statement similar to those referenced above, the trial judge indicated that the evidence from the USB drive would be excluded.[54]

The trial judge's lack of attention to the question of disrepute is concerning. It represents a disregard for the ultimate standard to be imposed, which in itself may risk tarnishing the long-term repute of the justice system. Additionally, and as we will discuss further below, there is a strong argument that a proper consideration of disrepute would not lead to exclusion.

D. WHEN IS EXCLUSION OF EVIDENCE APPROPRIATE?

To answer the question of when exclusion will be warranted, we begin with the proposition that the interpretation of "bringing the administration of justice into disrepute" should be consistent. That is, the disrepute standard should be the same in both the section 24(2) and joint sentencing submission contexts. We consider it to be analogous to the presumption of consistent expression with respect to statutory interpretation, where it is presumed "that the legislature uses language carefully and consistently so that within a statute or other legislative instrument the same words have the same meaning."[55] Allowing for the differences between the legislature and courts, the fact remains that the Supreme Court specifically chose to use the exact words found in section 24(2) to encapsulate the public interest test for departing from a joint submission.[56] They presumably did so with the expectation that the standard would be interpreted consistently in other contexts where that language is employed. A consistent application would have the additional benefit of enhanced predictability of the law's application, a laudable goal in itself.

We do not challenge that the *Grant* factors are those that should be considered. Rather, it is the application of the disrepute standard that must be re-emphasized: once a trial judge has determined the seriousness of the *Charter*-infringing state conduct, the impact of the infringement on the accused, and the public interest in adjudicating the offence on its merits, the judge must then take the next step. They must ask themself, in light of their findings, has the accused demonstrated that admission of this evidence would bring the administration of justice into disrepute? Put in the words used in *B.O.2* and *Anthony-Cook*, has the accused established that admission of the evidence would cause a reasonable, well-informed member of the public to conclude that the system was collapsing or had broken down?

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52 *Ibid* at paras 18, 20, 35. Notably, he held this despite noting that the failure to seek a warrant was "understandable" (*ibid* at para 35).

53 *Ibid* at para 54.

54 *Ibid* at para 65.

55 Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham: LexisNexis, 2014) at ss 8.32, 8.35. See also *Green v University of Winnipeg*, 2020 MBCA 2 at para 11.

56 *Anthony-Cook*, *supra* note 4 at para 5.

In considering this question, a greater emphasis should be placed on the result of exclusion. In many cases, the *Charter* arguments are determinative of the case: exclusion of the evidence ends the prosecution. This has the same result as when a stay of proceedings is ordered under section 24(1) for an abuse of process. Such drastic results must significantly inform the question of whether admitting evidence would bring the administration of justice into disrepute.

We are hardly the first to recognize this parallel. In her concurring decision in *Grant*, Justice Deschamps wrote:

> [T]he purpose of s. 24(2) is to maintain public confidence in the administration of justice.
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> …
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> This purpose also makes it possible to identify a common denominator between ss. 24(1) and (2). It is clear that one of the purposes of the remedy provided for in s. 24(1), more specifically a stay of proceedings for abuse of process, is to maintain the repute of the administration of justice. *Although a stay of proceedings can be granted only in the clearest of cases because it allows the accused to go free, the comparison with s. 24(2) is not without interest, especially in a case where the exclusion of evidence would in practice lead to the discharge of the accused by resulting in his or her acquittal*.[57]

In light of this perspective, one must recall that the test for a stay of proceedings under section 24(1) is reserved for "the clearest of cases," in part because a stay of proceedings is such a drastic remedy.[58] Accordingly, for a stay to be imposed:

> (1) There must be prejudice to the accused's right to a fair trial or the integrity of the justice system that "will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome";
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> (2) There must be no alternative remedy capable of redressing the prejudice; and
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> (3) Where there is still uncertainty over whether a stay is warranted after steps (1) and (2), the court is required to balance the interests in favour of granting a stay, such as denouncing misconduct and preserving the integrity of the justice system, against "the interest that society has in having a final decision on the merits."[59]

In *R. v. Reilly*, the Alberta Court of Appeal explained the rationale behind the onerous standard that must be met before proceedings are stayed:

> In the criminal context, *a stay results in impunity for the accused from any criminal conduct. That result may be entirely satisfactory to the accused, but it is not often "appropriate and just" considering the broader public interest in the administration of justice*. It is for that reason that a stay is "exceptional" and "rare" and

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57 *Grant*, *supra* note 1 at paras 198–99, Deschamps J, concurring [citations omitted, emphasis added].
58 *Ibid*.
59 *R v Babos*, 2014 SCC 16 at para 32 [*Babos*] [citations omitted], citing *R v Regan*, 2002 SCC 12 at paras 54, 57.

> only justified in the "clearest of cases", where the abuse of process is an "affront to fair play and decency" that is "disproportionate to the societal interest in the effective prosecution of criminal cases."[60]

These comments apply equally to exclusion of evidence when such exclusion necessitates an acquittal. Exclusion of, for example, breath samples in an impaired driving case, or of the child pornography located on an accused's computer, will frequently have the same effect as a stay of proceedings and deprives the public of a trial on the merits of a case. Such a result can rarely be said to enhance public confidence in the administration of justice. Indeed, where such evidence is properly excluded it is, at best, the lesser of two evils.

Even where evidence is not strictly determinative, its exclusion results in the finder of fact being deprived of information it would otherwise have the benefit of considering. It is trite law that evidence is to be considered in its totality, with regard to all of the circumstances — but where some evidence is excluded that approach is, by definition, impossible. The truth-seeking function of a trial is thus impaired, and it may be that it is the consistent exclusion of evidence, rather than admission, that would cause damage to the long-term repute of the administration of justice.

In saying this, we are cognizant that disrepute is not to be assessed on the basis of a "community shock" test or a measuring of public opinion.[61] It is, as the Supreme Court has stated numerous times, the long-term repute that section 24(2) is concerned with.[62] In this vein, it could be argued that our approach places too much weight on the results of an individual prosecution, or that we place too much emphasis on the nature of the charges.[63]

We acknowledge that many who seek *Charter* protection are unsympathetic, but no less deserving of it.[64] However, as we explain below, we do not seek to deprive anyone of *Charter* protection — even where evidence is not excluded, there are other remedial options available. When considering exclusion, though, the focus must be on the ultimate question of whether the disrepute standard is met. In our view, it is impossible to divorce that analysis from its practical result. Moreover, where there is a pattern of evidence being excluded — as we demonstrated above is the case — the long-term result is the disrepute that the jurisprudence seeks so fervently to avoid.

It is for these reasons that evidence should only be excluded in those clearest of cases where exclusion is the only remedy capable of addressing serious state misconduct that had a substantial impact on an accused's *Charter*-protected interests. One hallmark of such circumstances is egregious police conduct that demonstrates an intentional or reckless disregard for an accused's *Charter* rights or established constitutional norms. In essence, where there is evidence of bad faith police conduct, the standard for exclusion will often be met. As the Supreme Court noted in *Harrison*, the courts cannot countenance officers acting in bad faith.[65]

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60 *R v Reilly*, 2019 ABCA 212 at para 28 [*Reilly*] [citations omitted, emphasis added], rev'd on other grounds 2020 SCC 27.
61 See *Collins*, *supra* note 5 at 292.
62 *Grant*, *supra* note 1 at para 70; *Le*, *supra* note 26 at para 168.
63 See *R v Feeney*, [1997] 2 SCR 13 at para 198.
64 *R v Burlingham*, [1995] 2 SCR 206 at para 50.
65 *Supra* note 28 at para 62.

In determining whether this standard has been met, the subject matter of the evidence as it impacts the community as a whole should be considered under the public interest branch of the *Grant* test. Justice Moldaver touched on this in his dissent in *Le*, noting that "the term 'administration of justice' under s. 24(2) 'embraces maintaining the rule of law and upholding *Charter* rights in the justice system as a whole.'"[66] In his view, it follows that section 7 includes the right of Canadians to feel safe and secure in their communities. The realities of, for example, drug and gun violence cannot be lost in the section 24(2) analysis when considering what would truly bring the administration of justice into disrepute.[67]

Justice Moldaver is not alone in his perspective. In his dissenting judgment in *R. v. Omar*, which was subsequently adopted by a Supreme Court majority, Justice Brown of the Ontario Court of Appeal observed that "to fail to give some recognition to the distinctive feature of illegal handguns — which are used to kill people or threaten them with physical harm, nothing else — and, instead, to treat them as fungible with any other piece of evidence risks distorting the *Charter*'s s. 24(2) analysis by wrenching it out of the real-world context in which it must operate."[68] Similarly, a per curiam panel of the Alberta Court of Appeal held in regards to a loaded handgun found under the driver's seat of a reputed gang member's pickup truck, "we consider society's interest in the adjudication of the merits to be greater where the offence is one that so literally involves the safety of the community."[69]

Examples of *Charter* breaches that could — and indeed, should — result in the exclusion of evidence are readily available. In *Le*, where the majority's decision to exclude evidence was grounded in large part on findings of racial profiling, Justice Moldaver's dissent was predicated on his opinion that the majority had recast the record in a manner inconsistent with the factual findings of the trial judge. It was not, however, the majority's section 24(2) analysis that offended him:

> Let me be clear: if the record as recast by my colleagues accurately reflected the police behaviour, I would be the first to exclude the incriminating evidence found on Mr. Le. *Police misconduct of such an egregious nature would be intolerable, if not abhorrent, to our society. It would have serious long-term effects on the repute of the administration of justice and would be deserving of this Court's swift and unequivocal sanction.*[70]

We agree wholeheartedly. The repugnant nature of racial profiling would, if countenanced by the courts, cause a reasonable person to conclude that the justice system was collapsing.[71] It should be noted that Justice Moldaver's comments in *Le* were made notwithstanding that the evidence seized included a firearm and drugs, thus engaging the significant community interests that must be considered. Similar conclusions would undoubtedly be reached if evidence were admitted in circumstances where police officers plant evidence as a pretext

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66 *Le*, *supra* note 26 at para 300 [citations omitted], citing *Grant*, *supra* note 1 at para 67.
67 *Le*, *ibid* at paras 300–301.
68 2018 ONCA 975 at para 123, Brown JA, dissenting, aff'd 2019 SCC 32.
69 *R v Chan,* 2013 ABCA 385 at para 49, cited with approval in *Le*, *supra* note 26 at para 301.
70 *Le*, *ibid* at para 168.
71 See *Peart v Peel (Regional Municipality) Police Services Board*, 2006 CanLII 37566 (Ont CA), Doherty JA ("racial profiling cannot be tolerated. It is offensive to fundamental concepts of equality and the human dignity of those who are subject to negative stereotyping") at para 93.

to arrest and search a suspect,[72] or provide false testimony about their conduct during an investigation.[73] Such conduct denotes nothing less than utter contempt for *Charter* rights and values, and is behaviour that courts must actively condemn and distance themselves from. Blatant racism, planting evidence, and perjury are examples of excessively blameworthy conduct, but breaches need not rise to that extreme to warrant exclusion. One of the hallmarks of serious misconduct is when it is undertaken deliberately.[74] In *R. v. Bielli*, the Ontario Court of Appeal held that the trial judge erred in admitting evidence that was discovered after police intentionally breached the Appellant's section 10(a) and (b) rights as part of a ruse engineered to search him and his vehicle while investigating illegal gambling — a ruse that was absolutely dependant on "a s. 24(2) rescue."[75] In holding the evidence ought to be excluded, Justice Pepall wrote regarding the integrity of the justice system that "[p]rotection of *Charter* rights is the operative principle, not planned circumvention for investigative purposes however laudable they may be."[76]

Similarly deliberate conduct was the focus of *R. v. Gill*.[77] In that case, Justice Masuhara found that the Integrated Homicide Investigation Team, the largest homicide investigative unit in Canada, engaged in a policy of "deliberate" and "systematic" non-compliance with provisions of the *Criminal Code* when they seized and held numerous cell phones and a home surveillance system for over six years without judicial authorization.[78] Despite that the evidence on those devices was critical to the Crown's case for murder, this deliberate conduct resulted in exclusion of the evidence.[79]

Examples of *Charter* breaches that should not lead to exclusion are likewise available, and indeed are far more common than the egregious examples above. Take the USB-drive search from *King*. There, officers were provided information by a concerned civilian that the drive contained direct evidence of a serious criminal offence.[80] The state of the law was unclear as to whether they needed a warrant.[81] Even if one accepts that the search engaged significant

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72 See e.g. *R v Tran*, 2015 ONSC 5607 at paras 42, 53–54, 60 (where the trial judge found that detectives orchestrated a traffic stop and planted heroin in a suspect's car in order to create grounds for a thorough search of the vehicle).

73 See e.g. *R v Somerville*, 2017 ONSC 3311 at paras 124–31 (where the trial judge found that one of the investigating officers had stolen property from the accused's storage locker, and that both he and three other officers provided false testimony about this at trial). See also *R v Harrison*, 2008 ONCA 85, aff'd 2009 SCC 34 at para 160:

> [T]he integrity of the judicial system and the truth-seeking function of the courts lie at the heart of the admissibility inquiry envisaged under s. 24(2) of the *Charter*. Few actions more directly undermine both of these goals than misleading testimony in court from persons in authority. Our system of criminal justice is fashioned on the collective expectation of the community that police officers who testify in a criminal case will do so honestly and impartially, unmotivated by self-interest or the desire to secure a conviction.

74 *Grant*, *supra* note 1 at para 72.

75 2021 ONCA 222 at paras 1–2, 83, 102.

76 *Ibid* at para 108.

77 2021 BCSC 377 [*Gill*].

78 *Ibid* at paras 102, 141; Royal Canadian Mounted Police in British Columbia, "About IHIT," online: *Integrated Homicide Investigation Team* <bc-cb.rcmp-grc.gc.ca/ViewPage.action?siteNodeId=2142&languageId=1&contentId=-1>.

79 *Gill*, *ibid* at para 141.

80 *King* breach decision, *supra* note 43 at paras 5–13.

81 We note parenthetically that we do not agree that a warrant was required in these circumstances, and agree with Steve Coughlin's comment that "the approach here does appear to limit a civic-minded individual, in cases such as this, to the arguably less persuasive 'I saw child pornography on that device' rather than being able to say 'here is the child pornography from that device.'" *R v King*, 2019 CarswellAlta 2016 (WL Can) (Alta Prov Ct) (Comment by Steve Coughlan). The case is nonetheless instructive in the section 24(2) context.

privacy interests, there is no indication that the police actions here were the product of a willful disregard for *Charter* standards or of police bad faith.[82] Nor can the realities of possessing child pornography be ignored: it is an inherently violent offence that propagates the ongoing exploitation and sexual abuse of children.[83] Such circumstances fall far below the disrepute standard.

Another example is *R. v. Paradis*.[84] The accused was found in possession of more than 130 grams of cocaine, over $4,000 cash, a hunting knife and an unsecured, loaded AR-15 semi-automatic rifle after police stopped his vehicle.[85] The trial judge found that the officers did not have a reasonable suspicion that the accused had committed a crime, and held the detention was unlawful.[86] Further breaches of sections 10(a) and (b) were conceded.[87]

Noting that the police conduct reflected a lack of care for the accused's *Charter* rights, the trial judge found that their conduct fell on the mid to serious end of the spectrum, and that the impact on the accused was "more than minimal, but not significant."[88] Both findings tended towards exclusion.[89] The public interest criterion, however, strongly favoured admission.[90] Despite the serious nature of the conduct and its impact on the accused, the trial judge determined that exclusion, rather than admission, would bring the administration of justice into disrepute, and admitted the evidence.[91] The Court of Appeal for the Northwest Territories upheld her decision, noting that the trial judge was "aware of and sensitive to the needs of the community in which she serves, [and] was alive to the real-world context relevant to these offences."[92]

Both the trial and appellate decisions in *Paradis* reflect a proper result. The officers' conduct, while negligent, was not indicative of bad faith or willful disregard. Similarly, the impact on the accused was not high on the spectrum. Moreover, the evidence was highly reliable and critical to a proper adjudication of the charges, and the subject matter of the charges raised serious concern for public safety.

The circumstances in *King*, and to an extent *Paradis*, were unusual. More commonplace breaches, which are likewise illustrative, are found in the impaired driving context. Determinations that a police officer's subjective belief that a driver was impaired by alcohol does not rise to the level of objective reasonableness; that a breath demand should have been made in a more expeditious fashion; or that a driver was detained for longer than necessary at roadside are minor infringements and ought to be treated as such in the absence of

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82 We likewise do not agree with Provincial Judge Fradsham's characterization of the accused's affinity for images and videos of children being sexually abused as "core biographical information," but would leave that discussion for another time. See *King* exclusion decision, *supra* note 51 at para 54.

83 *R v Sharpe*, 2001 SCC 2 at para 28; *R v Andrukonis*, 2012 ABCA 148 at para 29; *R v Inksetter*, 2018 ONCA 474 at para 22; *R v DLW*, 2014 BCSC 43 at para 86, citing *R v WAE*, [2009] 289 Nfld & PEIR 214 (Nfld Prov Ct) at para 77.

84 2020 NWTCA 2.

85 *Ibid* at para 2.

86 *Ibid* at para 8.

87 *Ibid* at paras 2, 8–10.

88 *Ibid* at para 25.

89 *Ibid* at paras 20–25.

90 *Ibid* at para 28.

91 *Ibid* at paras 26–30.

92 *Ibid* at para 28.

evidence tending to show bad faith. Honest and well meaning mistakes are not the type of state conduct that damages the long-term repute of the administration of justice, especially when the evidence under review is — like results of breath test analyses — highly reliable and demonstrates the factual guilt of the accused.

In sum, the disrepute standard should be applied in the manner that was explained by the Supreme Court in *Anthony-Cook*: whether a reasonable, well-informed member of the public would find a decision was so unhinged from the circumstances that they would conclude the administration of justice was collapsing or had broken down.[93] In the context of exclusion under section 24(2), this "undeniably high threshold" will be met only in those clearest of cases where it is the only remedy capable of meaningfully addressing egregious state conduct that had a substantial impact on the accused's *Charter*-protected interests.[94]

III. PRESERVING CONFIDENCE: THE *CHARTER* CANNOT BE LEFT TOOTHLESS

A predictable and meritorious response to our proposed application of section 24(2) is that adopting such a high bar for exclusion will result in the rights and freedoms entrenched in the *Charter* lacking meaningful protection. We agree with this concern. The *Charter* cannot become a paper tiger such that the rights and freedoms it seeks to guarantee are rendered illusory.[95] The wording of section 24(1) itself not only provides for, but *requires* "effective, responsive remedies that guarantee *full and meaningful protection* of *Charter* rights and freedoms."[96] As Kent Roach and Justice Robert Sharpe explain, "there can be no right without an effective remedy."[97]

We further agree that if our proposed application of section 24(2) were adopted in isolation, a lack of meaningful protection would result. As with legislation, however, our position must be read as a whole.[98] In addition to refocusing the test for exclusion on a consistent interpretation of disrepute, we are of the view that trial judges ought to increasingly look to section 24(1) for a just and appropriate remedy that responds to the circumstances of each individual case. The Supreme Court recently alluded to the potential of this approach in *R. v. Omar*, noting that "[i]t may be that consideration should be given to the availability, under s. 24(1) of the *Canadian Charter of Rights and Freedoms*, of remedies other than exclusion of evidence when dealing with s. 24(2), but the majority would leave this question for another day."[99]

Roach commented that this musing "hints that contrary to long-established jurisprudence and the mandatory wording of section 24(2) that the court may in the future consider the

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93 *Anthony-Cook*, *supra* note 4 at para 34.
94 *Ibid*.
95 See e.g. *R v Hart*, 2014 SCC 52 at paras 79–80.
96 *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62 at para 87 [*Doucet-Boudreau*] [emphasis added].
97 Hon Robert J Sharpe & Kent Roach, *The Charter of Rights and Freedoms*, 6th ed (Toronto: Irwin Law, 2017) at 424. See also *Doucet-Boudreau*, *ibid* at para 25.
98 See e.g. *Alberta (Information and Privacy Commissioner) v University of Calgary*, 2016 SCC 53 at para 63.
99 2019 SCC 32 at para 1.

availability of less drastic remedies … as an alternative to exclusion under section 24(2)."[100] Roach appears to interpret the majority as implying that it may be open to judges to consider alternative remedies despite that admission of the evidence would bring the administration of justice into disrepute. We do not read the majority's comment in this manner. As Roach points out, the wording of section 24(2) is imperative — exclusion *must* occur where the disrepute standard is met. We suggest that the majority's comment should be interpreted as observing that section 24(2) is not the only remedial section of the *Charter*, and that *where the standard for exclusion is not met* it may be appropriate to consider other, less drastic remedies.[101]

There are several principled reasons to adopt the more stringent interpretation of section 24(2) we have articulated in combination with an increased consideration of section 24(1). The first is that this method provides for a consistent interpretation of section 24, both in that it is consistent with the section when read as a whole, as well as with the plain language of each provision. Second, as previously stated, it provides for a consistent interpretation of the disrepute standard as it was articulated in *Anthony-Cook*.[102] Finally, it reflects the goals of sections 24(1) and (2) in that it provides for meaningful remedies that address the individual circumstances of each case while simultaneously maintaining the long-term repute of the administration of justice.

A. READING SECTION 24 IN ITS ENTIRETY

It is unfortunate that in the development of *Charter* jurisprudence, cases have tended to focus on either section 24(1) or (2), but rarely on both. This is in large part due to the incremental nature of the common law, as courts are generally loathe to make sweeping pronouncements about issues that are not squarely before them.[103] It also reflects trial strategy: the most frequently sought remedy for *Charter* infringements is exclusion of evidence.[104] Despite these reasons, the lack of an in-depth analysis of sections 24(1) and (2) together may have resulted in the erroneous impression that they are discrete provisions that should be interpreted separately. They are not. They must be considered together, and the interpretation of one subsection's language must be done in light of the other.

This is supported by the circumstances in which section 24 came to be included in the *Charter*. While Canadian law has rejected an originalist interpretation of constitutional provisions in favour of a living tree approach, this context is still relevant as it supports that

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100 Kent Roach, "Off the Bench Judgements and the Section 24(2) Lottery" (2019) 67:1&2 Crim LQ 1.

101 See *R v Morrissey*, [1995] 22 OR (3d) 514 (CA) at para 27, Doherty JA; see also *HMTQ v Pomeroy*, 2007 BCSC 142 at para 39.

102 *Anthony-Cook*, *supra* note 4 at para 33.

103 *Merrifield v Canada (Attorney General)*, 2019 ONCA 205 at paras 20–22. See also Mary Arden, *Common Law and Modern Society: Keeping Pace with Change* (Oxford: Oxford University Press, 2015) (Preface by Chief Justice McLachlin: "It is the role of judges to develop the common law – their home turf – incrementally, in conformity to changing values and needs, and to interpret legislation in a manner that reflects current realities.") See also John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) ("[t]he culture of common law is of incremental development on a case-by-case basis") at 113; Debra M McAllister, "Charter Remedies and Jurisdiction to Grant Them: The Evolution of Section 24(1) and Section 52(1)" (2004) 25 SCLR (2d) 1 at 7.

104 Tim Quigley, "The Impact of the *Charter* on the Law of Search and Seizure" (2008) 40 SCLR (2d) 117 at 142 [Quigley, "Search and Seizure"].

the language was purposefully chosen.[105] Moreover, "within the purposive approach, the analysis *must begin* by considering the text of the provision…. [I]n *Grant* … the Court stated that '[a]s for any constitutional provision, the starting point *must* be the language of the section.'"[106]

The inclusion of the remedial provisions was arguably the most significant substantive change from pre-*Charter* law.[107] Before the *Charter*, even where legal standards were provided for in statute there was no way to challenge evidence obtained in violation of them.[108] Thus, pre-*Charter* time was "one where legal standards existed but where meaningful remedies for their breach were nearly non-existent," and section 24 presented a groundbreaking ability of the courts to enforce the protections granted to those who came under the power of the state.[109]

These remedial powers, particularly the exclusionary clause in section 24(2), were contentious additions to the *Charter* — organizations like the Canadian Civil Liberties Association had to fight for their inclusion.[110] In the initial draft from 6 October 1980, no version of section 24 was included whatsoever.[111] The 12 January 1981 draft saw the inclusion of what would eventually become section 24(1), but not a specific exclusionary clause.[112] It was not until the matter was extensively debated in Parliament that section 24(2) was added, although it was initially with the permissive wording that evidence "may" be excluded instead of the final "shall," which did not come about until the Special Joint Committee of the House and Senate issued its final draft on 13 February 1981.[113]

We suggest that the extensive debate and multiple revisions of the remedial provisions, with the ultimate result that they were grouped together into one section, illustrates that they are meant to operate in tandem while addressing differing interests. This is further supported by jurisprudence that, as we explain below, has consistently interpreted their individual functions.

B. CONTRASTING THE SECTION 24 PROVISIONS

While section 24 must be interpreted as a whole, that interpretation reveals that sections 24(1) and (2) vary in important ways: they differ in purpose, in application, and in scope. As we will explain below, each of these differences support our proposed approach to remedying *Charter* infringements.

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105 See generally Ruth Sullivan, *Statutory Interpretation*, 3rd ed (Toronto: Irwin Law, 2016) at 265–71.

106 *Quebec (Attorney General) v 9147-0732 Québec inc.*, 2020 SCC 32 at para 8 [emphasis in original], citing *Grant*, *supra* note 1 at para 15.

107 Peter Sankoff, "Rewriting the *Canadian Charter of Rights and Freedoms*: Four Suggestions Designed to Promote a Fairer Trial and Evidentiary Process" (2008) 40 SCLR (2d) 349 at 350.

108 See Quigley, "Search and Seizure," *supra* note 104 at 119–22, citing *R v Wray*, [1971] SCR 272.

109 Quigley, "Search and Seizure," *ibid* at 122.

110 Sankoff, *supra* note 107 at 350, citing Dale Gibson, *The Law of the Charter: General Principles* (Toronto: Carswell, 1986) at 222–23.

111 Peter W Hogg & Annika Wang, "The Special Joint Committee on the Constitution of Canada, 1980-81" (2017) 81 SCLR (2d) 3 at 16–17.

112 *Ibid*.

113 *Ibid*.

1. Purpose

The difference in purpose between sections 24(1) and (2) is in whose interest each subsection is concerned with. Put simply, section 24(1)'s concern is individual, and section 24(2)'s societal. Justice Deschamps explained in *Grant*:

> [T]he exclusionary rule has, primarily, a prospective societal role and… the judge's analysis must focus on systemic concerns. The court cannot consider the case of the accused person who is on trial without addressing the long-term impact of its decision on the administration of justice in general. If, where the stay of proceedings and the admission or exclusion of evidence are concerned, the point of convergence between the first and second subsections of s. 24 is the balancing of two factors, *what distinguishes these provisions is that the purpose of the first is to provide for an individual remedy, whereas the ultimate purpose of the second lies in the societal interest in maintaining public confidence in the administration of justice. The first is focussed on the individual, the second on society*.[114]

The purpose of section 24(1) is to protect infringed right(s) by providing responsive and effective remedies.[115] In contrast, the purpose of section 24(2) is stated in the wording of the section — to guard against bringing the administration of justice into disrepute. It works to ensure that further damage to the administration of justice — over and above that caused by the breach itself — does not occur through the use of unlawfully obtained evidence. The focus is on societal and systemic concerns and the broad impact of the admission of such evidence on the reputation of the justice system.[116]

2. APPLICATION

The second significant difference is the circumstances in which each subsection applies. The language of section 24(1) is generous: it provides that "[a]nyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied" may seek a remedy.[117] The availability of a remedy is thus not predicated on any particular result flowing from the infringement.

Conversely, the exclusionary remedy under section 24(2) is limited: it is only where "evidence was *obtained in a manner* that infringed or denied any rights or freedoms guaranteed by this Charter" that a judge must exclude it.[118] While this does not strictly mandate a causal connection, the connection, whether it be causal, contextual, or temporal, must be one of substance: remote connections or those that are merely tenuous will not engage this subsection, and the court is not required to even consider whether the administration of justice's long-term repute will be negatively impacted.[119]

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114 *Grant*, *supra* note 1 at para 201 [citations omitted, emphasis added].
115 *Doucet-Boudreau*, *supra* note 96 at para 25; see also Sharpe & Roach, *supra* note 97 at 427.
116 *Doucet-Boudreau*, *ibid* at paras 67–70.
117 *Charter*, *supra* note 1, s 24(1).
118 *Ibid*, s 24(2) [emphasis added]. See also Sharpe & Roach, *supra* note 97 at 344.
119 *R v Mack*, 2014 SCC 58 at paras 37–38. See also *R v Henrikson (WO)*, 2005 MBCA 49 at paras 17–20, 45–25.

3. SCOPE

Finally, the subsections differ greatly in the scope of remedy offered. Describing the wording of section 24(1), Justice McIntyre commented in *R. v. Mills* that "[i]t is difficult to imagine language which could give the court a wider and less fettered discretion."[120] He went on to emphasize its flexibility, holding that "[i]t is impossible to reduce this wide discretion to some sort of binding formula for general application in all cases."[121] This flexibility provides trial judges the ability to tailor remedies to specifically address unconstitutional government acts,[122] and may result in:

- habeas corpus;[123]
- adjournments;[124]
- orders for disclosure;[125]
- orders for costs;[126]
- awarding financial damages;[127]
- exclusion of evidence;[128]
- ordering a new trial (when the analysis is performed on appeal);[129]
- sentence reductions;[130] and,
- in extreme cases, stays of proceedings.[131]

This is not an exhaustive list. As Justices Arbour and Iacobucci held, "[t]he meaningful protection of *Charter* rights … *may in some cases require the introduction of novel remedies*. A superior court may craft *any* remedy that it considers appropriate and just in the circumstances."[132]

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120 [1986] 1 SCR 863 at 965.
121 *Ibid*.
122 *R v Ferguson*, 2008 SCC 6 at para 60 [*Ferguson*].
123 Sharpe & Roach, *supra* note 97 at 350–51, citing *Ferguson*, *ibid*; *Steele v Mountain Institution*, [1990] 2 SCR 1385; *Mission Institution v Khela*, 2014 SCC 24; *May v Ferndale Institution*, 2005 SCC 82.
124 *R v Bjelland*, 2009 SCC 38 at paras 24, 38 [*Bjelland*].
125 *R v Stinchcombe*, [1991] 3 SCR 326.
126 *R v Tiffin*, 2008 ONCA 306.
127 *Vancouver (City) v Ward*, 2010 SCC 27; see also *Reilly*, *supra* note 60 at para 32.
128 *Bjelland*, *supra* note 124 at para 19.
129 *Gallant v R*, 2007 NBCA 36.
130 *R v Nasogaluak*, 2010 SCC 6 at paras 4–7.
131 *R v Arcand*, 2008 ONCA 595, leave to appeal to SCC refused, 32853 (18 December 2008); see also *Babos*, *supra* note 59 at para 44.
132 *Doucet-Boudreau*, *supra* note 96 at para 87 [emphasis added]. See also *Nasogaluak*, *supra* note 130 at para 58.

The extent of this authority was aptly illustrated in *R. c. Tshiamala*.[133] The five co-accused were charged with second-degree murder. After the trial judge found that the Crown Attorney's behaviour — otherwise characterized as "shenanigans"[134] — amounted to serious prosecutorial misconduct that violated the accuseds' section 7 *Charter* rights, she directed a stay of proceedings.[135]

The Crown's appeal of that order was granted, and a new trial ordered. In doing so, however, the Quebec Court of Appeal fashioned a particular remedy under section 24(1): it ordered that the Attorney General designate a different Crown Attorney conduct the new trial.[136] While entirely appropriate in the circumstances, this nonetheless represented a significant incursion into what would otherwise be a matter of prosecutorial discretion unreviewable by the courts except for abuse of process.[137]

Section 24(1) was more recently invoked in *R. v. Fuller*, after the Crown indicated its intention to repudiate a plea agreement it made partway through the trial.[138] While doing so will normally be permitted, albeit undesirable, in this case the accused was prejudiced by the fact that the Crown had informed some of its witnesses that the accused would be pleading guilty.[139] These witnesses — having been told that the accused was prepared to plead guilty — would be required to testify if the trial continued.[140] This undermined the fairness of the trial, as an accused "should not be forced to confront witnesses who were improperly told of his intention to plead guilty at a trial he had reason to believe was not going to occur."[141]

Justice Pomerance thus held that section 7 was infringed, but rejected the accused's request for a stay of proceedings. Instead, she ordered that the original plea agreement be enforced. In doing so, she acknowledged the unusualness of the order, but also its proportionality:

> This is not a typical remedy under s. 24(1) of the *Charter*, but nor is it common to see repudiation of plea agreements. A stay would have a windfall quality, particularly in the absence of bad faith or deliberate misconduct by the prosecution. The mischief is the failure of the crown to stand by the plea agreement. By enforcing the plea agreement, the accused is placed in precisely the position he would have been in, but for the impugned state conduct.[142]

Fuller stands as another illustration where an order that would otherwise be outside the authority of the court — requiring the Crown to accede to a plea bargain — may be imposed under section 24(1) where it is the just and appropriate remedy. It further illustrates the flexibility it provides to tailor a remedy to the facts of the case.

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133 2011 QCCA 439 [unofficial translation].
134 *Ibid* at para 174.
135 *Ibid* at para 9.
136 *Ibid* at paras 7, 173–79, 183.
137 See *Krieger v Law Society of Alberta*, 2002 SCC 65 at para 32; *R v Anderson*, 2014 SCC 41 at paras 37, 44.
138 2020 ONSC 180.
139 *Ibid* at para 32.
140 *Ibid*.
141 *Ibid*.
142 *Ibid* at para 37.

In keeping with the theme of this article, we have focused on individual remedies; However, an infringement may also result in remedial actions under section 52(1) of the *Constitution Act, 1982*.[143] These, in extremely rare cases, may even be combined with an individual remedy under section 24(1), thus further increasing the flexibility provided by our proposed approach to *Charter* remedies.[144]

In contrast, section 24(2) is a blunt instrument: entirely lacking in subtlety, it is meant to override consideration of the individual circumstances and consider only the reputation of the justice system. It only provides one remedy, and in criminal proceedings a determination of admissibility under section 24(2) is the ultimate zero-sum game.

The inherent flexibility in section 24(1) makes it impossible to provide examples of every way it may be applied. There are, however, remedies that we foresee having the potential for broad application. One such example is that of a sentence reduction. As stated above, the all-or-nothing approach of section 24(2) can result in *Charter* breaches being acknowledged but effectively unaddressed. Consider, for example, the case of *R. v. Hamilton*.[145] The trial judge held that the accused's right to counsel was infringed as the officer did not advise him of his right immediately, but admitted the evidence.[146] Those determinations were upheld on appeal.[147]

The accused did not seek a section 24(1) remedy in relation to that infringement. He did, however, seek a section 24(1) remedy, specifically a stay of proceedings, in relation to a separate *Charter* violation.[148] Namely there was a finding of "overholding" — that the accused was arbitrarily detained after his arrest.[149] The trial judge did not stay the proceedings, but considered the infringement at sentencing.[150] He ultimately sentenced the accused to the mandatory minimum fine for driving with a blood alcohol concentration above 80mg%.[151]

When one considers that the accused received the minimum fine despite having a related, albeit dated, criminal record, was found to be impaired while driving, had more than double the legal limit of alcohol in his blood, and caused a motor vehicle collision, it is clear that a sentence reduction was a meaningful remedy.[152] This approach fulfilled the purposes underlying section 24: the *Charter*-protected interests of the accused, while infringed, received meaningful consideration while the public confidence in the administration of justice is maintained in that a guilty accused did not walk free.

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143 *Constitution Act, 1982*, s 52(1), being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

144 See Sharpe & Roach, *supra* note 97, citing *Schachter v Canada*, [1992] 2 SCR 679 and *Mackin v New Brunswick (Minister of Finance)*, 2002 SCC 13 ("[r]emedies under both section 24(1) and 52(1) can only rarely be combined, for example, in cases where a law is declared invalid under section 52(1) but damages are justified under section 24(1) on the basis of governmental fault" at 425 [footnotes omitted]).

145 2019 MBQB 104 [*Hamilton*].

146 *Ibid* at para 19.

147 *Ibid* at paras 20, 42–50.

148 *Ibid* at para 1.

149 *Ibid*.

150 *Ibid* at para 19(vii).

151 *Ibid* at para 1.

152 *Ibid* at para 19(vi–viii). See also paras 57–62.

Conversely, in *R. v. Omeasoo* a section 24(1) remedy was not sought in response to breaches of the accused's section 10 rights when officers detained them without advising of the reason for the detention or of their right to counsel (the trial judge also found police infringed sections 8 and 9, although these were subsequently overturned).[153] The Manitoba Court of Appeal nonetheless held that the evidence seized subsequent to the detention should not be excluded.[154] Thus, the infringement was left un-remedied.

C. GOING FORWARD: CONSIDERING THE WHOLE SECTION

The significant differences between sections 24(1) and (2) call for an analysis of each when a *Charter* infringement is established, as the alternative is that one perspective is given significantly less consideration. This is aptly illustrated in the following two fact scenarios.

First, consider the accused who is charged with possession of a firearm, which was located by way of a search determined to be unreasonable and in breach of section 8. If the trial judge determines that admission of the firearm would not bring the administration of justice into disrepute, and, as is the common practice, the accused had only sought exclusion of evidence under section 24(2), no remedy would be ordered and there would be no effective consequence for the fact that his constitutional rights were infringed.

A similar fate may result when a police officer arbitrarily fails to release a person under section 497 of the *Criminal Code*, thereby infringing section 9 of the *Charter*.[155] Where the detention does not result in the collection of evidence (for example, where the investigation was complete prior to arrest and the person could have been released on a summons), it may be difficult for the accused to demonstrate the nexus required for section 24(2) to operate.

Conversely, where a section 24(1) remedy is also sought in the examples above, the trial judge would be able to determine whether a remedy other than exclusion is appropriate, having regard for the specific circumstances of the infringement and its impact on the accused.[156] The judge would have all the flexibility inherent in section 24(1), which, as Roach and Sharpe point out, is limited only by constitutional principles.[157] This would have the simultaneous effect of validating both the individual and societal interests considered by section 24, and allowing for a meaningful and appropriate remedy.[158]

When section 24 is read in its entirety, having regard for the aims and purposes of each subsection and for the meaning given to the disrepute standard by the Supreme Court in *Anthony-Cook*, we suggest it should be read in the following fashion: that judges are required to fashion a remedy that is meaningful and appropriate for each particular case, bearing in mind that exclusion of evidence is only required in exceptional circumstances where

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153 2019 MBCA 43 at paras 2–3, 13, 48.
154 *Ibid* at paras 48–55.
155 RSC 1985, c C-46, s 497.
156 *Doucet-Boudreau*, *supra* note 96 at para 55.
157 Sharpe & Roach, *supra* note 97 at 427.
158 See e.g. *Hamilton*, *supra* note 145 at paras 19(vi–viii), 57–62.

admission would cause a reasonable and well-informed person to conclude that the system was collapsing or had broken down.

As a practical matter, adopting this approach would inevitably lead to evidence being excluded in far fewer cases than is currently the norm. Given the overall high exclusionary rates cited above, we consider this a desirable result. However, as we have emphasized, this approach must also incorporate an increased consideration of alternate remedies under section 24(1). Where remedies are ordered under that section, they would be directly proportional to the circumstances of the infringement and its impact on the accused. This tandem approach will strongly protect public confidence in the administration of justice going forward.

In short, it is time, as the *Omar* majority alluded, for trial judges to turn to section 24(1)'s broad discretion to address *Charter* infringements that do not rise to the egregious level warranting exclusion of evidence. This flexibility allows judges to fashion the appropriate remedy in each case, thereby having the dual effects of protecting an individual's constitutional rights and ensuring long-term public confidence in the administration of justice.

IV. CONCLUSION

It is trite to say that the law should strive for a level of consistency and predictability in its application. As we have demonstrated, despite that the disrepute standard is employed in two frequently-seen contexts, the standard itself is applied in disparate fashions. When the Supreme Court articulated what would constitute bringing the administration of justice into disrepute in *Anthony-Cook*, it intentionally set out an onerous standard equated to a reasonable and well-informed person concluding that the system was collapsing or had broken down.[159]

This high bar should be equally applied in a section 24(2) analysis. It is consistent with the wording of section 24 in general, and section 24(2) in particular. It must be remembered that the overarching presumption of section 24(2) is admission of evidence; a presumption that is only displaced when the long-term reputation of the administration of justice is threatened. While judges must continue to evaluate the three *Grant* factors in their analysis, they must then use those factors to inform the ultimate question of whether the disrepute standard has been met.

Courts also need to give substantial consideration to the effects of exclusion when answering this question. All too often exclusion of evidence is determinative of the result — in these cases exclusion is tantamount to the drastic result of a judicial stay of proceedings. Even where exclusion is not determinative, per se, exclusion deprives the finder of fact of the ability to evaluate the evidence in its totality. Accordingly, exclusion under section 24(2) should be reserved for the clearest of cases, when there is no other remedy capable of addressing significant prejudice caused by serious state misconduct. Instead, courts should

[159] *Anthony-Cook*, *supra* note 4 at para 34.

increasingly turn to the broad authority in section 24(1) to fashion a meaningful remedy that directly responds to the individual circumstances of each case.

Such an approach is not only consistent insofar as the language of section 24(2) being given the same interpretation as has been given in other areas of the law, but this reading is also more consistent with the overall drafting of section 24 as a whole. Doing so would provide judges far more flexibility than a simple black and white exclusion of evidence remedy when faced with *Charter*-infringing conduct. It would also heighten the public's confidence in the justice system, as a well-informed person would recognize that *Charter* rights will be given meaningful protection, while simultaneously ensuring that criminal allegations are adjudicated on their merits.