S.C.C. No. 02732

NOVA SCOTIA COURT OF APPEAL

Jones, Freeman, and Pugsley, JJ.A.

Cite as: R. v. Borden, 1993 NSCA 194

BETWEEN:

JOSH RANDALL BORDEN	)	Frank E. DeMont
	)	for the Appellant
Appellant	)	
	)	
- and -	)	
	)	
HER MAJESTY THE QUEEN	)	William D. Delaney
	)	for the Respondent
Respondent	)	
	)	
	)	
	)	Appeal Heard:
	)	May 17, 1993
	)	
	)	
	)	Judgment Delivered:
	)	September 15, 1993

THE COURT: The appeal is allowed from conviction for sexual assault on a senior citizen; new trial denied, as per reasons for judgment of Pugsley, J.A.; Jones, J.A., concurring; Freeman, J.A. dissenting on grounds that exclusion of evidence of D.N.A. profile would bring administration of justice into disrepute.

PUGSLEY, J.A.:

The appellant was convicted of sexual assault.

The conviction was based on a comparison of the D.N.A. characteristics found in a semen stain located on a blanket in the victim's bedroom, and the D.N.A. characteristics of the appellant's blood determined from a sample taken at the request of the police.

The appellant submits he was tricked into giving the sample to the police.

The trial judge concluded that the appellant's right against unreasonable search and seizure was "technically" infringed by the police, but permitted the introduction of the evidence on the ground that the administration of justice was more likely to suffer disrepute, as a result of the exclusion of the evidence, then by inclusion. The appellant submits that conclusion was unreasonable and constitutes an error of law, because the admission of the evidence rendered the trial unfair.

FACTS:

It is common ground that the police had no statutory authority to demand that the appellant provide a blood sample.

An examination of the evidence reveals the following:

(1) On October 12, 1989, a senior citizen after returning from an evening church meeting, went to bed in her room in the senior citizens residence in the town of New Glasgow. She was subsequently the victim of a violent sexual assault. The New Glasgow Police Department, during the course of their investigation, seized a blanket from her bed with an obvious stain which later was determined to be human semen. The victim could
only state that her attacker was a "black male, of average build and fairly big features, hands and shoulders".

(2) In the early hours of the morning of December 2, 1989, the appellant committed a sexual attack on an exotic dancer in her room at the Sundowner Motel in New Glasgow. Sexual intercourse did not occur and there was no ejaculation of semen by the appellant. The victim

had, however, seen the appellant on three occasions in the past and positively identified him as the attacker.

(3) On the afternoon of December 2, 1989, Constable Roberts of the New Glasgow Police Department went to the home of the appellant's father seeking the appellant. The appellant was not present. A warrant was shortly thereafter issued for his arrest for the assault committed at the Sundowner Motel earlier that day.

(4) At approximately 21:50 hours, the appellant voluntarily went to the police station in New Glasgow and was locked up. He was asked if he wished to contact a lawyer and he replied "no".

(5) Both Constable Roberts and Sergeant Brown investigated the two assault cases. While they had no evidence of the appellant's involvement in the senior citizen assault, both policemen, shortly after the attack occurred, suspected the appellant was responsible.

Constable Roberts, the I.D. Officer, was an 18 year veteran of the New Glasgow Police Department. Sergeant Brown had served with the department for 25 years.

Sergeant Brown first met with the appellant in the police cells at 9:15 hours on December 3 and advised the appellant that he would be back later to talk to him.

The two policemen then went to interview the exotic dancer for approximately one hour. She said she had met the appellant three times. On one occasion he had presented her with a rose. She was shown photographs of 50 black males, three of which were photos of the appellant. They were taken over an extended period of time and they were "three different looking photos". She positively identified the appellant in the three photos. She confirmed that no penetration or ejaculation by the appellant had taken place.

(6) At approximately 11:40 hours on December 3, 1989, the appellant was taken to Sergeant Brown's office. The appellant was given both his Charter rights and a police warning. Sergeant Brown advised the appellant that the police were investigating a sexual assault which

occurred at the Sundowner Motel on December 2, 1989, that the appellant was the suspect, and he was asked "what he had to say about it".

The appellant acknowledged that he was present in the motel room with the exotic dancer, but that he did not assault her, and when he left, another male person was in the room. The appellant was then asked to commit his oral statement to writing. The police again gave him the standard warning and, as well, his Charter rights. The appellant said he wanted to call a lawyer. After a private conversation with a lawyer, the appellant advised the police "my lawyer told me not to tell you anything, my name is Josh Randall Borden".

For the next five to ten minutes the police attempted to persuade the appellant to commit the statement to writing, arguing that he had not admitted to any sexual assault, and that he had been "through the system". The appellant eventually agreed to give a statement in writing. A seven and one-half page statement was concluded at approximately 13:00 hours. The statement dealt solely with the motel offence involving the exotic dancer. The police had written at the commencement of the statement that it arose as a consequence of an investigation into a sexual assault at the Sundowner Motel on December 2, 1989. This was read out to the appellant by the police. After the statement was completed, the appellant was then returned to his cell.

(7) At 14:40 hours Constable Roberts went to the cell block and asked the appellant if he would give samples of his scalp hair and pubic hair. The appellant agreed to do so. Constable Roberts plucked 100 hairs from the appellant's head and 50 hairs from his pubic area. This procedure was completed at 14:50 hours.

(8) At 15:05 hours Constable Roberts returned to the cell and asked the appellant if he would give him a blood sample. No explanation was given for this request. The appellant testified that he had advised the police on a number of occasions that no sexual intercourse had taken place and that he could not understand why they wished to have a blood sample.

Constable Roberts testified that:

> "I wanted his blood mainly for the, sexual assault on the senior citizen, which had occurred on the 12th of October, 1989, to compare

> his blood to a seminal stain found on panties and a comforter at apartment #202 of the senior citizens complex".

Constable Roberts acknowledged that the "main thing on his mind" was the assault on the senior citizen. He gave the opinion that the appellant really did not know that the request for a blood sample was related to the senior citizen's case at all. He testified that the blood sample "may" have a use in relation to the assault on the exotic dancer because some hairs had been found in the motel and the D.N.A. from the blood sample "may have been able to match a hair if it had been a suspect hair."

(9) Both constables acknowledged that there was no urgency in the taking of the blood sample.

(10) After obtaining the appellant's verbal consent, Constable Roberts testified that:

> "I was very cautious, wanted to be very cautious before I removed, before I had received a blood sample from Mr. Borden, and I contacted the Crown attorney, Mr. Parker, prior to seizing the sample, even though he had given me permission to take it, and I wanted to make sure that we stood on solid ground for taking this, taking this blood sample, and, again like I say I was advised by . . . Mr. Parker to draft up a consent form and to go in and have him sign it."

The consent form was apparently dictated by the Crown prosecutor over the telephone and it read as follows:

> "I, Josh Randall Borden, of Frederick Street, in New Glasgow, Pictou County, do hereby give my consent to the New Glasgow Police Department to take a sample of my blood for the purposes relating to their investigations. Dated the 3rd of December, 1989."
>
> (emphasis added)

After typing up the consent form, Constable Roberts, together with Sergeant Brown attended upon Mr. Borden in the cells. Constable Roberts explained to the appellant that:

> "Before we take your blood I have to have you sign this consent form. And I read it to him, I passed it to him in the cell, he put it down on one of the benches, I gave him a pen, and he looked at it and then he signed it."

Sergeant Brown acknowledged that he had the senior citizen's investigation in his mind but gave to the appellant no clue that the blood sample could be used in that investigation.

This is similar to the evidence of Constable Roberts who stated that the appellant "did not know it had to do with the senior citizen at all".

(11) The appellant, during the course of events of December 3, 1989, did not appear upset, was not under the influence of alcohol or drugs, and also appeared "very confident".

(12) The blood sample was taken later in the afternoon, was analyzed, and the sample and the analysis, as well as expert evidence relating thereto was introduced at trial, over the objection of the appellant's counsel.

The trial judge concluded that the expert evidence established that the D.N.A. analysis of the appellant's blood sample was the same as the D.N.A. analysis of the semen stain on the blanket, and accordingly convicted the appellant.

ISSUES:

The appellant submits that in addition to a violation of his rights under s. 8, of the **Charter**, that since both police officers had the appellant in mind as a suspect in the senior citizen's assault, that his rights under s. 10(a) and (b) have been violated as well. The appellant submits that the evidence should be excluded under s. 24(2) of the **Charter** that the conviction should be quashed, and a verdict of acquittal entered.

The Crown does not take issue with the finding that the appellant's rights under s. 8 were breached, although it adopts the words of the trial judge, namely that a "technical breach had occurred", and maintains the trial judge was correct in refusing to exclude the evidence under s. 24(2).

The Crown submits that in the event the appeal is allowed, that a new trial should be ordered. The basis for this submission is that the Crown maintains only one scientific laboratory in the country, located in Ottawa, where scientists are employed capable of carrying out D.N.A. analysis, that although this offence was committed in October of 1989, charges could not be laid until after the blood analysis had been completed in 1992, because of the demands placed upon the laboratory's time. The Crown stated that it had been advised only a week prior to the argument on

this appeal that a further D.N.A. analysis of some hairs found at the senior citizen's residence compared with the hairs taken from the appellant on December 3, 1989 could be carried out which might be of sufficient evidence to convince a judge or jury, on a new trial, of the guilt of the appellant in the October, 1989 offence.

SECTION 8

Section 8 provides:

> "Everyone has the right to be secure against unreasonable search or seizure."

In Regina v. Wills (1992), 70 C.C.C. (3d) 529 at 539 the Ontario Court of Appeal, in commenting on Section 8, stated at p. 539:

> "This section stands as a bulwark against unreasonable state sponsored invasions of an individual's privacy."

In that case, the court was called upon to consider whether or not a consent was an effective one or whether it was vitiated by "non-disclosure or any misrepresentation of material facts".

Mr. Justice Doherty, speaking on behalf of the court stated at p. 542:

> "In my opinion, the requirements established by the Supreme Court of Canada for a valid waiver of a constitutional right are applicable to the determination of whether an effective consent was given to an alleged seizure by the police. The fairness principle which has defined the requirements of a valid waiver as they relate to a trial within a reasonable time, or the right to counsel, have equal application to the right protected by s. 8. In each instance the authorities seek an individual's permission to do something which, without that permission, they are not entitled to do. In such cases, fairness demands that the individual make a voluntary and informed decision to permit the intrusion of the investigative process upon his or her constitutionally protected rights."

In the course of enumerating a number of conditions that must be established by the Crown on the balance of probabilities, Mr. Justice Doherty enumerated that the "giver of the consent was aware of the potential consequences of giving the consent".

The onus is on the Crown to establish that the appellant had full knowledge of his right to be secure against an unreasonable search and that he had full knowledge of the effect the waiver would have on that right (Regina v. Neilson (1988), 43 C.C.C. (3d) 548).

In my opinion, the consent given by the appellant was not an informed consent and it did not operate as a waiver of his right to be free of unreasonable search or seizure. The taking of the blood sample constituted such a seizure.

The obtaining of the written consent from the appellant shortly after 15:00 hours on December 3, 1989 must be viewed in the light of the earlier events that occurred on that day.

(1) The appellant was in jail charged with the assault at the Sundowner Motel that occurred on December 2, 1989.

(2) Before any discussion occurred, the police advised the appellant that they were investigating that offence, and that the appellant was a suspect.

(3) The only conversation between the appellant and the police officers on December 3, 1989 related to the Sundowner Motel offence.

(4) Before the appellant gave his version of the events to Constable Roberts for inclusion in the written statement, Constable Roberts wrote at the top of the sheet that the statement arose out of an investigation into a sexual assault that happened at the Sundowner Motel in New Glasgow in the early hours of December 2, 1989.

(5) Both policemen acknowledged that they wanted the blood sample "mainly" or "mostly" for the senior citizen's offence. This makes perfect sense since the exotic dancer positively identified the appellant, and he admitted he was present in her motel room.

(6) Constable Roberts first asked the appellant for hair samples. The appellant readily agreed to provide them. These were taken. Fifteen minutes later Constable Roberts returned to the cells and requested a blood sample.

The appellant was obviously in a co-operative frame of mind, and he agreed to provide the sample.

As he expressed:

> "I then told Officer Brown about five or six times that there was no, that I didn't have no sexual intercourse, and I don't know why he needed it, and then he just kept on insisting that he needed it for this case . . ."

The consent to the taking of the blood sample in the appellant's mind obviously did not place him in jeopardy. The assailant at the senior citizens residence did ejaculate at the scene, and if the appellant had been advised that he had been a suspect in that assault and if the blood sample he was being asked to give was primarily for the purpose of that investigation, or indeed would be used in that investigation, it is a most reasonable inference that the appellant would have refused the request.

SECTIONS 10(a) AND 10(b):

Sections 10(a) and (b) of the Charter provide:

> "Everyone has the right on a rest or detention
>
> (a) to be informed promptly of the reasons therefor;
>
> (b) to retain and instruct counsel without delay and to be informed of that right . . ."

The trial judge, without reasons, concluded that there was no breach of the appellant's rights under s. 10.

With respect, I disagree.

I infer from the evidence that it was only after the hair samples were taken at 14:40 on December 3 that the police decided that in view of the willingness of the appellant to co-operate, that they should seek his consent for a blood sample. Certainly at this time, if not earlier, the appellant should have been advised that he was under investigation and considered to be a suspect for the attack on the senior citizen.

The appellant did not know the extent of his jeopardy when he consented to the blood sample. All the discussion with the two police officers up to this point took place consequent upon the investigation into the assault at the Sundowner Motel.

Once the emphasis shifted from the Sundowner Motel to the senior citizens residence, the appellant should have been informed of this change.

The comments of Wilson, J. on behalf of the court in R. v. Black (1989), 50 C.C.C. (3d) 1 at p. 12, are particularly apposite:

> "An individual can only exercise his s. 10(b) right in a meaningful way if he knows the extent of his jeopardy. . . In my opinion, it is improper for a court to speculate about the type of legal advice which would have been given had the accused actually succeeded in contacting counsel after the charge was changed."

In R. v. Evans (1991), 63 C.C.C. (3d) 289, McLachlin, J. on behalf of the majority stated at p. 306:

> ". . . This court's judgment in *R. v. Black, supra, per* Wilson J. makes it clear that there is a duty on the police to advise the accused of his or her right to counsel a second time when new circumstances arise indicating that the accused is a suspect for a different, more serious crime than was the case at the time of the first warning. This is because the accused's decision as to whether to obtain a lawyer may well be affected by the seriousness of the charge he or she faces. The new circumstances give rise to a new and different situation, one requiring reconsideration of an initial waiver of the right to counsel. . .
>
> I should not be taken as suggesting that the police, in the course of an exploratory investigation, must reiterate the right to counsel every time that the investigation touches a different offence. I do, however, affirm that in order to comply with the first of the three duties set out above, the police must restate the accused's right to counsel when there is a fundamental and discrete change in the purpose of the investigation, one involving a different and unrelated offence or a significantly more serious offence than that contemplated at the time of the warning."

Certainly by 3:00 o'clock in the afternoon there was a fundamental and discrete change in the purpose of the investigation, namely the intent to take a blood sample and compare the D.N.A. component with that component in the semen stain on the blanket in the senior citizen assault.

SECTION 24(2)

This section provides:

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

R. v. Collins (1987), 56 C.R. (3d) 193 is authority for the following propositions:

(1) The trial judge's decision to exclude or not to exclude under s. 24(2) of the Charter is a question of law from which an appeal will generally lie.

(2) The burden of persuasion on the applicant is the civil standard on the balance of probabilities.

In the Collins case, Lamer, J. (as he then was) stated that an investigation into the applicability of the section should deal with the following three matters:

(1) Does the admission of the evidence affect the fairness of the trial?

(2) Is the Charter violation of a trivial or serious nature?

(3) Is the justice system better served by the inclusion or exclusion of the evidence?

I propose examining the facts in the present appeal in the light of the three factors.

The cases make a distinction between what has been termed "real evidence" and that described as being "conscripted evidence".

Real evidence is defined as that which exists "irrespective of the violation of the Charter and its use does not render the trial unfair. However, the situation is very different with respect to cases where, after a violation of the Charter, the accused is conscripted against himself through a confession or other evidence emanating from him. The use of such evidence would render the trial unfair, for it did not exist prior to the violation and it strikes at one of the fundamental tenets of a fair trial, the right against self-incrimination". (Collins, supra, per Lamer, J. at p. 211).

Blood analysis is generally considered to be conscriptive evidence, but this classification has arisen in cases where the blood itself contained a contaminate (such as alcohol), the very nature of which established the guilt of the accused.

In R. v. Brown (1992), 107 N.S.R. (2d) 349, a case involving the extent of alcohol impairment of an accused while operating a motor vehicle, Mr. Justice Hallet on behalf of this Court, commented at p. 353:

> "In my opinion, the analysis of the blood, analysis in this case, although real evidence in one sense, is more correctly categorized as self-incriminating evidence as it emanated from the respondent and therefore its admission into evidence would go to the very fairness of the trial . . ."

Goodman, J.A. on behalf of the Court of Appeal of Ontario in R. v. Pavel (1990), 74 C.R. (3d) 195 at p. 208:

> "There can be no doubt that the demand for and taking of breath and blood samples constitute substantial interference with the liberty of the subject, and the taking of a blood sample is an interference of a very intrusive nature."

In Pohoretsky v. R. (1987), 33 C.C.C. (3d) 398, another impairment case, Lamer, J. (as he then was), for the court, said:

> "First, a violation of the sanctity of a person's body is much more serious than that of his office or even of his home."

This appeal raises a slightly different issue than that raised on the blood alcohol impairment cases. The analysis of the blood here, it could be argued, was a neutral factor. That analysis did not establish the guilt of the accused. That guilt was only established when the D.N.A. content of the blood taken was determined to be identical when compared with the D.N.A. in the semen stain located on a blanket in the senior citizen's residence.

While there may be arguments as to whether or not the blood taken in this case is "real evidence" or "conscriptive evidence", the fact remains that the Crown had no right to obtain the blood without the consent of the appellant. The D.N.A. content of the semen on the blanket was entirely without significance until it was compared with the D.N.A. content of the appellant's own blood. The accused was conscripted against himself. While the blood in one sense did "exist prior to the violation", it did not exist in a form accessible to the Crown.

Even if one accepted a classification of this evidence as "real evidence", the statement in **R. v. Ross** (1989), 1 S.C.R. 3, cited with approval in **R. v. Mellenthin** (1992), 3 S.C.R. 615 at 626 is germane:

> ". . . the use of any evidence that could not have been obtained but for the participation of the accused in the construction of the evidence for the purposes of the trial would tend to render the trial process unfair."

In my opinion, the use of such evidence rendered the trial unfair.

With respect to the second factor, (the seriousness of the Charter violation), Lamer, J. in the Collins case cites with approval the following comments of LeDain, J. in R. v. Therens, [1985] 1 S.C.R. 613 at p. 652:

> "The relative seriousness of the constitutional violation has been assessed in the light of whether it was committed in good faith, or was inadvertent or of a merely technical nature, or whether it was deliberate, wilful or flagrant. Another relevant consideration is whether the action which constituted the constitutional violation was motivated by urgency or necessity to prevent the loss or destruction of the evidence."

Both Sergeant Brown and Constable Roberts agreed that there was no urgency for them to have obtained the blood sample. The appellant was incarcerated and was obviously going to be available to them for some period of time.

In my opinion, the police should have advised the appellant that the focus of their investigation had changed, at the very latest by 3:00 o'clock, before the request for the blood sample was made.

The acknowledgment by Constable Roberts that he was aware that the appellant did not understand that the consent had to do with the senior citizen case "at all", is a significant factor which tends to indicate a disregard for the Charter, a point supporting the exclusion of the evidence.

I have concluded that there has been a violation of the appellant's Charter rights under s. 8 as well as s. 10(a) and 10(b).

These violations, in my opinion, are of a serious nature.

The final matter is whether the justice system will be better served by the admission, or exclusion, of the evidence.

The test formulated by Chief Justice Lamer in Collins, supra, at p. 209 is:

> "Would the admission of the evidence bring the administration of justice into disrepute in the eyes of a reasonable man, dispassionate and fully apprised of the circumstances of the case?"

I am mindful that this Court should not interfere with the decision of the trial judge if that decision was not unreasonable, even though we might have decided the matter differently.

Crown counsel submits that the good faith of the police is illustrated by their action in phoning the Crown prosecutor to determine if a written consent for the blood sample should be obtained in addition to the verbal consent. The Crown prosecutor, as well, provided the wording used by the police in the written consent.

In response to a question framed in chief by Crown counsel at the trial:

"Did you or Officer Roberts in preparing Exhibit C-7 and the wording

in this is worded, attempt to conceal or hide or trick in any fashion

this man as to the form of consent he was signing?"

Sergeant Roberts responded:

"No we didn't."

The trial judge stated:

> "Constable Roberts caused the blood sample to be taken in the good faith belief, that he was acting lawfully with the proper written consent form that had been drafted after Constable Roberts sought legal advice from Crown attorney . . . and which consent form included the word 'investigations' plural.

The good faith of the police cannot operate to strengthen the case for including the evidence.

In R. v. Elshaw (1992), 7 C.R. (4th) 333, Iacobucci, J. at p. 348 stated:

> "Even if the good faith of the police officers were definitively established, it should not have been considered by the Court of Appeal as a mitigating factor in the violation of the appellant's rights

> . . . In other words the bad faith of the police may strengthen the case for exclusion because as Lamer, J. points out in Collins, supra, it may tend to show a 'blatant disregard for the Charter'. However, the good faith of the police will not strengthen the case for admission to cure an unfair trial. The fact that the police thought they were acting reasonably is cold comfort to an accused if their actions result in a violation of his or her right to fair criminal process."

If good faith were an operative issue, I would find the police actions deficient. Constable Roberts was cross-examined as follows:

> "Q. But I am submitting to you that what you really had in mind, and what you've already told the court, what you really had in mind was a senior citizen case.
>
> A. Yes . . .
>
> Q. I would submit that, or ask you to comment on, that if you had told him that there was another charge involving a senior citizen the reason that you didn't tell him that is that he would not have given you the blood or the hair. Is that correct?
>
> A. No I didn't tell him, that is correct. I didn't tell him. But I felt that this consent covered investigations in the plural.
>
> Q. Yes, but you didn't say anything about the investigations in the plural.
>
> A. No I did not . . .
>
> Q. You've already established before that he didn't know that it had to do with the senior citizen at all?
>
> A. No."

To the same effect is the following evidence of Sergeant Brown:

> "Q. Did you intimate to him at all, give him any clue that you were going to use this blood, his consent and get the blood and use it in the incident in the senior citizen case?
>
> A. No."

(emphasis added)

The police were obviously concerned that the verbal consent they obtained from the appellant for the taking of the blood sample would not stand up in court. It was for this reason they

phoned the Crown prosecutor to obtain his opinion on the desirability of securing a written consent, as well as his expertise in drafting the words of the consent.

Does the use of the word "investigations" in the written form cure the defect - in the sense that it alerted the appellant to the jeopardy that he was being placed in, namely that the blood sample might be used in the senior citizen's investigation?

In my opinion, it clearly did not.

The circumstances I have outlined that occurred on December 2 lead to the inference that the appellant's mind was not in tune with the change of emphasis.

If one needed further support for this inference, it is found in the testimony of both Constable Roberts and Sergeant Brown referred to.

In R. v. Elshaw (1992), 7 C.R. (4th) 333, the majority endorsed the three groups of factors set forth by Lamer, J. in Collins.

Iacobucci, J. stated at p. 350:

> "The Court of Appeal's balancing of all the various factors arguing for admission or exclusion is contrary to the approach to s. 24(2) suggested by this court in *Collins* and subsequent cases. A violation of rights which jeopardizes the fairness of the trial cannot be "saved" by mitigating factors (such as the good faith of the police). It can, however, be worsened by aggravating factors (such as a lack of urgency or necessity).
>
> It is well established that the test for the admissibility of self-incriminating evidence under s. 24(2) is more stringent than the test for real evidence. This is so because the former is directly related to the *Charter* violation and its admission would dramatically affect the presumption of innocence of the accused and also affect his or her right not to testify. A series of decisions by this court, beginning notably with *Collins*, makes it clear that the exclusion of inculpatory statements obtained in violation of s. 10(b) should be the rule rather than the exception. McLachlin, J. most recently wrote in *R. v. Evans*, (April 18, 1991), Doc. 21375 (S.C.C.) [now reported 4 C.R. (4th) 144, 63 C.C.C. (3d) 289, 124 N.R. 278, 3 C.R.R. (2d) 315] at p. 25 [p. 166 C.R.]:
>
> > 'Generally speaking, the use of an incriminating statement, obtained from an accused in violation of his rights, results in unfairness because it infringes his privilege against self-incrimination and does so in a

> most prejudicial way - by supplying evidence which would not be otherwise available.'
>
> In this case, the Court of Appeal listed the self-incriminating nature of the evidence obtained in violation of s. 10(b) as just one factor among many to be considered in admission. A proper approach would have been premised on the principle that, as a general rule, such evidence is not admissible because it would adversely affect the fairness of the trial and bring the administration of justice into disrepute."

While these comments relate to the admission of a self-incriminating statement, they are, in my opinion, applicable to the present case.

In R. v. Wise, [1992] 1 S.C.R. 527, Cory, J. on behalf of the majority stated at p. 541:

> ". . . Evidence has been found to be 'real' when it referred to tangible items. For example narcotics were held to be real evidence in *R. v. Jacoy*, [1988] 2 S.C.R. 548, and in *R. v. Debot*, [1989] 2 S.C.R. 1140. Weapons were held to be real evidence in *R. v. Black*, [1989] 2 S.C.R. 138. In all of these cases, the real or tangible evidence was admitted even though it had been obtained as a result of an unreasonable search.
>
> On the other hand, 'conscriptive' evidence usually refers to evidence which emanates from the accused following a violation of s. 10(b) of the *Charter*. Samples of blood taken from the accused were found to be conscriptive evidence in *R. v. Pohoretsky*, [1987] 1 S.C.R. 945.
>
> . . .
>
> In *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission*), [1990] 1 S.C.R. 425, La Forest J. found there was a clear distinction between evidence which an accused was forced to create, which should not be admissible, and existing evidence, which the accused had merely been forced to locate or identify, which should be admitted. He put forth his position at pp. 552-553:
>
> > 'A breach of the *Charter* that forces the eventual accused to create evidence necessarily has the effect of providing the Crown with evidence it would not otherwise have had. It follows that the strength of its case against the accused is necessarily enhanced as a result of the breach. This is the very kind of prejudice that the right against self-incrimination, as well as rights such as that to counsel, are intended to prevent.'
> >
> "

A decision to exclude the evidence is a most significant step in this case because there is no other evidence on which a conviction can be based.

This assault was a violent attack on an older citizen in the sanctity of her bedroom.

The admission of the evidence establishes, beyond a scintilla of a doubt, (according to the expert evidence accepted by the trial judge) that the D.N.A. characteristics of the appellant's blood matched up exactly (ie. a 5 "probe" match) with the D.N.A. characteristics found in the semen stain.

Notwithstanding these cogent factors, in my opinion, the admission of the evidence would bring the administration of justice into greater disrepute than its exclusion.

When the police are requesting permission from any person to obtain blood, hair, or some physical component peculiar to that person, that without that person's permission, the police are not entitled to obtain, the police are under an obligation to be candid; that is, they are obliged to afford to the individual an opportunity to appreciate the jeopardy in which he or she is placed, if the consent be granted.

I do not suggest that the circumstances that occurred, prior to the request for hair and blood samples in this case, were consciously orchestrated to lull the appellant into a state of false security. But I am of the opinion that, in light of the dealings earlier in the day that created an "environment" of the Sundowner Motel investigation, the police were required to advise the appellant of the emphasis shift to the senior citizen's offence and grant s. 10 Charter rights.

This is particularly important when the police know, as they did here, that the appellant did not appreciate the significance of the insertion of the word "investigations" or the extent of permission that the police intended that word to have.

The long term consequences of regular admission of this type of evidence obtained in these or similar circumstances would, in my opinion, bring the administration of justice into disrepute. (See Lamer, J. in Collins).

In R. v. Genest, [1989] 1 S.C.R. 59, Dickson, C.J., for the court, stated at p. 82:

"In his analysis of the effect the admission of the evidence would have on the administration of justice, Owen J.A. considered the effect of excluding it and the effect of admitting it. He pointed out that exclusion of the evidence would mean an automatic acquittal, while admission would mean a trial on the merits with the possibility of an acquittal if the facts of the case warranted it. Elsewhere in his judgment, as I have indicated, he emphasized that the accused had not sought any remedy under s. 24(1), which he considered to be the primary remedial section of the *Charter*. In these circumstances, Owen J.A. concluded that exclusion of the evidence would be likely to bring the administration of justice into disrepute.

With respect, I think that such an approach would mean that in almost every case evidence would be admitted. Any time evidence is excluded there is a strong chance of an acquittal without a trial on the merits. If Owen J.A.'s approach were followed, exclusion of evidence under s. 24(2) would be very rare, probably only in those cases where a conviction was likely in any event. While the purpose of the rule is not to allow an accused to escape conviction, neither should it be interpreted as available only in those cases where it has no effect at all on the result of the trial. The consideration whether to exclude evidence should not be so closely tied to the ultimate result in a particular case. Lamer, J. for the majority in *Collins, supra,* held that courts should consider the effect on the administration of justice of excluding evidence, but that factor alone should not decide the case."

In the course of a dissenting opinion in R. v. Wise, supra, La Forest, J. stated at p. 567

"It may at times be difficult to accept that an individual - even a dangerous individual - should be allowed to escape the clutches of the law because law enforcement bodies must be kept within constitutional norms. But that is the price of freedom. Nor must we mislead ourselves that we are dealing here with mere technicalities. The great American jurist, Brennan, J., with characteristic vigour, thus responded to this misconception in a radio interview in 1987:

> "Honestly," Brennan said, raising his voice, "you in the media ought to be ashamed of yourselves to call the provisions and the guarantees of the Bill of Rights 'technicalities'. They're not. They're very basic to our very existence as the kind of society we are. We are what we are *because* we have those guarantees, and this Court exists to see that those guarantees are faithfully enforced. They are not technicalities! And no matter how awful may be the one who is the beneficiary time and time again, guarantees have to be sustained, even though the immediate result is to help out some very unpleasant person. They're there to protect all of us."

See "Profiles: The Constitutionalist", *The New Yorker*, March 12, 1990, p. 45, at p. 65."

In my opinion, the decision of the trial judge to include the evidence was unreasonable and constituted an error of law.

Since there was no other evidence to establish beyond a reasonable doubt that the appellant committed the offence, I would set aside the conviction.

The Crown has submitted that a new trial should be ordered.

The Crown laboratory had the facilities available in 1989, and thereafter, to carry out the hair analysis the Crown now wishes to have undertaken. The Crown elected not to proceed with this analysis three years ago. It could well have done so.

Further, there is no evidence before this Court that the results of that analysis would establish beyond a reasonable doubt that it was the appellant's hair found in the bedroom of the senior citizen.

For these reasons, I would deny the Crown's request.

J.A.

Concurred in:

Jones, J.A.

FREEMAN, J.A.: (Dissenting)

While detained for sexual assault upon an exotic dancer, knowing that a few weeks earlier he had entered a senior citizen's home and sexually assaulted a woman in her bed, Josh Randall Borden disregarded the advice of counsel and voluntarily gave police a sample of his blood for testing.

As they intended, the police had the blood sample analyzed and obtained Mr. Borden's DNA profile. When the DNA profile obtained from a semen stain left behind by the assailant of the senior citizen was compared with it, there was a positive match. Without qualification, it was Mr. Borden who raped the sixty-nine-year-old woman.

I agree with Justice Pugsley that if Mr. Borden's consent to the taking of the blood sample was vitiated, Mr. Borden's rights under the **Canadian Charter of Rights and Freedoms** were infringed by an unlawful search interfering with his expectations of privacy under s. 8. It was only the existence of a valid consent that made the taking of the sample lawful. There is as yet no statutory authority for police to demand samples of blood or other bodily substances for purposes of identification in investigations of violent crimes. While such bodily substances as loose hairs may be gathered by police as part of a search incidental to an arrest, opinion is not unanimous that living hairs can be removed without consent.

If there was a **Charter** breach vitiating Mr. Borden's consent, it must be determined whether the DNA profile should be excluded under s. 24(2) of the **Charter**. The DNA profile from the semen stain is virtually the only evidence against Mr. Borden in this case, and without the DNA profile from his blood sample for comparison, it cannot be proved that the semen issued from him. If the DNA profile is excluded, he must be acquitted.

S. 24(2) of the Charter

I take the judgment of Mr. Justice Cory, writing for the majority of the Supreme Court of Canada in **R. v. Wise** (1992), 11 C.R. (4th) 253 to represent the present level of evolution of the law as stated in **Collins v. R**. (1987), 56 C.R. (3d) 193 regarding S. 24(2) exclusions, and I will quote from his judgment at some length. That case involved police surveillance of a suspect's vehicle in which they had without authorization installed a simple radio tracking beeper. Guided in part by the beeper, police observed the suspect's car leaving the scene where a $2,000,000 communications tower had come crashing down. Pieces of metal matching cut guy wires were found in the vehicle. Mr. Justice Cory stated at pp. 263-267:

> " What then are the principles that should be considered? They are set out in **R. v. Collins,** [1987] 1 S.C.R. 265, 56 C.R. (3d) 193, [1987] 3 W.W.R. 699, 74 N.R. 276, 13 B.C.L.R. (2d) 1, 28 C.R.R. 122, 33 C.C.C. (3d) 1. There, Lamer J., as he then was, divided the factors that should be taken into account when considering the admissibility of evidence under s. 24(2) into three groups:
>
> (1) the effect of admission on the fairness of the trial process;
>
> (2) the seriousness of the violation; and
>
> (3) the effect of exclusion on the reputation of the administration of justice.
>
> It was emphasized that the object of s. 24(2) was not to remedy police misconduct, but rather to prevent the administration of justice being brought into further disrepute through the admission of improperly obtained evidence. These factors will have to be applied to two aspects of the evidence, namely, the location of the appellant's car and the metal pieces found in the vehicle which were similar to the metal guy wires of the destroyed tower.
>
> The fairness of the trial process has been described as a critical factor. In determining fairness, the nature of the evidence obtained must be considered. The admission of real evidence obtained as a result of a **Charter** violation will rarely result in a finding of unfairness. However, the admission of evidence obtained by conscripting the accused against himself, such as a confession, will generally render the trial unfair. In **Collins**, **supra,** Lamer J. at pp. 284-285 [S.C.R.] wrote:
>
> 'It is clear to me that the factors relevant to this determination will include the nature of the evidence

> obtained as a result of the violation and the nature of the right violated and not so much the manner in which the right was violated. Real evidence that was obtained in a manner that violated the **Charter** will rarely operate unfairly for that reason alone. The real evidence existed irrespective of the violation of the **Charter** and it does not render the trial unfair. However, the situation is very different with respect to cases where, after a violation of the **Charter,** the accused is conscripted against himself through a confession or other evidence emanating from him. The use of such evidence would render the trial unfair, for it did not exist prior to the violation and it strikes at one of the fundamental tenets of a fair trial, the right against self-incrimination. Such evidence will generally arise in the context of an infringement of the right to counsel. Our decisions in **Therens, supra**, and **Clarkson v. The Queen,** [1986] 1 S.C.R. 383, are illustrative of this. The use of self-incriminating evidence obtained following a denial of the right of counsel will generally go to the very fairness of the trial and should generally be excluded.'

"How should the evidence as to the location of the appellant's vehicle be considered? Evidence has been found to be 'real' when it referred to tangible items. For example narcotics were held to be real evidence in **R. v. Jacoy**, [1988] 2 S.C.R. 548, 66 C.R. (3d) 336, 2 T.C.T. 4120, [1989] 1 W.W.R. 354, 89 N.R. 61, 18 C.E.R. 258, and in **R. v. Debot,** [1989] 2 S.C.R. 1140, 73 C.R. (3d) 129, 52 C.C.C. (3d) 193, 102 N.R. 161, 37 O.A.C. 1, 45 C.R.R. 49. Weapons were held to be real evidence in **R. v. Black,** [1989] 2 S.C.R. 138, 70 C.R. (3d) 97, 50 C.C.C. (3d) 1, 98 N.R. 281, 93 N.S.R. (2d) 35, 242 A.P.R. 35, 47 C.R.R. 171. In all of these cases, the real or tangible evidence was admitted even though it had been obtained as a result of an unreasonable search.

On the other hand, 'conscriptive' evidence usually refers to evidence which emanates from the accused following a violation of s. 10(b) of the **Charter**. Samples of blood taken from the accused were found to be conscriptive evidence in **R. v. Pohoretsky**, [1987] 1 S.C.R. 945, 58 C.R. (3d) 113, 75 N.R. 1, [1987] 4 W.W.R. 590, 47 Man. R. (2d) 295, 29 C.R.R. 238, 33 C.C.C. (3d) 398, 39 D.L.R. (4th) 699. Statements made by the accused were found to be conscriptive in **R. v. Manninen**, [1987] 1 S.C.R. 1233, 58 C.R. (3d) 97, 76 N.R. 198, 21 O.A.C. 192, 34 C.C.C. (3d) 385, 41 D.L.R. (4th) 30l, 38 C.R.R. 37. The compulsory appearance in a police line-up was held to constitute conscriptive evidence in **R. v. Ross**, [1989] 1 S.C.R. 3, (sub nom. **R. v. Leclair**) 67 C.R. (3d) 129, 46 C.C.C. (3d) 129, 37 C.R.R. 369, 91 N.R. 81, 31 O.A.C. 321. There, at p. 16 [S.C.R.], it was said**:**

> '[T]he use of any evidence that could not have been obtained but for the participation of the accused in the construction of the evidence for the purposes of the trial would tend to render the trial process unfair.'

" In this case, I agree with the court of appeal that the movements of the car constituted real evidence. . . .

In **Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission),** [1990] 1 S.C.R. 425, 76 C.R. (3d) 129, 54 C.C.C. (3d) 417, 67 D.L.R. (4th) 161, 29 C.P.R. (3d) 97, 39 O.A.C. 161, 106 N.R. 161, 47 C.R.R. 1, La Forest J. found there was a clear distinction between evidence which an accused was forced to create, which should not be admissible, and existing evidence, which the accused had merely been forced to locate or identify, which should be admitted. He put forth his position at p. 552 [S.C.R.]:

> 'I would first of all note that I do not believe that in drawing this distinction, Lamer J. intended to draw a hard and fast line between real evidence obtained in breach of the **Charter** and all other types of evidence that could be so obtained. ... I think this clearly indicates that what Lamer J. had in mind was the much broader distinction between evidence which the accused has been forced to create, and evidence which he or she has been forced to merely locate or identify.
>
> ...
>
> A breach of the **Charter** that forces the eventual accused to create evidence necessarily has the effect of providing the Crown with evidence it would not otherwise have had. It follows that the strength of its case against the accused is necessarily enhanced as a result of the breach. This is the very kind of prejudice that the right against self-incrimination, as well as rights such as that to counsel, are intended to prevent. In contrast, where the effect of a breach of the **Charter** is merely to locate or identify already existing evidence, the case of the ultimate strength of the Crown's case is not necessarily strengthened in this way. The fact that the evidence already existed means that it could have been discovered anyway. Where this is the case, the accused is not forced to confront any evidence at trial that he would not have been forced to confront if his **Charter** rights had been respected. In such circumstances, it would be the exclusion rather than the admission of evidence that would bring the administration of justice into disrepute.'

"and at p. 555:

> 'The one qualification that must be made to the above has to do with the difference between independently existing evidence that could have been found without compelled testimony, and independently existing evidence that would have been found without compelled testimony. As I have acknowledged at several points in these reasons, there will be situations where derivative evidence is so concealed or inaccessible as to be virtually undiscoverable without the assistance of the wrongdoer. For practical purposes, the subsequent use of such evidence would be indistinguishable from the subsequent use of the pre-trial compelled testimony.' (Emphasis in original.)

" There my colleague indicated that 'created' evidence would affect the fairness of the trial and should not be admitted while 'located' evidence would only affect the fairness of the trial if the evidence were virtually undiscoverable without the assistance of the accused.

In this case, the use of the beeper merely assisted the police to gather evidence which, to a great extent, they had obtained by visually observing the vehicle. It is difficult to determine from the transcript what evidence was obtained from the beeper and what was obtained from observation. In light of the unsophisticated nature of the beeper, it seems that the essential evidence was obtained by direct observation. In any event, evidence as to movement of the vehicle was certainly not 'undiscoverable'. It follows that the admission of the evidence as to the location of the car could not be said to affect the fairness of the trial."

In my view the refusal of the trial judge, Judge Clyde MacDonald of Provincial Court, to exclude the evidence of the DNA profile is consistent with the principles stated by Cory J., although I acknowledge this may be apparent only after close scrutiny.

One principle that seems to flow consistently through the cases referred to in **R. v. Wise** is that the more reliable the nature of the evidence, the greater the reluctance of the courts to exclude it. This may be because the substantial unfairness which the law must guard against is the conviction of an innocent person. (See **R. v. Evans** (1991), 94 C.R. (4th) 144.) That is the ultimate objective of procedural safeguards, which otherwise might sometimes be seen to have more to do with good sportsmanship than criminal justice. Because of the unique reliability of the DNA profile,

which is unique in other respects as well, I am not satisfied that a trustworthy analogy exists between a DNA profile and evidence that must be excluded under s. 24(2) following a **Charter** breach on the authority of any of the cases referred to in **R. v. Wise.** That is not to assert that DNA evidence can never be excluded under s. 24(2), although I am aware of no case in which it has been excluded, my concern is whether it is necessary to exclude it on the peculiar facts of the present case.

The Seriousness of the Violation

The Crown has acknowledged that a "technical" infringement occurred. However, it was not the taking of the blood sample by consent--the very act consented to--that vitiated the consent. It is necessary to find another **Charter** breach or other element that invalidated the consent before there can be a s. 8 violation. (While it might also be argued that the unauthorized taking of a blood sample infringes the right to security of the person under s. 7, in the context of the present case it makes no difference whether a breach occurred under s. 7 or under s. 8. It is the s. 8 breach which is considered in virtually every relevant case.)

In the absence of a **Charter** breach it appears to me that the Crown has met the requirements for establishing the validity of consent set forth by the Ontario Court of Appeal in **R. v.Wills** (1992), 70 C.C.C. 529 at p. 546 with the possible exception of the sixth test, that "the giver of the consent was aware of the potential consequences of giving the consent." The use of consents would have to be virtually abandoned if that were taken to mean that a consent could be revoked when it led to adverse consequences which were not anticipated by the consent giver. Here the blood sample was given for the obvious purpose of testing and comparison in the course of a sexual assault investigation. In my view, that is sufficient. In **R. v. Williams**, **supra,** Melnick, J. found that consent for the taking of hair samples for a DNA test was not vitiated when police merely explained that the evidence would clear the accused if he were innocent and did not tell him it could be used against him to prove his guilt. The presence of the accused's counsel was a factor.

It makes a great deal of difference whether the blood sample was taken in the case of the exotic dancer. The trial judge found that "Mr. Borden consensually gave the blood sample in respect to the exotic dancer sexual assault case." Elsewhere he stated: "The blood was being sought for the exotic dancer assault case, and Mr. Borden fully consented to this aspect." I would be reluctant to disturb these findings of fact.

However Justice Pugsley, writing for the majority, has concluded that Mr. Borden's consent was sought in the case of the senior citizen. In that event, there may well have been a s. 10(a) and s. 10(b) infringement. Mr. Borden was not informed he was arrested or detained in that case, nor was he informed of his right to counsel afresh in that case. The s. 10(a) breach was the more serious: Mr. Borden had just exercised his right to counsel in the exotic dancer case and knew he had the right to remain silent. If the investigation had shifted to the senior citizen case, Mr. Borden should have been informed. However at relevant times, when the blood sample was requested and taken with Mr. Borden's consent, he was not arrested or detained in the senior citizen case. Indeed, the police had no basis beyond a suspicion, then unfounded, for so arresting or detaining him.

In my view, if the police had not harboured suspicions at that time that Mr. Borden was involved in the senior citizen case, they would have been perfectly justified in requesting a blood sample in the exotic dancer case, and there would have been nothing to vitiate his consent. It was not an obvious necessity in view of the evidence they already had, but neither was it an unreasonable request. (Mr. Borden was eventually convicted in the exotic dancer case on evidence already available to police at the time the blood sample was requested.) Hairs had been found in the exotic dancer case which, if they lacked the root tissue needed for a positive microscopic identification, might have been identified by a DNA profile taken from the blood sample. Mr. Borden was free to agree or refuse as he saw fit. He had exercised his right to counsel and had been advised to tell the police nothing beyond his name. He had chosen to disregard the advice of counsel by giving the police a statement and hair samples before he was asked for a blood sample, which he agreed to willingly. It is to the credit of the investigating officers that they sought, and acted upon, legal advice

before they had the blood sample taken by a doctor. By an objective standard, disregarding the unuttered thoughts of the police officers, the taking of Mr. Borden's blood sample with his consent in the exotic dancer case involved no infringement of his **Charter** rights, and there would have been no basis for excluding evidence of his DNA profile arising out of that case.

It would seem perfectly reasonable for police to request a blood sample in every case of sexual assault, provided all constitutional safeguards were respected and the accused understood a DNA profile was wanted as a matter of record. Few other investigative tools are capable of clearing an innocent suspect or implicating a guilty one with such certainty.

Police suspicions in the senior citizen case aside, in my view the request for a blood sample in the exotic dancer case was so reasonable it cannot be characterized as a trick. After obtaining Mr. Borden's verbal consent the police officers went no further until they had obtained legal advice from the Crown Prosecutor, who advised them to obtain his written consent in the following form:

> "I, Josh Randall Borden, of Frederick Street, in New Glasgow, Pictou County, do hereby give my consent to the New Glasgow Police Department to take a sample of my blood for the purposes relating to their **investigations**. Dated the 3rd of December, 1989." (Emphasis added.)

There was considerable attention paid at the trial to the pluralization of the word "investigations." Knowing that there was no statutory authority for using DNA results, such as the right to publish fingerprint test results under the **Identification of Criminals Act**, it would have been prudent for the Crown to have suggested broad language that would extend the use police might make of the DNA profile by consent. In giving his consent Mr. Borden made no effort to limit its use, despite his recollection of events at the senior citizens' home.

If this was indeed a trick to enable police to play their hunch that Mr. Borden could have been involved in the senior citizen assault, they could hardly have seen it as an unlawful one. In **R. v. Collins** 1987, 36 C.R. (3d) [S.C.C.] Lamer J. (as he then was), referred to **Rothman v. R.**, [1981] 1 S.C.R. 640 and remarked:

> "I am still of the view that the resort to tricks that are not in the least unlawful, let alone in violation of the **Charter,** to obtain a statement should not result in the exclusion of a free and voluntary statement unless the trick resorted to is a dirty trick, one that shocks the community."

If the steps taken by the investigating officers must be considered subjectively, taking into account their suspicions and motives, rather than objectively from the point of view of a reasonable person uninformed as to their states of mind, Justice Pugsley's analysis of the evidence makes it clear that the senior citizen case was uppermost in their thoughts when they sought the blood sample. Some suspicion of Mr. Borden in that case was permissible, even subjectively. The strength of the suspicion present in their minds must be weighed, for it was only if the suspicion was strong enough to alter the nature of the investigation that a **Charter** infringement could have occurred.

In **R. v. Evans** (1991), 4. C.R. (4th) 144 at p. 163 McLachlin J. stated the test:

> "I should not be taken as suggesting that the police, in the course of an exploratory investigation, must reiterate the right to counsel every time that the investigation touches on a different offence. I do, however, affirm that in order to comply with the first of the three duties set out above, the police must restate the accused's right to counsel when there is **a fundamental and discrete change in the purpose of the investigation**, one involving a different and unrelated offence or a significantly more serious offence than that contemplated at the time of the warning." (Emphasis added)

In my view the request for the blood sample, whatever the police may have suspected, was merely incidental to, that is, an incident of, the exotic dancer investigation. This was certainly so by an objective standard. Even subjectively, giving full effect to the suspicions of the police, it was only a fortuitous opportunity to play a hunch. It did not represent "a fundamental and discrete change in the purpose of the investigation." That "fundamental and discrete change", in my view, must be of sufficient substance to equate a separate arrest or detention, in order to trigger fresh rights under s. 10 of the **Charter.**

An example of a fundamental and discrete change in the purpose of the investigation is to be found in **R. v. Black** (1989), 70 C.R. (3d) 97. The accused in a stabbing incident exercised her right to counsel before the victim had died. After the victim's death she made a statement and located the knife for police. Her confession was excluded because she had not been informed of her right to counsel afresh after the victim's death, an occurrence that changed the basis of her detention to a murder charge. That is quite different from the present situation, in which police merely seized an opportunity presented by one case to check their suspicions in another. There was no change in the basis on which Mr. Borden was being detained. There was no basis for detaining Mr. Borden in the senior citizen case until much later, when the test results were known. Until then he was to be presumed innocent and, but for the fact that he had assaulted the victim, the DNA profile from the blood sample would have established his innocence.

In my view therefore there was no breach of s. 10 (a) or 10(b) of the **Charter**, and no other factor present which would have vitiated Mr. Borden's consent to give the blood sample. Therefore, there was no breach of s. 7 or s. 8.

The majority on the panel has reached a contrary conclusion, so I shall assume the existence of a minor infringement, discernible only after weighing subtle considerations, and not a flagrant or serious one. Then I must proceed to consider other factors relevant to the exclusion of evidence under s. 24(2). The nature of the evidence is customarily considered under the heading of "fairness" but because the DNA profile is a unique kind of evidence, I propose to consider it separately and at some length. In **R. v. Baptiste** (B.C.S.C. July 16, 1991--unreported) Mr. Justice Hamilton found DNA results admissible as "novel scientific evidence" after tracing the history of acceptance of fingerprint and DNA evidence by courts in England, the United States and Canada, so I will not plough the same ground.

The Nature of the Evidence

DNA evidence is real evidence relating to identifying characteristics found in each of an individual's cells that do not vary between conception and death. That much can be said without serious fear of contradiction. It is less obvious that a blood sample taken for the purpose of obtaining a DNA profile is not incriminating evidence, and that it is not evidence emanating from an accused who is conscripted against himself. That will require explanation.

DNA is a long and complex molecule found in the nucleus of each of the body's cells; it is formed at the time of conception from genetic materials contributed by both parents, and it makes each individual unique. The **Random House Dictionary** defines it as follows:

> " DNA, Genetics. deoxyribonucleic acid: an extremely long macromolecule that is the main component of chromosomes and is the material that transfers genetic characteristics in all life forms, constructed of two nucleotide strands coiled around each other in a ladderlike arrangement with the sidepieces composed of alternative phosphate and deoxyribose units and the rungs composed of the purine and pyrimidine bases adenine, guanine, cytosine, and thymine; the genetic information of DNA is encoded in the sequence of the bases and is transcribed as the strands unwind and replicate. "

The same dictionary defines "gene" as "the basic unit of heredity; a linear sequence of nucleotides along a segment of DNA that provides the coded instructions for synthesis of RNA which, when translated into protein, leads to the expression of hereditary character."

The uniqueness of each individual, except for identical twins, results from the almost infinite variety of sequences in which bases occur along the length of the DNA molecule. The genetic code embedded in the DNA molecule is replicated in each cell of the body, and serves as a blueprint for the manufacture of the proteins which constitute each cell. Recent technology permits the determination of each individual's genetic code from the study of cell samples. The odds against any two individuals, other than identical twins, having similar DNA profiles is in the order of billions to one. Two scientific disciplines are involved: molecular biology to determine the DNA pattern and genetic population statistics to determine the likelihood of repetition of particular patterns within known population databases.

When an individual's known DNA profile is found to match with the DNA profile of cells of formerly unknown origin, the fact that both cell samples came from the same individual can be stated with a degree certainty rarely encountered in the law. A good DNA match, theoretically, is evidence of the highest probative quality.

While a single cell of any bodily tissue or substance holds a complete DNA blueprint, present analysis methods require an appreciable sample to provide a profile. Blood is a convenient substance for testing, but any bodily material comprised of cells can be used. Hair was used for a DNA profile in **Williams**, a mouth swab in **R. v. Baptiste**, **supra**. While police could theoretically follow an individual collecting dead cells that are continually discarded by the body, such as hairs left on a pillow in a cell, a voluntarily contributed sample is somewhat more convenient. Nonetheless, Mr. Borden's blood sample was not the only source from which his DNA profile could have been taken. In the present case police had hair samples from Mr. Borden before they requested the blood sample. In my opinion the hair samples would appear to have been lawfully collected with Mr. Borden's consent in the exotic dancer case and presumably could have yielded a DNA profile if the blood sample had not been available.

In **R. v. Alderton** (1985), 17 C.C.C. (3d) 204 police ran a comb through the head of a suspect who then plucked a number of his hairs "voluntarily but under protest."

The Ontario Court of Appeal found this did not infringe s. 8 of the **Charter**. Martin J.A. wrote at p. 208:

> "It is settled law that following a valid arrest a police officer may search the person arrested and may seize anything that he reasonably believes will afford evidence of the commission of the offence with which the person arrested is charged and of the arrested persons's connection with it."

Alderton was followed in **R. v. Légère** (1988), 43 C.C.C. (3d) 502 by the New Brunswick Court of Appeal. In both cases it was decided there was no infringement of s. 8 of the **Charter** but if there were, the DNA evidence should not be excluded under s. 24(2) of the **Charter**.

A contrary view was expressed by Melnick J. of the British Columbia Supreme Court in **R. v. Williams** (October 15, 1992--unreported) who considered the plucking living hairs from a suspect by police without consent to be a s. 8 infringement. **Williams** was decided on the basis that the accused had consented.

To explain and illustrate the unique nature of evidence resulting from DNA typing in the context of the present case it is necessary to quote at length from the helpful findings of fact made by the trial judge on the basis of evidence by three Crown experts, Dr. John Hales Bowen, a biochemist specializing in molecular genetics, Jeffrey Gordon Modler, a molecular genetic specialist with the Molecular Genetic Section, R.C.M.P. Central Forensic Laboratory, Ottawa, and Dr. George Richard Carmody, a population geneticist.

> " We've heard the evidence from these three experts that the Crown has presented to the court, and that expertise involved DNA typing. And I think I would be remiss in this decision if I didn't refer to the actual process, and I find that looking over these decisions involving DNA typing, that the decision rendered by Mr. Justice Flanagan, of the Ontario Court, General Division, **Regina v. Bourguygnon**, in January of 1991, is very cogent, very applicable, to this particular case, and I find that the scientific evidence and facts put forward by these three expert witnesses are indeed consistent with what Mr. Justice Flanagan has stated in his summary in this **Bourguygnon** case involving DNA, and I'm going to read it and refer to it. And I find that all these facts have been shown to my satisfaction as being scientific facts in this particular case.
>
> > ' "Deoxyribonucleic Acid (D.N.A.) has been around for many years. I believe the evidence." The witnesses indicated "that the D.N.A. chromosome was discovered in 1953 and has had great use in the scientific community. D.N.A. is that which makes a human a human, and a dog a dog."...
> >
> > D.N.A. provides the genetic blueprint for all living things. Its chemical structure is such that no two people, save identical twins, have the exact same code.
> >
> > One D.N.A. molecule is contained in each of the 46 chromosomes which are identically replicated in every nucleated cell. One chromosome from each of the numbered pairs comes from each parent.

D.N.A. takes the form of a double helix resembling a twisted ladder. Each rung is composed of four organic bases with one base located on either rail of the ladder. The sequence in which these pairs occur determines all our physical traits.

Ninety-nine percent of the three billion base pairs found in a single D.N.A. molecule are sequenced the same way in all people. The remaining area is a variation, polymorphisms, have like sequences of varying lengths in different people. The combination of these different polymorphisms, makes each individual genetically unique.

A testing procedure called Restriction Fragment Length Polymorphism, or R.F.L.P. analysis allows us to measure this distinctive feature of a D.N.A. sample. In R.F.L.P. analysis, the collected D.N.A. sample is mixed with an enzyme, sometimes referred to as a molecular scissor solution, which cuts the D.N.A. molecule at recognized points in the chemical sequence. This solution is run in lanes along a gel, polarized with an electric current so that the fragments align themselves in order of size.

The ordered fragments are transferred through capillary action to a nylon membrane, where a probe, tagged with a radioactive marker, is spread on the membranes. Each probe is specialized to recognize and bond to its specific polymorphic region. When the membrane is exposed to x-ray film, a darkened band will appear where the probe is located.

The resulting 'x-ray' called in autoradiograph, auto-rad for short, depicts a band or bands which represents the size of the segments in this targeted region. From the banding pattern, two D.N.A. samples may be compared and matched. To express the uniqueness of the genetic code, the test must be repeated using different probes which target different locations on the D.N.A. ladder.

Scientific studies of D.N.A. in blood samples indicate the frequency with which a fragment of a given length at a single locus will occur in the population considered. When considering the banding pattern of several different loci, the resulting probability of one individual having all the same lengths will be the product of each of the individual probabilities.'

" So I think that very succinctly sums up the procedure regarding D.N.A. typing, and as I've indicated, regarding the method that the C.F.S. performed its test, I found that the C.F.S. performed its test according to techniques which are generally accepted in the scientific community and this was borne out by the evidence of three experts, and regarding the execution of this test, these tests that were conducted on the material in question, I'm satisfied the C.F.S. performed its tests correctly, carefully, and with all the appropriate safe-guards against error. And this is borne out by the three experts whose evidence I accept, and so find is accepted scientific facts and methods.

Regarding interpretation, it then goes on to the numerical expression of the likelihood involving the accused's genetic profile recurring in the population, as referred to by the experts that interpret these databases, and interpret the results of the D.N.A. typing.

Mr. Modler's report and his evidence has to be considered here. His written report indicates that the five-probe match between the D.N.A. profile obtained from exhibit 31 F-3, and exhibit 39, and we have to keep in mind that exhibit 31 is the semen stain on the comforter, court exhibit E, which is the comforter, 39 we have to keep in mind that that is the known blood sample from Josh Borden, court exhibit number H, and keeping in mind the semen stain on the comforter and the known blood sample of Josh Borden, Mr. Modler says the five-probe match between the D.N.A. profile obtained from exhibit 31 and exhibit 39 prevents the donor of exhibit 39, which is Mr. Borden, the accused, from being excluded as the contributor of the male D.N.A. found on exhibit 31, which is the comforter. Regardless of the population database examined, a coincidental five-probe match between two unrelated individuals is an extremely remote event. He goes on to refer to the caucasian, Canadian Caucasian population in his estimated frequencies of occurrence in relation to the coincidental match to the D.N.A. profile obtained from exhibit 31, which was a semen stain on the comforter, with the polymorphic loci D1S7, D2S44, D4S139, D10S28, and D17S79, which in simplistic forms are chromosome numbers which are referred to in the estimated frequency of coincidental match to exhibit 31, which is the semen stain as chromosome number 1, chromosome number 2, chromosome number 4, chromosome number 10 and chromosome number 17. And, the table goes on to indicate Canadian Caucasian 1 in 78 billion, I should say the frequency is less than 1 in 78 billion individuals, U.S.A. Caucasian is less than 1 in 650 billion individuals and U.S.A. Black, the frequency is 1 in 8 billion of the U.S.A. Black population. So Dr. Modler used three databases, and he goes on to say:

> "'These frequencies of occurrence are conservative estimates which illustrate the rareness of the DNA profile obtained from exhibit 31..." the semen stain on the comforter. "Again, these estimates all support the conclusion that the possibility that the male DNA on

> exhibit 31..." the semen on the comforter "originated from someone other than the donor of exhibit 39" which is the blood sample of Mr. Borden " is extremely remote.'"
>
> " Mr. Modler referred to this five-probe match. He indicated that he had never seen a five-probe match before, or heard of it before in related individuals, I'm sorry, between non-related individuals, or related individuals. And Mr. Modler had five visual matches in his test and he looked at six different regions, and of course he goes on to say in his report, that's Mr. Modler, that the possibility of the semen stain on exhibit 31 belonging to someone other that Mr. Borden is extremely remote.
>
> Dr. Bowen also commented on the five-probe match, as did Dr. Carmody, and each one of them indicated that a five-probe match is an extremely rare event, they've never seen it."

Because a DNA profile is evidence of a unique kind, analogies with other types of evidence, save for fingerprints, must be approached with great caution. Apart from its reliability it must also be emphasized that it is not, in itself, incriminating evidence, and it is not, in the sense used in **Collins**, evidence emanating from an accused conscripted against himself.

There would seem, for example, to be an obvious comparison with blood samples which can be demanded under s. 254 of the **Criminal Code** in the case of certain alcohol-related driving offence. But in cases such as **R. v. Pohoretsky** (1987), 58 C.R. (3d) 113 in which a blood sample was taken without consent from an unconscious man, the evidence which was obtained was evidence of guilt: actual, incriminating evidence that the blood in his veins contained an unlawful level of alcohol for a person who had been driving a vehicle. Chief Justice Lamer held that "the admission of the blood sample to **convict** the appellant would bring the administration of justice into disrepute." (My emphasis.) No one can be convicted as the result of a DNA profile obtained for identification purposes. A conviction can result only from actual incriminating evidence which is matched against it. By itself a DNA profile is no more relevant to guilt or innocence than evidence that one is tall or short or has black hair or blue eyes--or a particular fingerprint pattern. The existence of an identifying DNA profile however can give determinative importance to such

evidence, for example, as a semen stain from the scene of a rape. If there is a match, the DNA "fingerprint" from the scene of the crime is virtually conclusive of guilt. In the event of a mismatch it is conclusive of innocence; the investigative effort can be turned in more profitable directions. When evidence of such reliability is available, the haunting possibility of convicting an innocent accused is virtually eliminated.

In this respect the analogy with fingerprints is a very close one, saving only that the reliability of a fingerprint analysis depends upon the skill of the fingerprint analyst, while a DNA analysis is a biochemical procedure in which the human factor plays a smaller role. The fingerprints retained in police files as a matter of record are similarly non-incriminating evidence. They become of high probative value only when incriminating evidence in the form of fingerprints left at the scene of a crime is compared with them.

If Mr. Borden's consent was valid, his DNA profile would have passed into police hands just as lawfully as fingerprints taken under the statutory authority of the **Identification of Criminals Act**. Fingerprints taken pursuant to the **Act** in the exotic dancer case could without question have been used in the senior citizen case. Except for such statutory rights as the right to publish it, police were free to treat a DNA profile derived from a volunteered blood sample as a matter of record to be used as they could have used physical descriptions, fingerprints, photographs or other lawfully obtained identification evidence. Indeed, with a rapist at large, they would have had a duty to do so.

The constitutionality of the **Identification of Criminals Act** was upheld by the Supreme Court of Canada in **R. v. Beare**, [1988] 2. S.C.R. 387. Writing for the majority of the Court, LaForest J. stated:

> " It seems to me that a person who is arrested on reasonable and probable grounds that he has committed a serious crime, or a person against whom a case for issuing a summons or warrant, or confirming an appearance notice has been made out, must expect a significant loss of privacy. He must expect that incidental to his being taken in custody he will be subjected to observation, to physical measurement and the like. Fingerprinting is of that nature. While some may find

> it distasteful, it is insubstantial, of very short duration, and leaves no lasting impression. There is no penetration into the body and no substance is removed from it."

While penetration of the body to remove blood is distasteful, everyone who has been examined by a doctor or bitten by a mosquito is familiar with the experience. Taking a blood sample for DNA testing is obviously more invasive than smearing ink on the fingertips or posing for a photograph, but there is little to distinguish it in principle from the coerced acquisition of other identifying data. Innocent suspects may be expected to submit gladly to the inconvenience in order to be cleared by one of the most powerful forensic tools available; they did so by the thousands in the **Pitchfork** case, the first DNA case in England in 1986, which is described in **Baptiste**. Undue delicacy in the matter of obtaining blood samples would therefore serve only to protect those who are actually guilty of such crimes as rape and murder. A man who, for example, violates the person of a resident of a senior citizen's home in the privacy of her own room, must himself, in the words of LaForest J., himself "expect a significant loss of personal privacy" to result.

LaForest J. continued:

> " I am unable to accept that a provision providing for fingerprinting as an incident of being taken into custody for a serious crime violates the principles of fundamental justice. While a search of one's premises requires a prior authorization based on reasonable and probable grounds to believe both that the offence has been committed and that evidence will be found, the custodial fingerprinting process is entirely different. It involves none of the probing into an individual's private life and effects that mark a search.
>
> Apart from this, the invasion of privacy on arrest on reasonable and probable grounds is a far more serious violation of the right to privacy. It is not significantly aggravated by the taking of the fingerprints of the person in custody."

Except in the most superficial sense, a DNA profile is not evidence emanating from an individual. As used in the case law, "emanate" connotes a kind of active participation in the creation of evidence, such as making a statement or blowing into a breathalyzer or parading in a lineup. Evidence may originate with an accused without emanating from him in the sense used in the jurisprudence; emanation requires an accused to be conscripted against himself and play a role

in the creation of the evidence. Giving a blood sample is a passive act, similar to being bitten by a mosquito. What gives it significance is the analysis, a process that draws on the enormous resources of modern science to reach into the interior of cells to discover the pattern of genetic information that makes each individual unique. The reliability of a confession taken from an accused by unfair means--violence, coercion, threats, bribes, **Charter** violations--diminishes in proportion to the flagrancy of the unfairness. Unfair methods of obtaining a sample for a DNA test affect its reliability not at all. One's DNA is a constant from conception till death, regardless how the sample is extracted. An innocent accused can be convicted on a coerced confession; an innocent accused must be acquitted as the result of a DNA comparison, even if grossly unfair means have been used to get the sample. Thus any unfairness in the means by which a sample is obtained for an identifying DNA profile is merely procedural in nature. It is distinct from substantive unfairness which can result in the conviction of an innocent person.

In **Williams,** Melnick J. stated:

> "Defence counsel argued that the evidence of the accused's DNA makeup was evidence emanating from him in the sense that a confession does. That is, that the evidence would not exist apart from the accused's having given up the hair samples. I do not agree with this characterization. The hair samples were real evidence that existed independent of the **Charter** violation. So too did the swabs of semen from Boudreau's vaginal area. So too did the molecular composition of both those samples."

In **R. v. Ross** (1989), 46 C.C.C. (3d) 129 the majority of the Supreme Court of Canada held that identification evidence obtained from a lineup should be excluded under s. 24(2) because the appellants had not been given a reasonable opportunity to exercise their right to counsel. The appearance by the accused in the lineup was seen to be "participation of the accused in the construction of the evidence for the purposes of the trial", that is to say, evidence emanating from him.

The configuration of the facial and bodily features of the accused was real evidence in the sense that a DNA profile is real evidence; both are identifying evidence which originates with

the accused. But they do not in a meaningful way "emanate" from him. In a sense, the impression left by the features of the accused on the memory of a witness is also real evidence. The lineup is a technique for matching the two, the facial characteristics and the memory they created, fixing and even enhancing the recollection of the witness before it faded. There is an obvious distinction between the mere giving of a blood sample and conscripting the accused to engage in a group activity to assist in upgrading the quality of the evidence to be given against him by a witness. But an even more important distinction is the notorious unreliability of identification evidence given by eyewitnesses describing the impressions remaining in their memories.

In **Ross**, L'Heureux-Dubé J., McIntyre J. concurring, dissenting as to the need to exclude the evidence, had these interesting comments with respect to the "emanation" of evidence:

> "I share the view of the Court of Appeal that: 'there was no suggestion of bad faith on the part of the officers and '. . . the lineup was eminently fair.' I do not see how the admission of this evidence affected the fairness of the trial, particularly since I do not share my colleague Justice Lamer's view that this identification evidence 'emanates' from the accused in the same way that a confession does. In **Collins**, **supra**, Justice Lamer explains that the admission of evidence 'emanating' from the accused is made problematic because it 'did not exist prior to the violation and strikes at one of the fundamental tenets of a fair trial, the right against self-incrimination' (p. 19 C.C.C., p. 284 S.C.R.). I do not see how this is the case with line-up evidence. The identity of the accused existed prior to the violation, as did the perceptions of the witnesses to the crime. In my view, such evidence comes into existence when an accused is seen committing the crime. The evidence cannot be considered as 'emanating' from the accused simply because it may later be used to establish the credibility of identification evidence. **Evidence that could not have been obtained but for the participation of the accused will not automatically render the trial process unfair.** While this might be so in some cases, it will not necessarily be so in all cases." (Emphasis added)

In **R. v. Légère** (1988), 89 N.B.R. (2d) 361, leave to appeal to the Supreme Court of Canada dismissed (1989) 96 N.B.R. (2d) 180, hair samples were forcibly removed by police from the head and beard of the accused, who eventually stopped resisting as about 100 samples were collected. In finding that comparisons between those hairs and hairs found at the scene of the crime

were admissible in evidence, no issue appears to have arisen as to whether they emanated from the accused. An analogy may safely be drawn between the removal of hair and the taking of a blood sample.

The Fairness of the Trial Process

The key concept was stated by Lamer J. in **Collins** as follows:

> "The use of **self-incriminating** evidence obtained following a denial of the right of counsel will generally go to the very fairness of the trial and should **generally** be excluded." (emphasis added)

In **Evans**, McLachlin J. expressed the following reasoning a p. 166:

> " Generally speaking, the use of an incriminating statement, obtained from an accused in violation of his rights, results in unfairness because it infringes his privilege against self-incrimination and does so in a most prejudicial way--by supplying evidence which would not otherwise be available: **Collins, supra, Black**. For these reasons, Lamer J. (as he then was) stated in **Collins**, at pp. 284-285 [S.C.R. p. 211 C.R.] that "[t]he use of self-incriminating evidence obtained following a denial of the right to counsel will generally go to the very fairness of the trial and should generally be excluded."
>
> Admission of the statements taken from the appellant is unfair for the reasons enunciated in **Collins** and **Black.** The statements were obtained in violation of the appellant's rights. They were highly incriminatory. And they provide evidence which was not otherwise available. The Crown concedes that, without the confessions, it has no case against the appellant.
>
> This suggests a further reason why it would be unfair to use the statements against the accused. **There can be no greater unfairness to an accused than to convict him or her by use of unreliable evidence. . . . "** (Emphasis added.)

I consider that a statement of fundamental importance to the understanding of the concept of "fairness" as it is evolving in **Charter** jurisprudence. Regardless of other criteria, it is inescapable that confessions, which are notoriously unreliable, are excluded from evidence in circumstances in which real evidence, which is generally reliable, is admitted.

McLachlin J. added, at p. 167:

> "In all the circumstances, the appellant's statements must be regarded as highly unreliable. It would be most unfair to convict him

> entirely on their strength. I note in passing that significant portions of the evidence which undermines the reliability of the statements was not before the jury."

The reliability of the evidence of the DNA profile overcomes the risk of the substantive unfairness, that of convicting an innocent person, which concerned McLachlin J. in **Evans**. It seems clear from **Collins** and the actual results of cases which have considered s. 24(2) that the more reliable the evidence, the more substantial the **Charter** infringements which can be tolerated before courts will find procedural unfairness resulting in exclusion of evidence. On the other hand it is clear that absolute reliability of evidence cannot justify an absolute toleration of **Charter** infringements. In the present case the reliability of the evidence verges on the absolute, while any **Charter** breach is not, in my mind, substantial, and well within the limits of what can be tolerated without a finding of unfairness.

Mr. Borden consented to give a blood sample. The resulting DNA profile operated no more unfairly than a fingerprint record required by a statute which has been found to be constitutional. As pointed out above, the reliability of DNA evidence is unrelated to the manner in which the sample was taken: concerns with fairness might more appropriately focus on the integrity of the testing procedures. At the most, if his consent was vitiated by a **Charter** infringement, Mr. Borden removed an obstacle to the obtaining of real evidence which could otherwise have been only obtained with greater difficulty. He did not participate in any real way in the creation of the DNA profile.

This relates to the distinction Cory J. noted in **R. v. Wise,** quoting LaForest J. in **Thompson**:

> " I think this clearly indicates that what Lamer J. had in mind was the much broader distinction between evidence which the accused has been forced to <u>create</u>, and evidence which he or she has been forced to merely <u>locate or identify</u>."

The passive submission to the taking of a blood sample for DNA analysis is, in my view, the equivalent of locating or identifying evidence, not of creating it.

I do not consider that the procedures which created a DNA profile from Mr. Borden's blood sample operated unfairly against him or rendered his trial unfair. That profile merely permitted the semen stain to be fairly evaluated, and that is what convicted him. What could be more just than the conviction of a rapist upon the evidence of his own semen left at the scene of the crime?

The effect of the exclusion on the reputation of the administration of justice

S. 24 of the **Charter** provides:

> " 24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
>
> (2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this **Charter**, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute."

In **R. v. Strachan** (1988), 67 C.R. (3d) 87, the Supreme Court of Canada considered real evidence, narcotics, found after a breach of the right to counsel. Chief Justice Dickson said at pp. 108-109:

> "The denial of the right to counsel does not appear to have been part of a larger pattern of disregard for **Charter** rights. The police did not, as in **Manninen**, goad the accused into talking, nor did they hold him incommunicado for over six hours.
>
> ...
>
> The final group of factors relate to the effects of exclusion on the administration of justice. Routine exclusion of evidence necessary to substantiate charges may itself bring the administration of justice into disrepute. Any denial of a **Charter** right is serious, but s. 24(2) is not an automatic exclusionary rule. Not every breach of the right to counsel will result in the exclusion of evidence. In this case, where the breach of the right to counsel was inadvertent and where there was no mistreatment of the accused, exclusion of the evidence rather than its admission would tend to bring the administration of justice into disrepute. I am therefore of the view

> that the evidence of the marijuana ought not to have been excluded at trial."

Lamer J. also stated in **Collins**:

> "The question under s. 24(2) is whether the system's repute will be better served by the admission or the exclusion of the evidence, and it is thus necessary to consider any disrepute that may result from the exclusion of the evidence."

Such a consideration had to be made by the New Brunswick Court of Appeal on facts roughly similar to those of the present case in **R. v. Légère** (1988), 89 N.B.R. (2d) 361, leave to appeal to the Supreme Court of Canada dismissed (1989) 96 N.B.R. (2d) 180. The facts, as stated by Angers J.A. writing for the Court, were as follows:

> "Shortly after Légère had been arrested and placed in a cell, more particularly at 1:55 a.m. on June 25, four policemen entered his cell and requested hair samples from him. This action was taken following conversation with someone in the Crown Prosecutor's office. Cst. Turgeon, the officer assigned to take these samples, testified that upon entering the cell he 'advised him that he had no choice but to -- that we were going to get some hair samples from him.' Légère refused to give hair samples. The police, needing approximately 100 hairs from Légère's head and beard, began pulling hair. It did not take long before Légère offered to pull them himself. He did so and gave those samples, he allowed other samples to be cut.
>
> Six days later, on July 1, 1986, in the early afternoon, Cst. Turgeon accompanied by another police officer and a guard, entered Légère's cell at Dorchester Penitentiary with a search warrant for the purpose of seizing further hair from his head and beard. This time, the hair samples were taken without consent but with no resistance. As previously indicated, the identification of the hair sample was evidence of the presence of Légère at the scene. It constituted important evidence."

Angers J.A. continued:

> "The Crown concedes that the search warrant could not authorize the taking of hair in this manner. It says that there was no violation of rights and relies on **R. v. Alderton** (1985), 7 O.A.C. 121; 17 C.C.C. (3d) 204 (C.A.). Finally it argues that even if there is a violation of rights, the admissibility of the hair sample does not bring the administration of justice into disrepute.

The trial judge found that the samples were taken without consent and ruled on the basis of **Alderton** that there was no infringement of rights and if there was the subsequent admissibility would not bring the administration of justice into disrepute.

The **Alderton** case also involved the taking of hair samples. The Ontario Court of Appeal described the taking as follows at p. 208:

> ' . . . [The Detective] told the appellant that he could give the samples freely or the police would take them. The appellant said "all right". Ashton then removed the comb from his package and ran it through the appellant's hair obtaining some loose hairs. He then requested that the appellant pluck a few hairs as samples and the appellant complied without complaint.'

The taking of the samples without violence seems to have been determinative in that case. Indeed, the court said:

> 'The taking of the hair samples was not accomplished by violence or threats of violence and we are all of the view that the taking of the hair samples, in the circumstances of this case, and having regard to the serious nature of the offence, did not contravene s. 8 of the **Charter.**
>
> Even if, contrary to the view we have expressed, there was a contravention of s. 8 of the **Charter**, we are satisfied that, having regard to all the circumstances, the admission of the expert evidence with respect to the hair samples would not bring the administration of justice into disrepute.'"

Angers J.A. concluded:

> " The final question is whether the evidence should be excluded in accordance with s. 24(2) of the **Charter**. Considering that the police did not act arbitrarily but rather consulted the Crown Prosecutor, and that the decision in the **Alderton** case had been published; considering also the nature of the charge against the appellant and the nature of the evidence, I am of the opinion that the admissibility of the hair samples for identification purposes does not bring the administration of justice into disrepute in this case."

It should be noted that the factors found determinative by the Ontario and New Brunswick courts were present here. The police acted in good faith, believing there was a valid consent. There was no violence: given the depilatory zeal of the New Brunswick police, that can be

stated with more confidence here than in **Légère**. In the present case, as well, police did not act arbitrarily but consulted with the Crown Prosecutor before having the sample taken. Serious charges were involved. The evidence at issue was real evidence going to identification; it was not incriminatory in itself. The evidence was reliable and important to the outcome of the case.

(In a second case involving the same accused, **R. v. Légère** (New Brunswick Court of Queens Bench, 1991--unreported) DNA evidence was admitted in a brief judgment adopting **R. v. Baptiste.**)

To admit Mr. Borden's DNA profile in the present circumstances, if a s. 8 breach is acknowledged, **could** bring the administration of justice into disrepute. To exclude it, in my view, **would** bring the administration of justice into disrepute. When the system is made to appear to be incapable of convicting a person shown to be guilty of a serious violent crime by highly reliable evidence, after an investigation by competent police officers acting under Crown advice, it raises concerns that the system is not working. The purpose of the administration of criminal justice in Canada is to protect the public by convicting guilty persons. Avoidance of the abhorrent prospect of convicting innocent persons rightfully has a higher priority than convicting the guilty, but that is not the purpose for which the system was established. That concern does not arise in the present case, nor is any precedent it establishes with respect to DNA evidence likely to lead to that result.

When Mr. Borden consented to give the blood sample he knew the police intended to use it in investigating his guilt or innocence in a sexual assault case. Whether or not there was a **Charter** infringement with respect to use of the results of a DNA analysis of his blood in the present case, he had nevertheless waived any expectations he might have had as to preserving his privacy rights in that sample of his blood: the DNA profile would have been admissible in the exotic dancer case.

Thus the concern expressed by LaForest J. in **R. v. Dyment** (1989) 45 C.C.C. (3d) 244--"that the use of a person's body without his consent to obtain information about him invades an area of personal privacy essential to the maintenance of his human dignity"--does not apply on

the present facts. In **Dyment** police seized, without a warrant, a blood sample required in connection with an alcohol-related driving offence from the doctor who took it. In **R. v. Erickson** (1992), 72 C.C.C. (3d) 75 a blood sample taken for medical purposes was seized in similar circumstances but pursuant to a warrant; Major J.A. (as he then was) writing for the majority of the Alberta Court of Appeal panel, found a s. 8 violation but held evidence of the lab analysis of the sample to be admissible under s. 24(2). That decision was upheld by a panel of the Supreme Court of Canada consisting of Lamer C.J., LaForest, L'Heureux-Dubè, Sopinka, Gonthier, Cory and McLachlin JJ. in brief unreported reasons June 17, 1993.

Mr. Borden had already exercised his right to counsel in the exotic dancer case and he knew he had no duty to tell police more than his name; he knew he was disregarding the advice of his lawyer in giving the police the statement, the hair sample or his blood sample. A DNA profile could have been taken from the hair sample if he had not given a blood sample. Mr. Borden knew, as well, that he had sexually assaulted the senior citizen; he had no reason to believe that police did not suspect him, nor that his DNA profile might not be used in that case if he had left a cell sample at the scene for comparison. There is no evidence that he believed he had done so, nor that he would have refused his consent if he had known police were also interested in that case.

In all of the circumstances, it is my view that admission of the evidence of the DNA profile taken from the blood sample consented to by Mr. Borden would not bring the administration of justice into disrepute. It is also my view that to exclude that evidence would bring the administration of justice into serious disrepute.

Summary

As the result of a DNA profile taken from a blood sample he gave by consent during the investigation of a case in which he was later convicted for a sexual assault on an exotic dancer, the appellant was convicted in the present case involving an earlier sexual assault on a senior citizen. In his appeal he claims his consent was vitiated because he did not know the investigating officers wished to compare his DNA profile with the DNA profile of semen stains found after the

assault on the senior citizen. If they were investigating the senior citizen case he should have been so informed under s. 10(a) of the **Charter** and advised of his right to counsel under s. 10(b). If his consent was vitiated the blood sample was taken as the result of an illegal search and his rights under s. 8 of the **Charter** were infringed. In my opinion there was no **Charter** breach because the police were merely taking advantage of an opportunity to follow up on a suspicion. This did not create a fundamental and discrete change in the nature of the investigation (**R. v. Evans**), which must equate to a fresh arrest or detention to trigger the rights under s. 10 (a) or s. 10(b).

Assuming a **Charter** breach, there is no valid analogy between a DNA profile and evidence excluded under s. 24(2) following **Charter** infringements in cases cited in **R. v. Wise.** Assuming the integrity of the analysis, a match between the DNA profile of a semen stain at the scene of a sexual assault and a DNA profile from a blood or bodily substance sample provided by a known individual, is virtually conclusive of the guilt of the individual. Courts are more reluctant to exclude reliable evidence, such as real evidence, than unreliable evidence, such as confessions, following a **Charter** breach. Confessions may be rendered less reliable as a result of unfairness in the method by which they are obtained from accused persons, while the manner of extracting a tissue sample for a DNA analysis is irrelevant to the result. There is a valid analogy between a DNA profile and fingerprint evidence, which can be demanded under the **Investigation of Criminals Act.** The constitutional validity of the statute was upheld in **R. v. Beare**.

A DNA profile relates to genetic material present in an individuals' cells from conception to death. It is real evidence of unique reliability that is not incriminating. No one can be convicted by a DNA profile taken for identification purposes. However, when evidence from the scene of a crime is compared with it, that evidence can be conclusively incriminating in the event of a DNA match or conclusively exculpatory in the event of a DNA mismatch. While the blood sample originates with the accused, it does not emanate from him in the sense that he is conscripted to create evidence that otherwise would not have been available against him. In this regard it is similar to real evidence that is merely found or identified by an accused.

There is a clear comparison between the present case and the case of **R. v. Légère** in which the New Brunswick Court of Appeal found that evidence resulting from hairs forcibly removed from an accused for testing and comparison purposes need not be excluded under s. 24(2). Leave to appeal to the Supreme Court of Canada was refused.

In the present case there is no danger that an innocent person could be convicted if the evidence is not excluded. The appellant is the person who assaulted the senior citizen, and if his **Charter** rights were infringed, the infringement was insubstantial and not flagrant. In the circumstances the appellant would have to be acquitted if the evidence were excluded under s. 24(2) of the **Charter**, and this would cast the administration of justice into more serious disrepute than the admission of the evidence.

Conclusion

In my opinion the trial judge committed no error of law in refusing to exclude the evidence under s. 24(2) of the **Charter** and in convicting the accused. I would dismiss the appeal.

Freeman, J.A.