C.A.C. No. 109662

NOVA SCOTIA COURT OF APPEAL

Clarke, C.J.N.S., Chipman and Pugsley, JJ.A.

Cite as: R. v. Richard, 1995 NSCA 147

BETWEEN:

HER MAJESTY THE QUEEN	)	Paula Taylor
	)	for the Appellant
Appellant	)	
	)	
	)	
- and -	)	
	)	
	)	Warren Zimmer
	)	for the Respondent
	)	
	)	
ALFRED NICHOLAS RICHARD	)	
Respondent	)	
	)	
	)	Appeal Heard:
	)	February 8, 1995
	)	
	)	Judgment Delivered:
	)	May 17, 1995
	)	
	)	
	)	

THE COURT: The appeal is dismissed per reasons of Pugsley, J.A.; Clarke, C.J.N.S. concurring; Chipman, J.A. dissenting on the ground the evidence should not have been excluded under S. 24(2) of the **Charter.**

Pugsley, J.A.:

The sole issue in this appeal is whether the trial judge erred in excluding the evidence of drugs seized by the police in the search of a private residence in the light of an admission by the Crown that the search warrant was not validly issued.

Alfred Richard, his wife and two children, were finishing their supper at the kitchen table at 7:30 on the evening of February 10, 1993, when, preceded by a knock, three members of the RCMP invaded their house trailer. The three were shortly joined by four additional officers, one of whom was a member of the police dog section. The evidence does not disclose if the dog participated in the search.

Mr. Richard was shown a warrant obtained from a Justice of the Peace pursuant to s. 12 of the **Narcotic Control Act**, R.S.C., 1985, c. N-1 (the Act).

The police searched the premises and seized cash, digital scales, and a quantity of drugs.

Mr. Richard was charged with unlawfully possessing cannabis resin for the purpose of trafficking contrary to s. 4(2) of the Act.

At the commencement of trial, a *voir dire* was held during which the Crown acknowledged that sufficient information was not provided to the Justice of the Peace to allow the search warrant to be issued, that it was not possible for the Justice of the Peace to issue a valid search warrant, and that the search was, accordingly, a warrantless search.

The trial judge, after hearing the *viva voce* testimony of two members of the RCMP, concluded that the RCMP did not have reasonable grounds for a warrantless search of Mr. Richard's residence, that the actions of the RCMP constituted a serious

breach of Mr. Richard's s. 8 **Charter** rights, and that to admit the evidence seized would bring the administration of justice into disrepute.

The trial judge accordingly excluded the evidence under s.24(2) of the **Charter**.

The Crown having no further evidence to introduce, the charge against Mr. Richard was dismissed.

Facts

Cst. David Hadubiak on the afternoon of February 10, 1993, deposed in the information to obtain the search warrant:

> "The Informant says that he has reasonable grounds for believing and does believe that there is in a certain dwelling-house, namely the dwelling-house of Alfred RICHARD
>
> a brown house trailer, right hand side on MacIntyre Road, approximately one-half mile from Highway # 105, in the County of Inverness,
>
> in the said Province of Nova Scotia,
>
> a narcotic, to wit: **CANNABIS RESIN**
>
> by means of or in respect of which an offence under the Narcotic Control Act has been committed, namely the offence of: Did unlawfully have in his possession a narcotic for the purpose of trafficking, contrary to Section 4(2) of the Narcotic Control Act
>
> and that his grounds for so believing are that:
>
> SEE ATTACHED APPENDIX "A"
>
> WHEREFORE the Informant prays that a search warrant may be granted to search the dwelling-house for the said narcotic."

Appendix "A" reads as follows:

1. The informant has been informed by Sergeant Philip Eagan of the Royal Canadian Mounted Police Sydney Drug enforcement section that Alfred Nicholas Richard, who lives in a brown house trailer on the right hand side on the MacIntyre Road approximately one-half mile from the #105 highway in the county of inverness, Province of Nova Scotia has been under investigation at various times by the Royal Canadian Mounted Police since 1987 when he was charged with three counts of trafficking in cannabis hashish as a result of a police undercover operation.

2. I am informed by Sergeant Eagan that Richard has been known to the police to continue to be involved in the trafficking of cannabis hashish.

3. I am informed by Sergeant Eagan that information was received on 93-01-26 from a reliable source of passed proven reliability that there is a large delivery of cannabis hashish expected in the Port Hawkesbury area within the next two weeks.

4. I am informed by Sergeant Eagan that a citizen who wishes to remain confidential reported to Sergeant Eagan on Wednesday 93-02-10 that a large delivery of cannabis hashish was expected in the Port Hawkesbury area sometime during this day 93-02-10. I am informed by Sergeant Eagan that this citizen is known to him and that this citizen is believed reliable.

5. I am informed by Sergeant Eagan that this same citizen mentioned in the above paragraph reported that Alfred Richard, the person identified in Paragraph #1 came into possession of a large delivery of cannabis hashish during the afternoon of 93-02-10 and that Richards presently has the cannabis hashish at Richards residence on MacIntyre Road, Inverness County, Province of Nova Scotia.

Wherefore the informant prays that a search warrant may be granted to search the dwelling-house for the said narcotic."

The warrant to search was directed to Cpl. Ross Jenkins, Cst. Pat Murphy, Cst. Dave Hadubiak, and Cst. Tom O'Neil, all of the RCMP at Sydney, and it reads as follows:

WHEREAS it appears on the oath of CONSTABLE DAVE HADUBIAK, a member of the Royal Canadian Mounted Police, Sydney, Nova Scotia, that there are reasonable grounds for believing there is a

narcotic to wit: CANNABIS RESIN which is being sought as evidence by means of or in respect of which an offence under the Narcotic Control Act has been committed to wit: Did unlawfully have in his possession a narcotic for the purpose of trafficking, contrary to Section 4(2) of the Narcotic Control Act;

in the dwelling house of Alfred RICHARD, a brown house trailer, right hand side on MacIntyre Road, approximately one-half mile from Highway # 105 in the County of Inverness,

in the said Province of Nova Scotia.

THIS IS, THEREFORE, to authorized you, at any time on Wednesday the 10th day of February, A.D., 1993, to enter into the said dwelling house to search for the said narcotic.

Sgt. Eagan and Constable Hadubiak were the only witnesses on the *voir dire*, both being called by the Crown.

Sgt. Joseph Eagan testified as follows:

- he has been employed in the drug section of the RCMP for ten years;
- As a result of being in charge of the drug section of the RCMP at Truro between 1987 and 1990, and thereafter in charge of the Sydney drug section, and as a result of police information and information obtained generally in the community he was "well aware" that Mr. Richard was an "identified" trafficker in the area;
- On February 10, 1993, he spoke with Cst. Kevin Gotell (who grew up in the village of Arichat, where Mr. Richard's residence was located,) who advised that Mr. Richard was the target of an undercover drug operation in 1987, which revealed a person purchased, or was given, drugs by him.
- Sgt. Eagan's relatives who live in the area, advised that they knew of Mr. Richard as a trafficker and confirmed that he was living on the MacIntyre Road

(- the conversation was to the effect: "How come you never charged Alfie Richard with trafficking?"). The last conversation of this nature occurred around Christmas season of 1992;

- Upon reviewing an undercover drug file involving an operation in 1987, and the police information retrieval system, Sgt. Eagan determined that Mr. Richard was the target of a number of narcotics investigations by the RCMP where Mr. Richard was identified as a trafficker;
- Mr. Richard was charged in 1987 with three counts of trafficking in cannabis and hashish. He pled guilty to one count arising out of Mr. Richard giving a small amount of hashish to an undercover agent;
- On January 26, 1993, Sgt. Eagan received information from a source of past proven reliability (a paid informant) that a large amount of hashish was going to be delivered to the Port Hawkesbury area. He considered the source reliable "because of past dealings with him, where he supplied information over a period of two and a half years which resulted in either successful investigations or actual seizures (on three occasions)....in relation to narcotics, as well as stolen property." The source was not in a position to tell Sgt. Eagan the actual specifics of how it was arriving or to whom it was destined. The source referred to the amount of hashish as constituting a "box" which Sgt. Eagan explained consisted of twenty-one kilogram slabs of cannabis hashish;
- Sgt. Eagan did not want to reveal the identity of the source "for his safety";
- On February 10, 1993, Sgt. Eagan was called by an unpaid source who advised that a large delivery of cannabis hashish was expected in the Port

Hawkesbury area on that day, (i.e. February 10th). The source referred to the quantity as "the box". Sgt. Eagan advised the source that he was unable to act on the information because it was "too general. No time of arrival or place or person to institute an investigation on." Later on in the day (3:00 p.m.) he was called again by the unpaid source that the shipment of cannabis hashish had arrived and that it was presently at Mr. Richard's residence on the MacIntyre Road. Sgt. Eagan had received two other pieces of information from the same source on two separate occasions in the previous year. No arrests were made as a consequence of the information but the accuracy of the information was verified through "other investigative means and other sources". Sgt. Eagan did not wish to be too specific "because of the small area and the small circle of people that are in this particular drug culture that it would be difficult to be too specific without risking identity";

- Sgt. Eagan further explained:

> There was consideration given to surveillance or trying to confirm this information through other sources but, due to the location of the residence in a rural area, which would be very difficult to surveil and any police presence that would be detected would be considered to jeopardize the investigation. Also, it [would] considered that there was a time element involved here that the hash would not necessarily be there for any great length of time and, as a result of that, I took steps to compile the search warrant and our people were dispatched to Port Hawkesbury area".

- Sgt. Eagan acknowledged that he prepared the information to obtain the

search warrant but explained:

> ... I didn't use a lot of specifics, because I was fearful of identifying the sources involved, especially where it's the very close time element. Some of the things diminish over a period of time ... The second source was very fearful of their safety and definitely seeking confidentiality and specifically for this case...Source No. 1 is quite factual and confident and Source No. 2, especially on the day that he called me, was very nervous and fearful.

- Although Sgt. Eagan has been employed in drug investigation with the RCMP for a period of ten years and was aware that an application could be made to the Justice of the Peace to seal search warrant information, he never utilized that procedure;

Cst. David Hadubiak, a member of the RCMP for eight and a half years, testified that:

- the only information (supplied by Sgt. Eagan) presented to the Justice of the Peace was the material set out in the information to obtain a search warrant;
- In the company of six other constables the search was commenced at approximately 7:30 when Mr. Richard and his family were finishing their supper;
- Mr. Richard went to the bathroom and then handed over to Cst. Hadubiak one ounce of hash and then delivered to him a further one ounce that was located in a kitchen cupboard;
- Mr. Richard was arrested for possession, given his **Charter** rights and the police caution. Mr. Richard responded he was going to contact a lawyer. In

view of the number of police officers in the small trailer, there was no area of privacy available. Cst. Hadubiak advised Mr. Richard that if he wished to return to the detachment he could be given a private room from which he could make a private call. Mr. Richard advised that he did not wish to leave the trailer at that time. A search was then made by members of the force present, including a member of the police dog section. Mrs. Richard and the children were allowed to gather some belongings and leave. The search disclosed approximately three kilos of cannabis resin found in the back bedroom;

- The search concluded at 9:30; some other small quantities of hashish and marijuana were found in various locations throughout the residence.

Charter and Relevant Statutory Provisions

Charter

SEARCH OR SEIZURE

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

ENFORCEMENT OF GUARANTEED RIGHTS AND FREEDOMS - Exclusion of evidence bringing administration of justice into disrepute

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.

Narcotic Control Act

ENTRY AND SEARCH

10. A peace officer may, at any time, without a warrant enter and search any place other than a dwelling-house, and under the authority of a warrant issued under section 12, enter and search any dwelling-house in which the peace officer believes on reasonable grounds there is a narcotic by means of or in respect of which an offence under this Act has been committed.

WARRANT TO SEARCH DWELLING HOUSE

12. A justice who is satisfied by information on oath that there are reasonable grounds for believing that there is a narcotic, by means of or in respect of which an offence under this Act has been committed, in any dwelling-house may issue a warrant, under the hand of the justice, authorizing a peace officer named therein at any time to enter the dwelling-house and search for narcotics.

Crown's Position

The Crown submits that the key to resolving the s. 24(2) issue is the determination of whether the RCMP had reasonable and probable grounds to carry out the search of the trailer.

While the Crown acknowledges that reasonable and probable grounds were not set out in the Information to Obtain a search warrant, it submits that a "lot of specifics" were omitted because source number two was very fearful of his safety. Sgt. Eagan, as well, was fearful of identifying the source.

The Crown further contends that if the evidence presented at the *voir dire* had been included in the Information to Obtain, the totality of information presented would

have been sufficient to enable the Justice of the Peace to make an independent and judicial determination to authorize the search pursuant to the Act.

In short, the Crown submits that this is not a case of insufficient grounds, but rather a case of the RCMP inadequately stating the grounds.

Finally, it is argued that to exclude the real evidence seized, including three kilograms of cannabis resin, because of a flaw in the Information to Obtain, would bring the administration of justice into disrepute.

Protection of Identity of Informant

Sgt. Eagan's concern about revealing the identity of the informers was obviously a very real concern, and one which the trial judge did not discredit.

When the Crown is concerned about disclosure of this kind, however, an application, pursuant to s. 37 of the **Canada Evidence Act**, R.S.C. 1985 Chap. C-5, may

be made objecting to the disclosure of information on the ground of a "specified public interest".

An application may then be made on behalf of the accused for greater disclosure. The issue was addressed by the Ontario Court of Appeal in **R. v. Hunter** (1987), 34 C.C.C. (3d) 14. Cory, J.A. (as he then was) on behalf of the court stated at p. 26:

> Upon receipt of such a request the trial judge should review the information with the object of deleting all references to the identity of the informer... when that process had been completed, the edited information should have been returned to the Crown with the indication

> that an edited copy of the information would have to be given to the accused should the prosecution proceed. The Crown would then have been in a position to determine whether the edited version would identify the informer. Only if it did so would the Crown have to decide whether it was necessary to preserve the privilege, which belongs exclusively to the informer, to remain anonymous or whether, in the circumstances of this particular case, the Crown could proceed with the prosecution.

Sgt. Eagan was in charge of the Sydney section responsible for drug enforcement throughout the entire Island of Cape Breton. He had been involved in drug enforcement for a period of ten years. He was aware of a procedure entitling the Crown to apply to a Judge of the Provincial Court to "seal" information in the search warrant that the Crown did not wish to have revealed. The use of informants, particularly in narcotics prosecutions, has been a standard procedure for many years. The protection of an informant's identity is an issue with which he was personally familiar. It is reasonable to infer that a person holding Sgt. Eagan's position of responsibility in February of 1993, would be familiar with, or alternatively should be familiar with, a decision from one of the leading Courts of Appeal of this country on the critical issue of protecting the anonymity of an informant in a drug case. This would not, in my opinion, impose a "burden of instant interpretation of court decisions" on the police (see Sopinka, J. in **R. v. Kokesh**, [1990] 3 S.C.R. (3) at 33).

Section 24(2) Analysis

As indicated earlier, the Crown acknowledges that the key to resolving the s. 24(2) issue is the determination of whether the police had reasonable and probable

grounds to carry out the search of the trailer.

I agree that the issue is critical, but the trial judge has decided that issue against the Crown, and in my opinion, he has made neither an unreasonable finding of fact nor an error in law in so doing **(R. v. Grant**, [1993] 3 S.C.R. 223 at 256).

The Supreme Court of Canada has held that judges of the Court of Appeal should decline to interfere with the decision of a trial judge on a s.24(2) issue, even though they might have decided the matter differently, if they are of the view that the decision of the trial judge was not unreasonable (**R. v. Collins**, [1987] 1 S.C.R. 265 per Lamer, C.J.C. at 283).

In assessing the s. 24(2) **Charter** issue, the trial judge considered it relevant to determine whether the RCMP had reasonable and probable grounds to conduct the search of Mr. Richard's trailer.

In **R. v. Debot** (1989), 30 C.C.C. (3d) 207, Martin, J.A., on behalf of the Ontario Court of Appeal, in dealing with the same issue said at p. 218:

> Consequently a mere statement by the informant that he or she was told by a reliable informer that a certain person is carrying on a criminal activity or that drugs would be found in a certain place would be an insufficient basis for the granting of the warrant. The underlying circumstances disclosed by the informer for his or her conclusion must be set out, thus enabling the justice to satisfy himself or herself that there are reasonable grounds for believing what is alleged. I am of the view that such a mere conclusory statement made by an informer to a police officer would not constitute reasonable grounds for conducting a warrantless search or for making an arrest without warrant.

Wilson, J., in upholding the decision of the Ontario Court of Appeal in **Debot** (*supra*) stated (52 C.C.C. (3d) 193 at 215:

> In my view, there are at least three concerns to be addressed in weighing evidence relied on by the police to justify a warrantless search. First, was the information predicting the commission of a

> criminal offence compelling? Secondly, where that information was based on a "tip" originating from a source outside the police, was that source credible? Finally, was the information corroborated by police investigation prior to making the decision to conduct the search? I do not suggest that each of these factors forms a separate test. Rather, I concur with Martin, J.A.'s view that the "totality of the circumstances" must meet the standard of reasonableness. Weaknesses in one area may, to some extent, be compensated by strengths in the other two.

The trial judge examined the *viva voce* evidence given by Sgt. Eagan in the light of the three areas of concern mentioned by Justice Wilson.

When one compares Sgt. Eagan's *viva voce* evidence at the *voir dire*, with the matters contained in the Information to Obtain, the only additional information relates to the past dealings between Sgt. Eagan and the two sources.

The trial judge commented as follows:

> I find that the evidence supplied to me is not compelling in that it does not provide the kind of detail which I would expect before authorizing a search of a man's home. What we have is really a tip from a person who has provided information to the police in the past and which has been found to be credible. However, we do not have any detail to permit me to make an independent assessment of that information. What was communicated to the police was that the accused had come into possession of a large quantity of drugs. The informant did not tell Sgt. Eagan how he knew this to be the case. How can I assess whether that is any more than mere gossip or speculation on the part of the informant? I would have expected Sgt. Eagan to ask how the informant was aware that the accused was in possession of the drug. That was not asked nor answered.

The trial judge accordingly determined that, in light of first area of concern outlined by Justice Wilson in **Debot**, the Crown failed to produce compelling evidence of the commission of the offence.

The trial judge also determined that there was "no attempt by the RCMP to

corroborate the information provided by the second source except that Sgt. Eagan was aware from source number one that a large quantity of drugs was expected in the area some time after January 23, 1993," and hence he concluded that the Crown failed to satisfy the third area of concern outlined by Justice Wilson.

Since he found that the Crown had only met one of the three criteria (i.e. was the source of the information credible?) the trial judge concluded that there were no reasonable grounds for a warrantless search of Mr. Richard's trailer.

Whether the police were in possession of facts that clearly would have justified the granting of the warrant, or whether they obtained the warrant to enable them to conduct a fishing expedition, is not clear. It is evident, however, that reasonable grounds to conduct the search were not apparent either from the information to obtain the warrant or from the *viva voce* evidence of Sgt. Eagan. The search can not be justified on the basis of undisclosed information.

The Crown invites the court to examine the sufficiency of grounds in **Moore v. The Queen** C.A.C. 106889, a decision of this court on January 18, 1995, upholding the conclusion of a trial judge allowing the introduction of evidence, after a determination that the accused's rights under s. 8 of the **Charter** had been violated because of a warrantless search.

The facts in **Moore** are clearly distinguishable. The informant deposed that he had received information from a past proven reliable source, that the accused told the source that "he was too deep into cocaine and couldn't get out", that the source was present when a purchase was made from the accused's residence, that the source was present at the accused's residence and saw a quantity of cocaine within the past week".

This type of information fills in the gaps noted by the trial judge in the case at bar. The Crown also relies on the decisions of the Supreme Court of Canada in **R. v. Wiley** (1993), 84 C.C.C. (3d) 161, **R. v. Grant** (1993), 84 C.C.C. (3d) 173, and **R. v. Plant** (1993), 84 C.C.C. (3d) 203 in support of its contention that Sgt. Eagan had sufficiency of grounds.

The cases, however, are all distinguishable in the light of the three-part analysis suggested by Justice Wilson in **Debot** (*supra*).

In **Wiley** (*supra*) the information received by the police indicated the accused was engaged in a hydroponic marijuana cultivation operation in his residence, which included a detailed description of the residence, its location and that the informant had seen sixty marijuana plants growing in a lab in a concrete bunker below a hot tub

attached to the house. The information was further corroborated by subsequent police reconnaissance.

In **Grant**, the respondent had been stopped at a routine road block and his truck was found to contain a number of items consistent with a marijuana growing operation. Shortly thereafter, the police received a tip from a previously reliable confidential informer that the respondent had been on his way to set up a marijuana growing operation at the time. In addition, the police determined that the power service at a certain residence was in the name of the respondent and that the recent electrical consumption at the address was unusually high.

There were, as well, independent pieces of information which the court concluded assisted in establishing sufficient grounds upon which the justice could have

granted the warrant.

In **Plant** the electrical consumption for the respondent's residence over a six-month period was four times the average of two other comparably sized residences in the area, and this fact in combination with a tip that marijuana was being grown in the basement of the house, was determined by the Supreme Court of Canada to be sufficient to justify the issuance of a search warrant.

The trial judge has found, and I agree, that there is no significant corroborative evidence to verify the tips received from the two sources in this case.

I am entirely in agreement with the conclusion of the trial judge that the *viva voce* evidence of Sgt. Eagan does not provide sufficient information to establish that the RCMP had reasonable and probable grounds to conduct the search of the trailer.

This is a critical determination when considering whether the evidence should be admitted pursuant to s. 24(2).

The trial judge referred to the three factors stipulated by Lamer, J. in **R. v. Collins** (1987) 1 S.C.R. 265 to be considered by a court in determining a s. 24(2) issue:

1. Whether the admission of the evidence would affect the fairness of the trial;
2. The seriousness of the **Charter** violation; and
3. Whether the administration of justice would be brought into disrepute, by excluding the evidence, despite the fact that it was obtained in a manner that infringed the **Charter**.

The onus rests on the person seeking to exclude the evidence to establish on a balance of probability that its admission would bring the administration of justice into

disrepute.

(1) Factors Affecting Fairness of the Trial

The trial judge acknowledged that the drugs obtained from Mr. Richard's trailer clearly constituted real evidence, and that real evidence obtained after a Charter violation is "considered rarely to operate unfairly for that reason alone".

This comment was presumably prompted by the observations of Lamer, J. in **Collins** (*supra* at 284) where he stated that real evidence obtained in a manner that

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

In **Thomson Newspapers Limited v. Director of Investigation and Research**, [1990] 1 S.C.R. 425, LaForest, J. (one of the three judges in the majority, each of whom wrote) stated at 552:

> I would first of all note that I do not believe that in drawing this distinction (between real and conscriptive evidence) 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. He did not merely say that the admission of real evidence would generally not affect the fairness of the trial of the accused; he said at p. 284 that it would not generally affect the fairness of the trial because it "existed irrespective of the violation of the **Charter**" (emphasis added).

LaForest, J. then asked:

> Why is the prior existence of evidence regarded as relevant to the fairness of the trial in which it is introduced?
>
> There can be only one answer to this question. 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 in 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.

In the above passage LaForest, J. makes a distinction between evidence which an accused was forced to create, and evidence which he has been forced to merely locate or identify, emphasizing in the latter situation that "the ultimate strength of the Crown's case is not necessarily strengthened in this way".

At first impression this distinction suggests that the **Charter** violation in this case merely resulted in the location of the drugs in Mr. Richard's trailer, rather than the creation of the drugs, and hence their introduction in evidence should not impact on the fairness of the trial.

I conclude, however, that the **Charter** violation resulted in the creation of the drugs, in the sense used by Justice LaForest, because they were not capable of being discovered by the police without the unlawful search of the trailer.

In **R. v. Colarusso**, [1994] 1 S.C.R. 20 at 74, Justice LaForest noted that the mere fact that impugned evidence is classified as either real, or conscriptive evidence, should not of itself be determinative of the admissibility of the evidence.

He went on to point out in **R. v. Bartle**, [1994] 3 S.C.R. 173 at 220 that the distinction is not always "helpful as earlier cases have demonstrated and the law has evolved since: see **R. v. Mellenthin**" , [1992] 3 S.C.R. 615.

What is of particular relevance to this case, is his comment in **R. v. Bartle** (*supra*):

> The terms are not mutually exclusive; evidence may well be both. (220)

The drugs found in the trailer, in my opinion, constituted real evidence but possessed certain of the attributes of conscripted evidence as well.

The following cases considered by the Supreme Court of Canada assist this interpretation: see **Thomson** (*supra*), **Mellenthin** (*supra*), **Collaruso** (*supra*) and **R. v. Black** , [1989] 2 S.C.R. 128.

In **Thomson** (*supra*) Justice LaForest noted (at 553) the fact that the evidence already existed means that it could have been discovered anyway. (emphasis added)

In **Black** (*supra*), the accused went to an apartment immediately above her own, to join a party. After consuming alcohol she was dancing with a man when an altercation arose between her and the deceased. During a struggle, the accused was bitten on the hand and neck by the deceased. The accused left the apartment but returned a few hours later, was admitted to the apartment, walked over to the deceased and stabbed her with a kitchen knife inflicting a mortal wound. Ms. Black was charged

with second degree murder. After a *voir dire* the trial judge determined that an inculpatory statement made by her should be excluded in view of the violation of her rights under s. 10(b) of the **Charter** to retain and instruct counsel without delay.

After she gave the inculpatory statement, Ms. Black was taken to a hospital and treated for the bite wounds. The wounds were sutured, the police then escorted her back to her apartment. She went to a kitchen drawer, pulled out a knife and handed it to the officers, indicating to them that it was the murder weapon.

Wilson, J., on behalf of the court, upheld the decision of the trial judge to exclude the inculpatory statement, but then was required to consider whether the evidence regarding the recovery of the knife should be excluded.

She stated at p. 164:

> ...the knife itself is real evidence which existed whether or not the police breached the appellant's s. 10(b) rights and used her to assist in the preparation of the case against her. It did not come into existence as a result of the participation of the accused although the police obtained it as a result of such participation. I have little doubt that the police would have conducted a search of the appellant's apartment with or without her assistance and that such a search would have uncovered the knife.
>
> **...**
>
> Given Lamer J.'s comments and the fact that the knife would undoubtedly have been uncovered by the police in the absence of the **Charter** breach and the conscription of the appellant against herself, I do not think that the administration of justice would have been brought into disrepute by the admission of the knife. (emphasis added)

The trial judge was strongly influenced by the decision of the Supreme Court of Canada in **Mellenthin** (*supra*). He stated:

> In the past number of years, this distinction between real evidence and self-incriminatory evidence has not remained as clear cut as originally suggested. In the case of **R. v. Mellenthin** (1992), 76

> C.C.C. (3d) 481, the Supreme Court of Canada I suggest has redefined the issue of real evidence when it held that evidence which would not have been available except based on an illegal search would operate to make a trial unfair.
>
> ...
>
> Here we are dealing with a search conducted of the accused's home. The laws have always clearly recognized the sanctity of a person's home and I would suggest an illegal search of a person's home is much more serious than an illegal search of a person's vehicle.
>
> It is clear from the evidence presented before me that the evidence obtained by the search would not have been available if the search had not taken place.
>
> I find that the search conducted by the police in this case was unreasonable because there were no reasonable grounds to conduct such a search and that this is a serious breach of the **Charter** provision being s. 8.

The facts in **Mellenthin** reveal that shortly after midnight the RCMP were operating an "Alberta check stop" as part of a highway safety program. Mellenthin, who was operating his vehicle in a perfectly normal manner, was directed into the check stop. The constable, noticing that Mellenthin was not wearing a seat belt, asked him for his driver's license, vehicle registration and insurance papers. Mellenthin presented all, as requested, without difficulty. The officer shone his flashlight beam around the interior of the vehicle - to check whether drugs were present, as well as for his own safety. He did not see any drugs, but did see an open gym bag in the front seat. In response to a question as to what was inside the bag, Mellenthin pulled the bag open and replied there was food. Further questioning and subsequent examination of the bag led to the discovery of narcotics.

The court concluded that although Mellenthin was detained, the random stop was justified pursuant to s. 1 of the **Charter**, as a justifiable means of reducing highway traffic accidents.

The court further concluded, however, that before Mellenthin could be taken to consent to answer police questions with respect to the contents of the bag, his consent had to be an informed consent, and the court in the circumstances concluded it was not.

Acknowledging that the narcotics discovered constituted real evidence, Cory, J. noted that the trial judge:

> Found that the evidence, although real, could never have been discovered but for the illegal search. The majority of the Court of Appeal disagreed with this finding. It was their view that since the appellant transported the drugs in an open gym bag on the front seat of his car, he could not have been concerned about his own privacy, nor was he anxious to avoid detection. They concluded that so long as a person remains in the possession of a prohibited substance, it is not unlikely that the substance would be discovered. Be that as it may, it cannot be denied that the conclusion of the trial judge was a reasonable one. Had it not been for the illegal search, the drugs could not have been found. (emphasis added)

It could be argued in this case that the drugs in Mr. Richard's trailer, if not discovered in that location, might eventually be discovered by the authorities in the event he made any attempt to sell them.

The trial judge, however, on the basis of the evidence concluded that the "evidence obtained by the search would not have been available if the search had not taken place".

This is a critical finding. There is no evidence, let alone cogent evidence, to suggest the trial judge was wrong in his conclusion. The burden of proof on this issue rests with the Crown.

The comments of Sopinka, J. in **R.J.S. v. The Queen** (S.C.C., file No. 23581, February 2, 1995) are particularly apposite (p. 14):

> My colleague equates the new proposed procedure with a s. 24(2) analysis and cites **R. v. Black** , [1989] 2 S.C.R. 138, in support. It is, therefore, apt to point out that in **Black** Wilson J. first determined that "the knife ... is derivative evidence obtained as a direct result of 'a statement or other indication' made by the [accused]" (p. 162). Wilson then turned to consider the second issue, whether it would have been discovered in any event. Once, therefore, the first issue is resolved and a connection is established, the second issue must be addressed. This issue requires the proof of a hypothetical. Would the evidence have been discovered but for the compelled testimony? While the first issue can be based on what actually happened, the second must be based on what did not but would have happened. Clearly, as my colleague acknowledges, the burden of proof will rest with the Crown. <u>It will not be an easy one to meet.</u> (Emphasis added)

In **Colarusso,** (*supra*) blood and urine samples taken by a coroner acting pursuant to a statutory authority, were subsequently seized unreasonably by the police, for the purpose of incriminating Colarusso on an impaired driving charge.

In considering the third factor in the **Collins** analysis (the effect of exclusion on the reputation of the administration of justice) LaForest, J. noted at p. 77:

> <u>First, and most important,</u> the critical evidence would almost certainly have been discovered absent the violation. The blood and urine samples had already been taken for medical purposes at the time of the seizure by the coroner, the police were aware of their existence, and charges had already been laid against the appellant. If the coroner had not intervened and seized the sample, the officers would inevitably have obtained a warrant for the samples at the very first opportunity, would have done the same analysis and reached the same conclusions. A seizure pursuant to a warrant would be

> admissible under **Hunter v. Southam Inc.**, [1984] 2 S.C.R. 145. (emphasis added)
>
> Furthermore even without the existing sample, the police had several available means of pursuing evidence that would have been sufficient to convict the appellant.

As I have already indicated, the present case does not fall into the same category.

The question arises whether the active participation of the accused (in the sense of some voluntary physical act) is essential before the court should conclude the fairness of the trial has been affected.

In **Black** (*supra*) for example, the accused retrieved the knife from the kitchen drawer and handed it over to the police.

In **R. v. Ross**, [1989] 1 S.C.R. 3, the accused participated in a police line-up.

In this case there was no voluntary participation by Mr. Richard in handing over the majority of the drugs discovered in the trailer to the police, unless his lack of resistance to resist the search could be so classified.

It is clear, however, that Justice Cory's decision in **Mellenthin** (*supra*), and the opinion of Justice Iacobucci, on behalf of the majority, in **R. v. R.J.S.** (*supra*) extends the meaning of self-incriminatory actions by an accused to include not only conscripted evidence but also evidence which could not have been obtained from the accused except by a violation of the accused's **Charter** rights.

The decisions, in **Black** (*supra*) and **Colarusso** (*supra*), not to exclude the evidence, result from the ability of the police to obtain the critical evidence in ways which did not violate the **Charter** rights of the accused.

In **R. v. R.J.S.** (*supra*) Iacobucci, J. stated at p.102:

> Physical objects, observations, and bodily fluids may exist prior to a *Charter* breach, but they do not exist as evidence unless the state has a means to acquire them for trial. This [is] what I take from Lamer J.'s statement in *Ross, supra* to the effect that the evidence of concern is "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" (at 16(emphasis added)).
>
> Thus, I think it is clear that under s. 24(2), we tend to regard as self-incriminatory not only that evidence which is manifestly created by an accused (such as a pre-trial statement), but also any evidence which could not have been obtained by the state from the accused but for the *Charter* violation."

The phrases that appear in the cases such as "evidence emanating from an accused", evidence that "cannot be obtained without the assistance of the accused", or the "participation of the accused in the construction of the evidence" should be read in that light.

This case is clearly distinguishable from the fact situation determined in **Moore v. The Queen** (*supra*) where the trial judge remarked:

> A review of the totality of the evidence, reveals that the police did have reasonable and probable grounds, however, they did not display this to the Justice of the Peace.
>
> This information, had it been properly put before the J. P., would have shown reasonable and probable grounds. As such, this information can be considered on the application to exclude the evidence.

In **Moore**, the police could have obtained the drugs without the **Charter** violation, not so in the case at bar.

To admit evidence seized in this manner would unfairly affect the trial process (**R.J.S. v. The Queen,** *(supra),* **R. v. Mellenthin**, *(supra*).

When the fairness of the trial would be compromised, as it would if the evidence obtained on February 10, 1993 were admitted, the evidence should be excluded, without

the necessity of examining the other two factors referred to in **Collins** (**R. v. Mellenthin** at 629).

I consider, however, the seriousness of the **Charter** violation to be sufficiently extreme to warrant a few comments.

(2) Seriousness of the Violation

The unique expectation of privacy that the public exercises with respect to a dwelling-place is highlighted by the distinction made in s. 10 of the Act.

It authorizes a peace officer without warrant to search any place, other than a dwelling-house, in which the peace officer believes on reasonable grounds there is a narcotic by means or in respect of which an offence under the Act has been committed. (The Supreme Court of Canada has mandated that the section must be read as authorizing a warrantless search in places other than a dwelling-house only where "exigent circumstances render it impracticable to obtain a warrant" (**R. v. Grant** (*supra*)).

One's home is, for most purposes, and for very good reasons, a place where one expects privacy.

In **R. v. Grant** (*supra*) Sopinka, J., stated (at 188):

> The common law has long demonstrated a respect for freedom from trespass or private property by state authorities, especially where the homes of individuals are involved.

An example is provided in **Semayne's Case** (1604) 77 E.R. 194 where it was stated:

> The house of everyone is to him as his castle and fortress.

The reasons for this expectation have been succinctly expressed by Justice LaForest as follows:

> Grounded in man's physical and moral autonomy, privacy is essential for the well-being of the individual. For this reason alone, it is worthy of constitutional protection, but it also has profound significance for the public order. (**R. v. Dyment**, [1988] 2 S.C.R. 417 at 427).

The invasion of Mr. Richard's small trailer in a sparsely populated rural community, at night, by seven police officers, who had no valid authorization to conduct any search or seizure, and the subsequent confrontation with his family, including two young children, constitutes a most serious violation of his rights.

Chief Justice Lamer commented on the seriousness of breaches of s. 8 where evidence has been obtained as the result of an unreasonable search and seizure:

> it is clear that, unless the Crown can show that the police had reasonable and probable grounds to act as they did, such as a well founded belief at the time that an accused was in possession of drugs or that there were compelling and urgent circumstances, there is a presumption that the violation is a serious one under s. 24(2) which must be rebutted by the Crown: e. g. **R. v. Greffe**, [1990] 1 S.C.R. 755. (**R. v. Bartle** (supra) at 210)

In this case, the trial judge has rejected the contention that the police had reasonable and probable grounds to conduct the search. There was, in addition, no

finding that there were compelling and urgent circumstances respecting the search.

(3) Effect on the Administration of Justice

Trafficking in illicit drugs is a cancer on society. The decision to exclude evidence obtained by the RCMP on the trailer search is a most serious one, because it will result in Mr. Richard being acquitted of an offence of which he appears to be guilty.

The comments of Lamer, J. in **R. v. Greffe**, [1990] 1 S.C.R. 755 at 784 are particularly appropriate to the circumstances of this case:

> As well, and this is a point that bears repetition especially when a very serious crime might go unpunished because of the exclusion of evidence, it is the long-term consequences of regular admission or exclusion of the evidence on the repute of the administration of justice that must be considered. In other words, while I, and surely most people, would like to see the appellant convicted and punished severely for the offences with which he is charged, the long-term effect of admitting evidence obtained in a manner that infringed the *Charter* on the basis that the offence is a very serious one, would lead to the result that s. 24(2) will only be used to exclude evidence when less serious crimes are involved.

I agree with the conclusion of the trial judge that the administration of justice would be brought into disrepute if this evidence were to be admitted.

The issues raised in this case are similar to those raised before the Saskatchewan Court of Appeal in **R. v. Pippin** (1994), 27 C.R. (4th) 251.

The accused was convicted on a charge of possession for the purpose of trafficking contrary to s. 4(2) of the **Narcotic Control Act**, consequent upon the seizure

of certain hydroponic equipment and marijuana during a search of his residence by the Regina City Police pursuant to a warrant.

The Court concluded that there was a violation of the accused's rights under s. 8 of the **Charter** in that there was not sufficient evidence before the Justice of the Peace to justify the issuing of a search warrant.

The Court, however, split on whether the evidence obtained as a result of the violation of the **Charter** right should be excluded under s. 24(2).

The trial judge did not deal with the s. 24 issue because he had found that the warrant was properly issued.

Vancise, J.A. who wrote the majority decision noted at p. 269:

> Since writing the above reasons for judgment a number of decisions of the Supreme Court of Canada released in September, 1993 have again examined the effect of obtaining evidence by means of illegal search and seizure and police investigative illegality. The Supreme Court's trilogy of decisions: **R. v. Grant** [supra]**, R. v. Wiley** [supra], **R. v. Plant** [supra], examined (among other things) the effect of the violation of s. 8 of the **Charter** and whether real evidence which would not otherwise have been discovered should be excluded under s. 24(2).
>
> In my opinion, those decisions and the subsequent decision of **R. v. Dersch**, [(1993) 158 N.R., 375] have affected neither my analysis nor the result.

Chief Justice Bayda on behalf of the Court commented in **Richter v. The Queen**, (1994) 120 Sask. R. 257 at 263 as follows:

> In fairness, it should be noted that the reasons in **Pippin** were substantially completed before the decisions in **Grant**, **Wiley** and **Plant** were delivered, but were filed later, as Vancise, J.A. in what is essentially a post script points out [at p. 21]. He concludes, however, that "those decisions ... have affected neither my analysis nor the result". He drew that conclusion in the context of his decision to exclude evidence under s. 24(2) of the **Canadian Charter of Rights**

> **and Freedoms**, Part 1 of the **Constitution Act**, 1982 being Schedule B of **The Canada Act** 1982, (U.K.), 1982, C. 11, where the evidence was obtained through a violation of s. 8 (unreasonable search). His mind was obviously not addressing those three decisions from the prospective of the sufficiency of information used to obtain a search warrant.

I take it from Chief Justice Bayda's remarks that he is not commenting adversely on Justice Vancise's opinion respecting the admissibility of the evidence under s. 24(2).

In **Pippin** it is evident, as it is in the present case, that "without the warrant there would have been no search and no evidence would have been discovered and seized". (264)

Justice Vancise considered the situation as analogous to the facts in **Mellenthin** (supra). In considering the first factor relating to the fairness of the trial (as set out in **Collins**), Justice Vancise stated:

> Here, the evidence was discovered in the accused's residence, evidence which could not have been obtained but for the illegal search and the violation of his privacy. There was evidence which was obtained which would not have been obtained except for the compelled testimony of the accused and its submission would enhance the Crown's case to the prejudice of the accused. (266)

The Crown argued that the detrimental effect on the fairness of the trial by admitting the evidence should be balanced off by the good faith of the police. The same argument was advanced in the present case. Justice Vancise commented: (at 267)

> The bad faith of the police may strengthen the case of exclusion but good faith will not strengthen the case for admission or cure an unfair trial where there has been a violation of the **Charter** and the impugned evidence falls outside of trial fairness, the first set of factors. The

> admissibility of such evidence cannot be saved by resort to the second set of factors, the seriousness of the violation. Good faith of the investigating officers cannot cure an unfair trial.

In concluding that the system would be better served by the exclusion of the evidence, he stated:

> The appellant is charged with a very serious offence, a drug offence, which requires the use of sophisticated investigative techniques to control. The positive factors in favour of admitting the evidence is that the evidence is real, and it exists with or without the infringement of the right to be secure from unauthorized and unreasonable search and seizure. The factors which support the exclusion of the evidence are the unauthorized and illegal entry of the dwelling house to conduct the warrantless search and the fact that the admission of the evidence would have an unfair impact on the trial. ... Where the fairness of the trial would be affected by the admission of the evidence, the mere fact that the offence is a serious one provides no justification for admitting it into evidence.

In my opinion, the foregoing comments are directly applicable to the appeal before us.

Conclusion

The trial judge has made no unreasonable finding of fact, nor has he committed legal error in applying s. 24(2).

Recognizing the caution rendered by Lamer, J. in **Collins** (*supra* at p. 18) as approved by Cory, J. in **Mellenthin** (*supra* at 488) respecting the deference that should be paid to the decision of the trial judge, I would decline to interfere with that decision and accordingly dismiss the appeal.

Pugsley, J.A.

Concurred in:

Clarke, C.J.N.S.

CHIPMAN, J.A.: (Dissenting)

In view of the position taken by the Crown on this appeal the sole issue is whether the trial judge was correct in excluding the evidence found at the respondent's home under s. 24(2) of the **Charter**.

The trial judge examined the three groups of factors discussed in **R. v. Collins**, [1987] 1 S.C.R. 265.

Fairness of the Trial

The trial judge referred to the distinction between real evidence and self-incriminating evidence and said:

> "In the past number of years this distinction between real evidence and self- incriminatory evidence has not remained as clear cut as originally suggested. In the case of **R. v. Mellenthin** (1992), 76 C.C.C. (3d) 481 the Supreme Court of Canada, I suggest, has redefined the issue of real evidence when it held that evidence which would not have been available except based on an illegal search would operate to make a trial unfair. In that case Cory J. speaking for the Court said, in dealing with a situation where drugs were found as the result of an illegal search, . . . "

The trial judge then quoted extensively from the decision of Cory J. at pp. 489 and 491.

The trial judge then concluded:

> "In that case, the Court was dealing with a search of a vehicle stopped by police in a check stop. Here we are dealing with a search conducted of the accused's home. The laws have always clearly recognized the sanctity of a person's home and I would suggest an illegal search of a person's home is much more serious than an illegal search of a person's vehicle.

> It is clear from the evidence presented before me that the evidence obtained by the search would not have been available if the search had not taken place."

In effect, therefore, because the search was unreasonable and that, but for such the evidence would not have been available, he therefore excluded the evidence. I believe that in this reasoning process the trial judge made a material error.

There is a distinction between real evidence obtained in a manner that violated the **Charter** and the situation where, after a **Charter** violation, the accused is conscripted against himself through a confession or other evidence emanating from him. As Lamer J. said in **Collins**, supra (33 C.C.C. (3d) at 19) real evidence obtained in a manner that violated the **Charter** will rarely operate unfairly for that reason alone. However, the latter type of evidence would render the trial unfair for it did not exist prior to the violation and it strikes at one of the tenets of a fair trial, the right against self-incrimination. We must turn then to **Mellenthin** to see whether the position has now been carried to the extreme accepted by the trial judge, namely, that since the evidence obtained by the search would not have been available if the search had not taken place it is not admissible.

At p. 489 in **Mellenthin** Cory J. referred to **Collins** and to **R. v. Ross**, [1989] 1 S.C.R. 3 and the statement there made that 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. Cory J. referred to the finding of the trial judge in **Mellenthin** that the drugs would not

have been found had it not been for the illegal search. He then referred to **Thompson Newspapers Ltd. v. Canada**, [1990] 1 S.C.R. 425 where LaForest J., pointed out that in the case of real evidence, there was a distinction between real evidence which the accused was forced to create, and evidence which the accused has been forced to merely locate or identify. There are 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.

It was in this narrow context that **Mellenthin** was decided. Had the roadside check been properly carried out the drugs would have gone undetected in the bag on the seat. There was nothing about Mellenthin's conduct that warranted the police to get into the bag of drugs. As Cory J. said at p. 490:

> "In the case at Bar, the trial judge could certainly not be said to have acted unreasonably in concluding that the evidence (the marihuana) would not have been discovered without the compelled testimony (the search) of the appellant. To search a person who is stopped at a check stop, without any reasonable or probable cause, goes far beyond the purpose and aim of these stops and constitutes a very serious *Charter* breach. As noted earlier check stops infringe the *Charter* rights against arbitrary detention. They are permitted as means designed to meet the pressing need to prevent the needless death and injury resulting from the dangerous operation of motor vehicles. The rights granted to police to conduct check-stop programs or random stops of motorists should not be extended . . ."

Cory, J. continued at p. 491:

> "It would surely affect the fairness of the trial should check stops be accepted as a basis for warrantless searches and

> the evidence derived from them was to be automatically admitted. To admit evidence obtained in an unreasonable and unjustified search carried out while a motorist was detained in a check stop would adversely and unfairly affect the trial process and most surely bring the administration of justice into disrepute.
>
> It follows that the conclusions of the trial judge in this regard were neither unreasonable nor an error in law. It is clear that the admission of the evidence would render the trial unfair and there is no need to consider the other factors referred to in **Collins, supra** . . ."

The evidence in **Mellenthin** was evidence that would never have been discovered without the assistance of the wrongdoer. That assistance was provided in the form of the responses to improper searching and questioning, and the production by Mellenthin of the drugs which he was not required to produce. There was nothing prior to the alleged search that justified the police in taking an interest in the contents of his vehicle.

The rationale for exclusion in **Mellenthin** stands on a footing far narrower than the broad statement by the trial judge:

> "It is clear from the evidence presented before me that the evidence obtained by the search would not have been available if the search had not taken place."

It is literally true that the evidence would not have been available had the search of the respondent's home not taken place. That, however, is not the test. An inquiry must therefore be made to determine whether this is evidence that could or would have been obtained anyway without the <u>assistance of the wrongdoer</u> because it is this latter element that renders such real evidence in the same category of

conscripted evidence such as a statement, or to use the words of Lamer J. in **Collins**, supra, p. 19:

> "The accused is conscripted against himself through a confession or other evidence emanating from him."
>
> (emphasis added)

Cases on derivative evidence deal with evidence that emanates from the accused. **R. v. Black**, [1989] 2 S.C.R. 138 is such a case. The subject of derivative evidence was canvassed by the Supreme Court of Canada in **R. v. R.J.S.** (S.C.C. unreported, February 2, 1995). In **R.J.S.**, Iacobucci, J. commenced his reasons:

> "This appeal principally asks a narrow question: Is a person separately charged with an offence compellable as a witness in the criminal trial of another person charged with that same offence?"

Although he then indicated that to answer the question was to embark upon a much broader inquiry, he clearly restated the issue which was raised on the facts of the case before the court at p. 8:

> "The appellant's Notice of Appeal to this Court states a question of law comparable to the narrow question posed at the outset. Therefore, only one question is squarely before this Court, and it can be stated in the following general terms:
>
> > 'Is a person separately charged with an offence compellable as a witness in the criminal trial of another person charged with that same offence, or would compellability in this context violate s. 7 of the **Charter**?'"

In my opinion, general statements found in derivative evidence cases should not be relied on to support a departure from the general principle laid down in **Collins** 33 C.C.C. (3d) at 19 dealing with evidence which does not emanate from the accused. This principle has been applied by the Supreme Court of Canada and other courts over the last seven or eight years and is, I think, fairly well understood.

At p. 100 Iacobucci, J. said:

> "It will be observed in these cases that the question of the accused's participation is important. In some, it can be seen that the state has already become interested in the affairs of the accused, and the problem lies in determining whether the evidence consciously desired by the authorities could have been obtained without the accused's voluntary participation. Relevant considerations in this regard include whether the impugned evidence already existed, and, if it did, whether the state could legally compel its availability (*see, e.g., Ross, supra; Wise, supra; Black, supra; Colarusso, supra)*. In other cases, it may be that without the *Charter* breach the state would not have become interested in the accused at all (*e.g. Mellenthin, supra*)."

As appears from **R.J.S.** and the cases therein discussed, there are various degrees to which real evidence may be said to have emanated from the accused. Where the evidence itself triggers the state's interest in the accused, the element of "conscription" may become dominant. Statements made in the context of those cases are not helpful in resolving the issue here where the state's interest in the respondent was piqued by information existing altogether apart from the real evidence found in the search at issue. The respondent's participation had nothing to do with the coming into existence of the evidence.

The basic distinction to be kept in mind is whether the real evidence was evidence which the accused was forced to create or evidence which he was forced merely to locate or identify. The trial judge has, to my mind, failed to appreciate this distinction.

The principle stated by the trial judge (paraphrasing Cory, J.'s remarks applicable to the facts in **Mellenthin**) confuses real evidence such as existed here with the conscripted evidence seen in other cases. In effect, this approach would lead to the routine exclusion of all evidence obtained in contravention of the **Charter**. It would be virtually tantamount to amending s. 24 by striking out the words:

> "If it is established that, having regard to all of the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute."

For example, as applied to the facts in **Black, supra**, the trial judge's approach would result in the knife being excluded. This is because although the police "would have conducted a search of the appellant's apartment" (Wilson, J. in **Black** at p. 164), the search was triggered by the confession. The knife would not have been available "if the search had not taken place" (the trial judge's wording here).

An analysis of the numerous cases where the Supreme Court of Canada has admitted evidence which was obtained in violation of the **Charter** shows that the mere fact that the evidence came from the possession of the accused and would not have been obtained but for the **Charter** breach were not in and of themselves reasons for exclusion. In **R. v. Patriquin and Nagy**, a decision of this Court delivered on December 20, 1994, (as yet unreported) the court noted that the trial judge was under

the impression that evidence obtained as a result of a warrantless search is tainted and therefore usually inadmissible. Roscoe J.A., speaking for the court said, in response to this at p. 12-13:

> "With respect, the statement that "the evidence ... is usually not admissible" is an oversimplification and is inaccurate. An analysis of the twenty-one cases decided by the Supreme Court of Canada since 1982, dealing with warrantless searches that were found to have breached s. 8 of the **Charter** reveals that in eight of those cases, the evidence was excluded pursuant to s. 24(2). In the other thirteen cases, the evidence was admitted. The cases where the evidence was excluded are:
>
> **R. v. Collins**, [1987] 1 S.C.R. 265; **R. v. Pohoretsky**, [1987]**R. v. Dyment**, [1988] 2 S.C.R. 417; **R. v. Greffe**, [1990] 1 S.C.R. 755; **R. v. Kokesch**, [1990] 3 S.C.R. 3; **R. v. Mellenthin**, [1992] 3 S.C.R. 615; **R. v. Dersch**, [1993] 3 S.C.R. 768; and **R. v. Borden**, unreported, September 30, 1994, Q.L.S.C.J. No. 82.
>
> The cases where the Supreme Court of Canada determined that the evidence was admissible despite the s. 8 breach are:
>
> **R. v. Seiben**, [1987] 1 S.C.R. 295; **R. v. Hamill**, [1987] 1 S.C.R. 301; **R. v. Jacoy**, [1988] 2 S.C.R. 548; **R. v. Duarte**, [1990] 1 S.C.R. 30; **R. v. Thompson**, [1990] 2 S.C.R. 1111; **R. v. Wong**, [1990] 3 S.C.R. 36; **R. v. Tessier**, [1991] 3 S.C.R. 687; **R. v. Wise**, [1992] 1 S.C.R. 527; **R. v. Erickson**, [1993] 2 S.C.R. 649; **R. v. Plant, supra**; **R. v. Grant**, supra, **R. v. Wiley**, [1993] 3 S.C.R. 263; and **R. v. Colarusso**, [1994] 1 S.C.R. 20. (See also **R. v. Clark, Sullivan and Lambert** (July, 1994) B.C.C.A. unreported)."

It is useful to look at three recent Supreme Court of Canada cases to see if they justify the far-reaching proposition accepted by the trial judge that the trial

process will be unfair if the evidence obtained by the search "would not have been available if the search had not taken place".

In **R. v. Grant** (1993), 84 C.C.C. (3d) 173 (S.C.C.) drugs were found but there was an infringement of the accused's rights under s. 8 of the **Charter** in the investigatory process as a result of warrantless perimeter searches. The Supreme Court of Canada had to consider whether the evidence ultimately obtained should be excluded pursuant to s. 24(2) of the **Charter**. Sopinka J., speaking for the Court, did however note that apart from the information obtained through the warrantless perimeter searches there was sufficient information before the justice to allow for the issue of the search warrant in question. Nevertheless the initial s. 8 violation in the perimeter searches was sufficient to trigger s. 24(2) of the **Charter**.

At p. 199 Sopinka J. commenced the analysis by noting that the trial judge erred in that after finding that s. 8 was violated the evidence should be excluded without consideration of the factors set out in **Collins**, supra, almost as if a violation of s. 8 led automatically to exclusion under s. 24(2). That, by the way, is what the trial judge did in this case.

At p. 200, after referring to the three sets of factors in **Collins**, supra, Sopinka J. noted that the evidence found was real evidence which if obtained in a manner that violated the **Charter** will rarely operate unfairly for that reason alone. He said:

> "As such I find that given that the impugned evidence is real in nature, its admission would not tend to render the trial unfair."

I stop here to suggest that this is not the approach adopted by the trial judge here.

Sopinka J. then went on to consider the seriousness of the **Charter** violation and the effect which the exclusion of the evidence would have on the repute of the administration of justice. The violation, although serious, was not flagrant and the administration of justice would not be brought into disrepute by the admission of the evidence.

In **Wiley v. R.** (1993), 84 C.C.C. (3d) 161 (S.C.C.) the Supreme Court of Canada held that a warrantless perimeter search was a violation of s. 8 of the **Charter** but that there was sufficient other information to justify the issuance of a search warrant. The police had two tips which were of sufficient detail and accuracy to categorize them as compelling. They came from a credible source and were corroborated in subsequent police reconnaissances. Nevertheless the initial warrantless perimeter search triggered the operation of s. 24(2) of the **Charter**. At p. 172 Sopinka J. dealt with this issue. His concern was chiefly with the overruling by the Court of Appeal of the trial judge who was said to have erred in his determination that the police did not act in good faith. Sopinka J. agreed that the trial judge so erred and it was appropriate for the court of appeal to interfere with the trial judgment.

In **R. v. Plant** (1993), 84 C.C.C. (3d) 203 (S.C.C.) the police received a tip regarding marihuana being grown at the accused's premises. A reconnaissance located the address. The police checked the power consumption through the city utility's main frame computer finding consumption at the address to be four times the

average. Then the police entered and conducted a perimeter search making observations consistent with cultivation of marihuana. Information to obtain a search warrant was prepared and a warrant issued. An appeal from conviction to the Supreme Court of Canada was dismissed. The computer check and the tip were sufficient to justify the granting of the search warrant. The unreasonable perimeter search should not result in the exclusion of the evidence under s. 24(2) of the **Charter**. Sopinka J., speaking for the majority of the Court, made the s. 24(2) analysis commencing at p. 217. At p. 218, speaking of real evidence, he said:

> "Unlike the admission of self-incriminatory evidence the admission of this sort of real evidence does not tend to bring the administration of justice into disrepute in that the evidence does not depend for its existence on the *Charter* violation."
>
> (emphasis added)

Sopinka J. then considered the violation not serious and that the administration of justice would not be brought into dispute should the evidence be admitted. He noted the guilt of the appellant was clearly established on the real evidence.

The test, then, is not as stated by the trial judge that what is to be excluded is evidence obtained by the impugned search which would not have been available if the search had not taken place. What is to be excluded is evidence that could not have been obtained or located without the **Charter** breach - in other words evidence which the accused was forced to create, not merely locate or identify.

Pugsley, J.A. has referred to **R. v. Tippin** (1994), 27 C.R. (4th) 251 saying that there, as in the present case, "without the (invalid) warrant there would have been no search and no evidence would have been discovered and seized". With deference, the majority of the Saskatchewan Court of Appeal in **Tippin** made exactly the same error as did the trial judge here. That error consists of applying **Mellenthin** generally to all real evidence discovered as a result of a **Charter** breach. The analysis by Gerwing, J.A. in the dissent is compelling and I adopt it fully.

Before referring to the circumstances under which the police entered the respondent's home I keep in mind the fact that the onus of excluding evidence under s. 24(2) rests with the accused and not with the Crown. There is no automatic process of exclusion. In **R. v. Brown** (1987), 76 N.S.R. (2d) 64 (S.C. A.D.), MacDonald J. made the following observations with respect to Section 24(2) of the **Charter:**

> "We do not have nor do we need in this country a rule that evidence obtained as a result of a breach of a **Charter** right must in all cases be excluded.
>
> The test under s. 24(2) of the **Charter** is clear and admits of no judicial discretion. **Evidence obtained as a result of a breach of Charter rights is prima facie admissible. It shall not be excluded unless and only unless it is established on a balance of probabilities or by a preponderance of evidence that under all the circumstances to allow such evidence in the proceedings would bring the administration of justice into disrepute. When s. 24(2) of the Charter is utilized, it has the effect, in practically all cases, of interfering with the criminal justice system's truth finding function. It follows therefore in my view that the indiscriminate application of such exclusionary power is bound to generate disrespect for our legal system and the administration of justice**. See **Stone v. Powell supra**. Section 24(2) should not in my view be applied to nullify

> objectively reasonable law enforcement activities of the kind and nature that existed in this case."

(emphasis added)

The facts here are set out in the judgment of Pugsley, J.A.. The large quantity of drugs and other indicia of trafficking found in the respondent's home existed irrespective of the violation of the **Charter**. It was not picked up at a check stop under circumstances such as existed in **Mellenthin**, **supra**. There, as I have said, but for the participation of Mellenthin, the police could never have possibly have uncovered what was in the bag on the front seat of the car. Apart from having been stopped at the check stop, what possible reason could there have been to search his car for drugs? What possible reason was there for thinking that he had drugs? The answer, of course, is none.

The circumstances here should be assessed in the context of the three element analysis carried out in **Debot**, 52 C.C.C. (3d) 193 at 215, (S.C.C.).

Was the information predicting the commission of the offence compelling? Sergeant Eagan's source, previously found reliable, indicated a large shipment would be coming to the community during the time period in question. It was a relatively small community. The respondent was known to Sergeant Eagan on the basis of his researches at two Detachments and information obtained generally in the community to be an identified drug trafficker. Another officer had advised him that the respondent was the target of an undercover drug operation which revealed his activity in purchasing

or supplying drugs. Relatives of Sergeant Eagan spoke of the respondent's reputation as a drug trafficker.

Sergeant Eagan reviewed his files and confirmed that the respondent was the target of a number of narcotics investigations where he was identified as a trafficker.

Sergeant Eagan also knew that the respondent was charged with three counts of trafficking in cannabis (hashish) in 1987 and pled guilty to one of them.

On February 10th, 1993, the day of the seizure, Sergeant Eagan was called by an unpaid source advising that a large delivery of cannabis was coming to the Port Hawkesbury area that very day. Later on the same day the same source advised that the shipment had arrived and was at the respondent's residence. This source had proven reliable on a previous occasion.

The informants feared for their safety should their identity as such become known. Sergeant Eagan's computer checks confirmed the respondent was still reputed to be a trafficker.

In my opinion this information is compelling. The only reason the trial judge did not find it so was:

> "I find the evidence supplied to me is not compelling in that it does not provide the kind of detail which I would expect before authorizing a search of a man's home. What we have is really a tip from a person who has provided information to the police in the past which has been found to be credible. However, we do not have any detail to permit me to make an independent assessment of that information. What was communicated to the police was that the accused had come into possession of a large quantity of drugs. The information did not tell Sergeant Eagan how he knew this to be the case. How can I assess whether that is any more than mere gossip or speculation on the part of the informant? I would have expected Sergeant Eagan to ask

> how the informant was aware that the accused was in possession of the drug. That was not asked nor answered."

If there was a deficiency here it was not so much a matter of the absence of compelling evidence but the failure of the police to better articulate the underlying circumstances disclosed by the informer or informers. The circumstances suggest a high probability that better compliance on the part of the police would have resulted in the issuance of a valid warrant. I believe that these drugs could and would have been found had the police procedures been tidier. This is exactly the kind of evidence about which Lamer J. spoke in **Collins**, supra, as being that which existed altogether apart from the **Charter** violation. It is not evidence that is compelled from the accused as in the case of **Mellenthin**. It was evidence which could have been uncovered without a **Charter** violation. It was at best located or identified with the respondent's assistance. It was not created by him.

The trial judge was satisfied as to the second element which is to say the credibility of the source.

The trial judge was not satisfied with the third element in that the police did not conduct an examination to corroborate the information prior to making the decision to conduct the search. There was no surveillance due to the fact that the residence was located in a rural area where it would be difficult to surveil and the investigation would be jeopardized. Moreover, Sergeant Eagan concluded that there was a time element involved in that the drugs would not necessarily be there for any great length of time. It does not take much imagination to draw that conclusion. There was,

however, a degree of investigation consisting of Sergeant's Eagan's reference to the information in his files and obtained from other officers respecting the respondent's reputation as a trafficker. This is an element he was entitled to take into account; **Debot**, supra, pp. 215-216.

While it is conceded that the Crown did not conduct a reasonable search within the meaning of s. 8 of the **Charter,** the evidence on which the police acted did not fall far short of the standard, and is strong enough to suggest that more careful steps by Sergeant Eagan could and probably would have resulted in a proper search. Time was limited. I agree with the Crown's submission that Sergeant Eagan would have been in dereliction of duty had he failed to act here.

In short, this was far from a fishing expedition. There was good reason to believe that the drugs were at the respondent's home, as indeed they were.

I turn then to the analysis under **Collins**, supra.

Factors Affecting Fairness of the Trial

I have already shown that the trial judge erred materially in the application of the law in this respect. These drugs were not compelled testimony. They were not something the respondent was "forced to create" as in **Mellenthin**. In **Mellenthin** the police had not the slightest information, compelling or otherwise to, cause them to suspect drugs in Mellenthin's car. Mellenthin alone provided the evidence against himself. That is just not the case here.

I firmly believe that the police could have obtained the drugs without the **Charter** violation. The burden to show otherwise rests with the respondent who must establish the grounds for exclusion under s. 24(2).

Seriousness of the Violation

The invasion by the police of a dwelling house is a very serious matter about which I will have more to say in dealing with the third set of factors.

Here the police did have a warrant. While the justice of the peace erred in granting it the fact that the police obtained it is a major consideration in assessing their good faith. The breach by the police was inadvertent and technical in nature. They did not simply barge into the home without legal colour of right. They were operating on much more than just mere suspicion. There was obvious urgency. I do not consider their violation to be a flagrant one.

Effect on the Administration of the Exclusion of Evidence

Under this heading, the fact that we are dealing with a home is a relevant consideration.

It is important that the people of Canada should be free to enjoy the privacy of their homes without unwarranted police invasion. Against this must be balanced the protection of society from the numerous evil consequences of the drug trade which flourishes on a rampant basis. The respondent's home was invaded and

by the Crown's concession, unreasonably. However, it was more than just the respondent's home. It was also his place of business. His business was a nefarious business which strikes at the very foundation of our society.

The Canadian home has in my opinion more to fear from the corrosive and far reaching effects of the drug trade than it does from the policeman's knock on the door.

The sweeping test applied by the trial judge that evidence that would not have been obtained but for the search that violates the **Charter** in effect rewrites s. 24(2) of the **Charter**. It would result in routine exclusion. It is a departure from the approach previously taken by the courts that is unsettling to say the least.

In considering the long term consequences of such regular exclusion of evidence obtained in violation of the **Charter** on the repute of the administration of justice, a moment's reflection would reveal that it would be disturbing indeed. Such an approach would seriously impair the ability of the courts to ascertain the truth, tilting the scales against this worthy objective heavily in favour of the rights of criminals. It would demoralize those involved in law enforcement. It would be truly upsetting to law abiding citizens and deminish the **Charter** in their esteem. It is futile for courts to decry the drug trade when they adopt **Charter** positions that substantially reduce their ability to deal with it effectively.

Returning to this case, in my opinion the reasonable, well informed and dispassionate citizen would find most offensive the fact that the respondent - almost certainly guilty of the charge - should escape on what appears to be a technicality. This

result would not in my view sit well with decent ordinary people. I believe the reputation of the administration of justice would suffer should this evidence be excluded.

I would allow the appeal, set aside the acquittal and order a new trial.

Chipman, J.A.

C.A C. No. 109662

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

HER MAJESTY THE QUEEN Appellant	)	
- and -	)	REASONS FOR JUDGMENT BY:
	)	PUGSLEY, J.A.
ALFRED NICHOLAS RICHARD Respondent	)	CHIPMAN, J.A. (Dissenting)