

R v. Stillman
[1997] 1 SCR 607

CORY J: [1] ...

I. Factual Background

[2] On the evening of April 12, 1991, a group of seven teenagers gathered in the Oromocto area, in New Brunswick. They walked to a camp in the woods where they drank beer and wine and shared some LSD. Between 8:00 p.m. and 8:30 p.m. the 17-year-old appellant, William Stillman, and the 14-year-old victim, Pamela Bischoff, left the group. When he arrived at his home between 11:45 p.m. and midnight, the appellant was obviously cold, shaken and wet from the upper thighs down. He was cut above one eye, and had mud and grass on his pants. The explanation he gave for his condition was that he had been in a fight with five Indians. This explanation, as well as his account of where he had last seen the victim, varied over time.

[3] The victim's body was found six days later in the Oromocto River next to a bridge some 300 to 400 metres from where she had last been seen by the group. An expert placed the time of death between 10:30 p.m. and 11:30 p.m. on April 12, 1991. A motorist and his passenger saw Pamela on the bridge with a male companion around 10:15 p.m. Between 11:45 p.m. and midnight, another motorist positively identified the appellant, walking on a public road that led to the bridge. Mud was observed on the appellant's pants from above the knees down to his feet.

[4] The autopsy revealed that the cause of death was not drowning but rather a wound or wounds to the head. Semen was found in the victim's vagina and a human bite mark had been left on her abdomen.

[5] On April 19, 1991, the appellant was arrested for the murder of Pamela Bischoff. At the time of the arrest, the appellant retained counsel. He was transported to the RCMP headquarters in Fredericton where he was met by his lawyers. The police indicated that they wished to take hair samples and teeth impressions and to question the appellant. After spending over two hours with the appellant, the two lawyers gave a letter to the police which read as follows:

This is to confirm that Bryan Whittaker and I are representing the above young person who we understand has been arrested for murder.

This is to confirm that we have advised this young person that he is not to consent to provide any bodily samples whatsoever including hair and or teeth imprints to you or anybody else.

This is also to confirm that he has been advised not to give any statements to you or anyone else concerning your investigation into the death of Pam Bischoff. He is not to talk to you at all without one of the undersigned being present.

[6] **Notwithstanding this statement of intention, once the lawyers left, the RCMP took bodily samples from the appellant, under threat of force.** A sergeant took scalp hair samples by passing a gloved hand through the appellant's hair, as well as by combing, clipping and plucking hairs. The appellant was made to pull some of his own pubic hair. Plasticine teeth impressions were then taken.

[7] Then, in the absence of the appellant's parents or his lawyers, a constable interviewed the appellant for an hour in an attempt to obtain a statement. Although the appellant did not say anything, he sobbed throughout the interview. The appellant asked to speak to his lawyer, at which point the interview ended and he was permitted to make the telephone call. While waiting for his lawyer to arrive, the appellant asked to use the washroom. Escorted by the constable, he did so. As the appellant was leaving the washroom, he used a tissue to blow his nose and threw the tissue in the waste bin. The tissue containing mucous was seized by the constable and subsequently used for DNA testing.

[8] When the appellant's lawyer arrived at the headquarters he objected to the actions taken by the RCMP with respect to the appellant. Yet, after the lawyer left, the sergeant brought the appellant into an interview room and, once again, attempted to obtain a statement. The police thought that they had enough evidence to charge the appellant, but the Crown's office disagreed. Accordingly, five days after the arrest, the appellant was released without being charged.

[9] Several months later, after they had received the DNA and odontology analysis, the RCMP again arrested the appellant. This action was taken in part in order to obtain better impressions of the appellant's teeth. A dentist attended at the RCMP detachment for that purpose and, without the appellant's consent, took impressions of his teeth, in a procedure which took two hours. More hair was taken from the appellant, as well as a saliva sample and buccal swabs.

• • •

[11] The appellant was convicted, by a jury, of first degree murder and sentenced to life imprisonment with no eligibility for parole for eight years....

• • •

III. Relevant Statutory Provisions

[23]

Canadian Charter of Rights and Freedoms

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

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

24. ...

(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.

Criminal Code, RSC 1985, c. C-46

487.05(1) A provincial court judge who on *ex parte* application is satisfied by information on oath that there are reasonable grounds to believe

- (a) that a designated offence has been committed,
- (b) that a bodily substance has been found
 - (i) at the place where the offence was committed,
 - (ii) on or within the body of the victim of the offence,
 - (iii) on anything worn or carried by the victim at the time when the offence was committed, or
 - (iv) on or within the body of any person or thing or at any place associated with the commission of the offence,
- (c) that a person was a party to the offence, and
- (d) that forensic DNA analysis of a bodily substance from the person will provide evidence about whether the bodily substance referred to in paragraph (b) was from that person

and who is satisfied that it is in the best interests of the administration of justice to do so may issue a warrant in writing authorizing a peace officer to obtain, or cause to be obtained under the direction of the peace officer, a bodily substance from that person, by means of an investigative procedure described in subsection 487.06(1), for the purpose of forensic DNA analysis.

Young Offenders Act, RSC 1985, c. Y-1

56. ...

- (2) No oral or written statement given by a young person to a peace officer or other person who is, in law, a person in authority is admissible against the young person unless ...
 - (c) the young person has, before the statement was made, been given a reasonable opportunity to consult with counsel or a parent, or in the absence of a parent, an adult relative, or in the absence of a parent and an adult relative, any other appropriate adult chosen by the young person; and
 - (d) where the young person consults any person pursuant to paragraph (c), the young person has been given a reasonable opportunity to make the statement in the presence of that person.

IV. Issues on Appeal

[24] The issues are as follows:

1. Did the majority of the Court of Appeal of New Brunswick err in law in holding that the search by way of teeth impressions, hair samples and buccal swabs, but not the seizure of the discarded tissue, infringed the appellant's rights as guaranteed by the Charter?

2. Did the majority of the Court of Appeal of New Brunswick err in holding that the evidence obtained in a manner which infringed the appellant's rights and freedoms should not be excluded pursuant to s. 24(2) of the Charter?

V. Analysis

A. Was any of the Impugned Evidence Obtained in a Manner that Infringed or Denied the Appellant's Charter Rights?

(1) The Hair Samples, Teeth Impressions and Buccal Swabs

- (a) Did the Taking of the Hair Samples, Teeth Impressions and Buccal Swabs Contravene Section 8 of the Charter?

[25] **There are three requirements which must be met if a search is to be found reasonable: (a) it must be authorized by law; (b) the law itself must be reasonable; and (c) the manner in which the search was carried out must be reasonable: see *Collins* [[1987] 1 SCR 265], at p. 278.** An appropriate starting point, therefore, is to determine whether there existed either a statutory or common law power that authorized the police to search and seize the appellant's scalp hairs and pubic hairs or to take dental impressions or buccal swabs.

[26] **At the time that this seizure occurred in 1991, the *Criminal Code* only provided a procedure for obtaining a warrant to search a "building, receptacle or place." It did not authorize the search of a person, nor the seizure of parts of the body.** It is only with the recent addition of s. 487.05 that this limitation has been removed to the extent of its provisions. Therefore, the taking of hair and teeth samples was conducted without statutory authority. The respondent can justify these searches only by demonstrating that they were authorized by a common law power or that the appellant had no reasonable expectation of privacy in the things seized. To this end, the respondent asserts that the hair samples and teeth impressions were seized pursuant to the common law power of search incident to a lawful arrest.

• • •

WAS THE ARREST LAWFUL?

[28] For the arrest to have been lawful, the police officers must have subjectively believed that there were reasonable and probable grounds on which to arrest the appellant. As well, those grounds must have been reasonable and probable when viewed objectively. However, the standard is not so high as to require the police to establish a prima facie case for a conviction before making the arrest: see *R v. Storrey*, [1990] 1 SCR 241.

• • •

[31] The statements made by the officers involved in the investigation reveal that, subjectively, they were under the impression that they had reasonable and probable grounds to believe that the appellant had committed the murder. I am also satisfied that, from an objective point of view, there were good and sufficient grounds for the officers to have reached that conclusion. The supporting facts can be summarized in this way: (a) the appellant was the last person seen with the deceased on the evening of her disappearance; (b) he could not, or at least did not, account for his whereabouts between 9:00 p.m. and 11:30

p.m. on that evening when he returned to his residence; (c) when the appellant returned home he was wet and cold, his clothes were muddy and he had a scratch over his eye and blood on his face consistent with having been in a scuffle. When the deceased's body was found she appeared to have been physically beaten; (d) the appellant claimed to have been in a fight with some "Indians" but this story changed over time; (e) the appellant's worried and disturbed reaction to the police helicopter which was searching the river close to where the deceased was found; (f) immediately following the appellant's observation of the helicopter he left a suicide note and fled; ...

• • •

WERE THE SEIZURES OF THE HAIR SAMPLES, TEETH IMPRESSIONS AND BUCCAL SWABS MADE "INCIDENTAL" TO THE ARREST?

THE SCOPE OF THE COMMON LAW POWER OF SEARCH INCIDENT TO ARREST

[33] In *Hunter v. Southam Inc.*, [1984] 2 SCR 145, it was held that a search conducted without prior authorization is presumptively unreasonable. However, the long-standing power of search incident to arrest is an exception to this general rule: see *Leigh v. Cole* (1853), 6 Cox CC 329, and *Bessell v. Wilson* (1853), 1 El. & Bl. 489, 118 ER 518 (QB). The original rationale for this power was based on (i) the need for the arresting officers to prevent the escape of the person arrested and to protect themselves by removing from the person arrested any weapon or tool that might facilitate escape and (ii) the need to prevent evidence under the control of the detainee from being destroyed. ...

• • •

(II) APPLICATION TO THE FACTS OF THIS CASE

[44] While the appellant was not subjected to a body "cavity" search, the search conducted went far beyond the typical "frisk" search which usually accompanies an arrest. Sergeant Kennedy passed his gloved hand through the appellant's hair to remove some hair, combed some more out, and clipped and pulled out still more. The appellant was then made to pull hair from his own pubic area. A dentist was called in to take the appellant's teeth impressions and buccal swabs. All this was without the appellant's consent and despite his protests. The dental procedure involved the placing of several instruments and various substances into the appellant's mouth. As well, photographs and a video were taken of his mouth. The whole procedure took two hours.

• • •

[50] It is clear that the appellant's right to be free from unreasonable search and seizure was very seriously violated. Since the search and seizure of the bodily samples was not authorized by either statutory or common law it could not have been reasonable. It is thus unnecessary to consider either the reasonableness of the law or the manner in which the search was conducted.

(b) Did the Taking of the Hair Samples, Teeth Impressions and Buccal Swabs Contravene Section 7 of the Charter?

[51] The taking of the dental impressions, hair samples and buccal swabs from the accused also contravened the appellant's s. 7 Charter right to security of the person. The taking of the

bodily samples was highly intrusive. It violated the sanctity of the body which is essential to the maintenance of human dignity. It was the ultimate invasion of the appellant's privacy. See *Pohoretsky* [[1987] 1 SCR 945]. In *Dyment* [[1988] 2 SCR 417], at pp. 431-32, La Forest J emphasized 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." Quite simply, the taking of the samples without authorization violated the appellant's right to security of his person and contravened the principles of fundamental justice.

(2) *The Discarded Tissue*

(a) Did the Taking of the Discarded Tissue Contravene Section 8 of the Charter?

[52] The appellant had advised the police, through the letter from his lawyers, that he refused to provide any bodily samples whatsoever. Despite this express refusal, the police seized a tissue, used by the appellant to blow his nose, from the garbage bin in the washroom of the RCMP headquarters. In other words, the police obtained surreptitiously that which the appellant had refused to provide them voluntarily; namely a sample from which his DNA profile could be obtained.

[59] The appellant had been arrested at the time the tissue was seized, and was being detained. He had exercised his right to refuse to provide the police with bodily samples for the purposes of DNA analysis. Without that consent, the police had no right to take these samples from him. However, in the course of his five-day detention, it is reasonable to presume that, among other things, the appellant would blow his nose, use the toilet, possibly cut himself and bleed, and eat from a spoon. In other words, through "happenstance" the police would be able to take advantage of the appellant's imprisonment to obtain all the samples they needed, but which they could not legally seize in the absence of a valid search warrant. In those circumstances, how can the appellant assert his right *not* to consent to the provision of bodily samples? **He would be required to destroy every tissue he used, to hide every spoon he ate from, to keep cigarette butts, chewed gum or any other potentially incriminating evidence on his person at all times in order to prevent the police from "retrieving" this "potentially useful waste."**

[60] *R v. Mellenthin*, [1992] 3 SCR 615, at p. 624, set out the requirements for a consent to be considered valid in the context of a search and seizure. **Specifically it is, "incumbent upon the Crown to adduce evidence that the person detained had indeed made an informed consent to the search based upon an awareness of his rights to refuse to respond to the questions or to consent to the search"** (emphasis added). It follows that for consent to be validly given, the accused must have the ability to prevent the police from conducting a search or seizure by withholding his consent. Where the accused is in custody, his announced refusal to consent to providing bodily samples becomes meaningless if, because he is incarcerated, he cannot prevent those samples from being taken.

[61] Obviously an accused person will have a lower expectation of privacy following his or her arrest and subsequent custody. That expectation of privacy will be even lower when serving a sentence after conviction. Therefore, it may well be that certain kinds of searches and seizures may validly be performed on a person in custody which could not validly be performed on persons who have not yet been arrested or convicted. Nevertheless, I am of the view that the appellant's expectation of privacy in this instance, although lower after his arrest, was not so low as to permit the seizure of the tissue. The privacy expectation should not be reduced to such an extent as to justify seizures of bodily samples without consent, particularly for those who are detained while they are still presumed to be innocent.

[62] **Thus, where an accused who is not in custody discards a kleenex or cigarette butt, the police may ordinarily collect and test these items without any concern about consent.** A different situation is presented when an accused in custody discards items containing bodily fluids. Obviously an accused in custody cannot prevent the authorities from taking possession of these items. Whether the circumstances were such that the accused had abandoned the items and relinquished any privacy interest in them will have to be determined on the particular facts presented in each case.

[63] However, in this case, the accused had announced through his lawyers that he would not consent to the taking of any samples of his bodily fluids. The police were aware of his decision. Despite this they took possession of the tissue discarded by the appellant while he was in custody. In these circumstances the seizure was unreasonable and violated the appellant's s. 8 Charter rights.

B. Section 24(2) of the Charter

(1) The Hair Samples, Dental Impressions and Buccal Swabs

[67] It is clear that the seizures of the hair samples, dental impressions and buccal swabs violated s. 8 of the Charter. In my view, they also breached s. 7 since they violated the right to security of the person in a manner not consistent with the principles of fundamental justice. The evidence was obtained as a result of the Charter violation and s. 24(2) is thereby triggered.

[68] It has been held that appellate courts should only intervene with respect to a lower court's s. 24(2) analysis when that court has made "some apparent error as to the applicable principles or rules of law" or has made an unreasonable finding: *R v. Duguay*, [1989] 1 SCR 93, at p. 98; *Mellenthin*, supra. The majority of the Court of Appeal of New Brunswick found that, in admitting the impugned evidence, the trial judge considered the appropriate principles and performed a correct analysis of the factors outlined in *Collins* [[1987] 1 SCR 265]. With respect, I cannot agree.

[69] The factors outlined by this Court in the trail blazing decision of *Collins* can be divided into **three groups based on their effect on the repute of the administration of justice. The first of these categories includes those factors which relate to the fairness of the trial; the second group pertains to the seriousness of the Charter violation; and the third group concerns the possibility that the administration of justice could be brought into disrepute by excluding the evidence even though it was obtained in violation of the Charter.** In my view, the trial judge erred in his consideration of the first two factors.

[70] **In considering how the admission of the evidence would affect the fairness of the trial, the trial judge erred in concluding that the hair samples and dental impressions existed independently of any Charter breach and were thus admissible. Certainly the appellant's hair samples, dental patterns and saliva existed as "real" evidence. However, the trial judge failed to appreciate the significance of the inescapable conclusion that, in violation of his Charter rights, the appellant was conscripted or forced by the police to provide evidence from his body thus incriminating himself.** I have used the term "conscripted" to describe the situation where the police have compelled the accused to participate in providing self-incriminating evidence in the form of a confession or providing bodily samples. It is a term that has been used in other decisions of the Court, including *Collins*, to describe self-incriminating evidence obtained as a result of a Charter breach. In the circumstances, it was unnecessary and inappropriate to consider the

seriousness of the breach. However, when he did so, the trial judge focussed exclusively on the conduct of the police. While police conduct is certainly one factor to be considered under this heading, it is not the only consideration. Here it was essential that other factors be considered. It is thus apparent that the trial judge erred in his appreciation and application of the proper legal principles to be considered in applying s. 24(2), and that the admissibility of the impugned evidence must be reconsidered.

• • •

(a) Fairness of the Trial

[72] A consideration of trial fairness is of fundamental importance. If after careful consideration it is determined that the admission of evidence obtained in violation of a Charter right would render a trial unfair then the evidence must be excluded without consideration of the other *Collins* factors. A fair trial for those accused of a criminal offence is a cornerstone of our Canadian democratic society. A conviction resulting from an unfair trial is contrary to our concept of justice. To uphold such a conviction would be unthinkable. It would indeed be a travesty of justice. The concept of trial fairness must then be carefully considered for the benefit of society as well as for an accused. In discussing the aspect of trial fairness and its application under s. 24(2), Lamer J, as he then was, in *Collins*, supra, stated, at p. 284 that:

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 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. [Emphasis added.]

[73] **It is apparent from this passage that the primary aim and purpose of considering the trial fairness factor in the s. 24(2) analysis is to prevent an accused person whose Charter rights have been infringed from being forced or conscripted to provide evidence in the form of statements or bodily samples for the benefit of the state.** It is because the accused is *compelled* as a result of a Charter breach to participate in the creation or discovery of self-incriminating evidence in the form of confessions, statements or the provision of bodily samples, that the admission of that evidence would generally tend to render the trial unfair. That general rule, like all rules, may be subject to rare exceptions.

[74] Thus, as a first step in the trial fairness analysis it is necessary to classify the type of evidence in question. *Evidence to be considered under "fairness" will generally fall into one of two categories: non-conscriptive or conscriptive.* The admission of evidence which falls into the "non-conscriptive" category will, as stated in *Collins*, rarely operate to render the trial unfair. If the evidence has been classified as non-conscriptive the court should move on to consider the second and third *Collins* factors, namely, the seriousness of the Charter violation and the effect of exclusion on the repute of the administration of justice. The key, then, is how to distinguish between "non-conscriptive" and "conscriptive" evidence.

(I) CLASSIFICATION OF THE NON-CONSCRIPTIVE EVIDENCE

[75] If the accused was not compelled to participate in the creation or discovery of the evidence (i.e., the evidence existed independently of the Charter breach in a form useable by the state), the evidence will be classified as non-conscriptive. The admission of evidence which falls into this category will, as stated in *Collins*, supra, rarely operate to render the trial unfair. If the evidence has been classified as non-conscriptive the court should move on to consider the second and third of the *Collins* factors, namely, the seriousness of the Charter violation and the effect of exclusion on the repute of the administration of justice.

[76] What has come to be referred to as "real" evidence will not necessarily fall into the "non-conscriptive" category. There is on occasion a misconception that "real" evidence, referring to anything which is tangible and exists as an independent entity, is always admissible. It is for this reason that blood, hair samples or the identity of the accused are often readily, yet incorrectly, classified as "real evidence existing independently of the Charter breach." It is true that all of these examples "exist" quite independently of a Charter breach. Yet, it is key to their classification that they do not necessarily exist *in a useable form*. For example, in the absence of a valid statutory authority or the accused's consent to take bodily samples, the independent existence of the bodily evidence is of no use to the prosecution since there is no lawful means of obtaining it.

[77] The crucial element which distinguishes non-conscriptive evidence from conscriptive evidence is not whether the evidence may be characterized as "real" or not. Rather, it is whether the accused was compelled to make a statement or provide a bodily substance in violation of the Charter. Where the accused, as a result of a breach of the Charter, is compelled or conscripted to provide a bodily substance to the state, this evidence will be of a conscriptive nature, despite the fact that it may also be "real" evidence. Therefore, it may be more accurate to describe evidence found without any participation of the accused, such as the murder weapon found at the scene of the crime, or drugs found in a dwelling house, simply as *non-conscriptive* evidence; its status as "real" evidence, *simpliciter*, is irrelevant to the s. 24(2) inquiry.

[78] The concept of "real" evidence without any further description is misleading. It will be seen that, in certain circumstances, evidence such as the gun in *R v. Burlingham*, [1995] 2 SCR 206, may come into the state's possession as a result of the accused's compelled participation or "conscripted" against himself. Thus, while the evidence is "real" it is nevertheless conscriptive evidence.

• • •

CONSCRIPTIVE EVIDENCE

[80] Evidence will be conscriptive when an accused, in violation of his Charter rights, is compelled to incriminate himself at the behest of the state by means of a statement, the use of the body or the production of bodily samples. The traditional and most frequently encountered example of this type of evidence is a self-incriminating statement made by the accused following a violation of his right to counsel as guaranteed by s. 10(b) of the Charter. The other example is the compelled taking and use of the body or of bodily substances of the accused, such as blood, which lead to self-incrimination. It is the compelled statements or the conscripted use of bodily substances obtained in violation of Charter rights which may render a trial unfair.

[81] In considering the application of s. 24(2), courts will be rightly concerned that there has been a breach of the rights of the accused which led to the compelled self-incrimination of the accused. Historically, the judicial misgivings relating to self-incrimination came from the abhorrence of conscripting an accused to incriminate himself by means of a confession. When the rule against self-incrimination first emerged, there was a very real concern that a confession sometimes obtained by torture or threats could well be unreliable. Over the years, forms of compulsion other than torture were recognized as being just as compulsive, just as insidious and just as abhorrently unfair. At the time when the principle against enforced self-incrimination evolved, a confession or statement was often the only evidence tendered by the state to prove the crime.

[82] It is only in recent times that the compelled use of the body of the accused has been considered. Yet, it cannot be forgotten that in *Collins*, supra, Lamer J astutely observed that "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" (p. 284). The carefully worded phrase "or other evidence emanating from him" gives a clear indication that the compelled or conscripted use of bodily substances in violation of the Charter will tend to render the trial unfair.

[83] It is contended that the taking of bodily substances should not be subject to the same protection as statements or confessions. **Statements, it is said, are a product of the mind which would not exist but for the Charter violation. Bodily substances on the other hand already exist.** Thus it is said that the body itself or identifying marks on it may always be used for identification. As a result, it is argued that bodily substances should always be available for testing and identification.

[84] Those who take this position rely upon the decision of the US Supreme Court in *Schmerber v. California*, 384 US 757 (1966). There, a blood sample was taken without the consent of the accused. It was contended that the taking infringed his right against self-incrimination. It was conceded that the state compelled him to submit to the taking to discover evidence that might be used to prosecute him. In a 5 to 4 decision the majority found the right against self-incrimination only guaranteed the right "to remain silent unless he chooses to speak in the unfettered exercise of his own will" (p. 760). The minority were of the view that taking the blood constituted a breach of the right against self-incrimination. I must say I prefer the view of the minority. Black J in his dissenting reasons stated at p. 778:

How can it reasonably be doubted that the blood test evidence was not in all respects the actual equivalent of "testimony" taken from petitioner when the result of the test was offered as testimony, was considered by the jury as testimony, and the jury's verdict of guilt rests in part on that testimony? The refined, subtle reasoning and balancing process used here to narrow the scope of the Bill of Rights' safeguard against self-incrimination provides a handy instrument for further narrowing of that constitutional protection, as well as others, in the future. Believing with the Framers that these constitutional safeguards broadly construed by independent tribunals of justice provide our best hope for keeping our people free from governmental oppression. ...

• • •

[86] It has, for a great many years, been considered unfair and indeed unjust to seek to convict on the basis of a compelled statement or confession. If it was obtained as a result of a breach of the Charter its admission would generally tend to render the trial unfair. Similarly, to compel an accused to use his body or to provide bodily substances in order to incriminate himself would generally render the trial unfair. This is so because the compelled production of bodily parts or substances is just as great an invasion of the essence of the person as is a compelled conscripted statement. The unauthorized use of a person's body or bodily substances is just as much compelled "testimony" that could render the trial unfair as is a compelled statement.

[87] Canadians think of their bodies as the outward manifestation of themselves. It is considered to be uniquely important and uniquely theirs. Any invasion of the body is an invasion of the particular person. Indeed, it is the ultimate invasion of personal dignity and privacy. No doubt this approach was the basis for the assault and sexual assault provisions. The body was very rightly seen to be worthy of protection by means of criminal sanctions against those who assault others. The concept of fairness requires that searches carried out in the course of police investigations recognize the importance of the body.

[88] Traditionally, the common law and Canadian society have recognized the fundamental importance of the innate dignity of the individual. There is little likelihood of maintaining any semblance of dignity where, without consent and in the absence of any statutory authorization, intrusive procedures are employed to take bodily substances. For example, can there be any respect demonstrated for an individual if against their will women and men accused of a crime can be compelled to provide samples of their pubic hair to the police?

[89] **It is repugnant to fair-minded men and women to think that police can without consent or statutory authority take or require an accused to provide parts of their body or bodily substances in order to incriminate themselves.** The recognition of the right to bodily integrity and sanctity is embodied in s. 7 of the Charter which confirms the right to life, liberty and the security of the person and guarantees the equally important reciprocal right not to be deprived of security of the person except in accordance with the principles of fundamental justice. This right requires that any interference with or intrusion upon the human body can only be undertaken in accordance with principles of fundamental justice. Generally that will require valid statutory authority or the consent of the individual to the particular bodily intrusion or interference required for the purpose of the particular procedure the police wish to undertake. It follows that the compelled use of the body or the compelled provision of bodily substances in breach of a Charter right for purposes of self-incrimination will generally result in an unfair trial just as surely as the compelled or conscripted self-incriminating statement.

[90] **So soon as that is said, it is apparent that a particular procedure may be so unintrusive and so routinely performed that it is accepted without question by society.** Such procedures may come under the rare exception for merely technical or minimal violations referred to earlier. For example, assuming that fingerprinting is conscriptive, it is minimally intrusive and has been recognized by statute and practice for such an extended period of time that this Court readily found that it was acceptable in Canadian society. ...

• • •

[94] The compulsion which results in self-incrimination by a statement or the taking of bodily substances or the use of the body itself may arise in a number of ways such as the forced participation in a line-up identification (*R v. Ross*, [1989] 1 SCR 3); providing a breath

sample (*R v. Bartle*, [1994] 3 SCR 173); providing DNA samples—blood (*Borden*, [[1994] 3 SCR 145]); telling the police where to find evidence (*Burlingham*, supra); and making an incriminating statement (*R v. Manninen*, [1987] 1 SCR 1233).

• • •

[97] With respect to the first branch of the *Collins* test, it was held at para. 55 that:

On the first question, it seems readily apparent that the admission of the evidence did not affect the fairness of the trial. *The appellant could not by any stretch of the imagination be said to have been conscripted into incriminating himself in these conversations.* [Emphasis added.]

[98] Thus, it can be seen that the admission of evidence, which was obtained following the breach of an accused's Charter rights resulting in the accused being compelled or conscripted to incriminate himself by a statement or the use as evidence of his body or bodily substances will, as a general rule, be found to render the trial unfair.

DERIVATIVE EVIDENCE

[99] **A subset of conscriptive evidence is "derivative evidence." This is a term frequently used to describe what is essentially conscriptive "real" evidence.** It involves a Charter violation whereby the accused is conscripted against himself (usually in the form of an inculpatory statement) which then leads to the discovery of an item of real evidence. In other words, the unlawfully conscripted statement of the accused is the necessary cause of the discovery of the real evidence.

[100] An example is provided by *Burlingham*, supra. There the accused, who was charged with murder, was subjected to an intensive and manipulative interrogation by the police in violation of his right to counsel. The questioning ultimately led to the accused giving a full confession, including a statement that the murder weapon could be found at the bottom of a frozen river. It was found that nothing would have been said had the accused not been improperly conscripted by the police to provide evidence against himself. The gun, which was ultimately seized from the river, was "real" evidence. However, its seizure was derived from the conscripted statement. This decision demonstrates that the gun should not be treated as "real" evidence "which will rarely render the trial unfair," but rather, it should be viewed as conscriptive or self-incriminating evidence discovered as a result of the accused being conscripted to provide the evidence following a breach of his Charter rights. As Sopinka J aptly put it (at paras. 144-45):

... it is unfair for the Crown to make out its case in whole or in part by the use of evidence that it obtained in breach of the rights of the accused and involving his or her participation. ...

The participation of the accused in providing incriminating evidence involving a breach of Charter rights is the ingredient that tends to render the trial unfair as he or she is not under any obligation to assist the Crown to secure a conviction.

[101] If the evidence under consideration is classified as conscriptive, that is to say self-incriminating, which in the case of statements includes derivative evidence, then it will be necessary to take the second step of the analysis and determine whether the admission of the evidence would render the trial unfair.

(II) THE DISCOVERABILITY OR "BUT FOR" PRINCIPLE

[102] The admission of self-incriminating evidence in the form of statements or bodily substances conscripted from the accused in violation of the Charter and evidence derived from unlawfully conscripted statements will, as a general rule, tend to render the trial unfair. Nevertheless, in recent cases it has been held that the admission of conscriptive evidence will not render the trial unfair where the impugned evidence would have been discovered in the absence of the unlawful conscription of the accused. There are two principal bases upon which it could be demonstrated that the evidence would have been discovered. The first is where an independent source of the evidence exists. The second is where the discovery of the evidence was inevitable.

WHERE THE EVIDENCE WOULD HAVE BEEN DISCOVERED ABSENT THE UNLAWFUL CONSCRIPTION OF THE ACCUSED.*INDEPENDENT SOURCE*

[103] In certain circumstances, the police may have had an alternative non-conscriptive means by which they could have obtained the impugned evidence, notwithstanding the fact that they obtained it by conscriptive means. Evidence which would have been obtained without the accused's participation yet, the accused was still compelled to participate, will nonetheless be classified as conscriptive evidence. The existence of an alternate means of obtaining the evidence has no bearing on how the evidence is classified. Nevertheless, where an alternative non-conscriptive means exists and the Crown has established on a balance of probabilities that the police would have availed themselves of it, the admission of the evidence would not effect the fairness of the trial.

[104] In *R v. Colarusso*, [1994] 1 SCR 20, the accused, whose impaired driving resulted in a motor vehicle accident, refused to give samples of his blood and urine for anything other than medical purposes. Notwithstanding the lack of consent, a lab technician gave the accused's bodily samples to the coroner, who then turned them over to a police officer. The results of the analysis of the samples were used against the accused at trial. It was held that the independent and prior existence of the sample, completely apart from any s. 8 infringement by the state, meant that the evidence was discoverable in any event. The police could have obtained a warrant to seize the sample and therefore a non-conscriptive means or independent source for the evidence existed.

[105] In those cases where it is determined that a non-conscriptive means existed by which the evidence would have been obtained, the admission of the evidence may not render the trial unfair. However, the fact that an alternate means existed for obtaining the evidence may well also be relevant to the consideration of the seriousness of the violation. It is important to bear in mind what was said about such a situation in *Collins*, supra, at p. 285:

... the availability of other investigatory techniques and the fact that the evidence could have been obtained without the violation of the Charter tend to render the Charter violation more serious. We are considering the actual conduct of the authorities and the evidence must not be admitted on the basis that they could have proceeded otherwise and obtained the evidence properly. In fact, their failure to proceed properly when that option was open to them tends to indicate a blatant disregard for the Charter, which is a factor supporting the exclusion of the evidence.

INEVITABLE DISCOVERY

[106] *R v. Black*, [1989] 2 SCR 138, involved a breach of the accused's s. 10(b) rights. Following the Charter violation, the police officer improperly questioned the accused about the details of the offence. This led to the accused making an inculpatory statement. She was then escorted to her apartment where she produced a knife from a kitchen drawer and handed it over to the officers indicating that it was the murder weapon. The Court excluded the accused's statement on the basis that its admission would infringe her right against self-incrimination and thus render the trial unfair. The knife was held to be derivative evidence obtained as a direct result of the conscripted statement made by the accused. The Court then applied the discoverability principle. It concluded that there was no doubt that the police would have conducted a search of the accused's apartment where the killing occurred. During that search, the police, even without her assistance, would have discovered the knife. In other words, the discovery of the knife was inevitable and therefore its admission would not render the trial unfair. The *Black* case, then, provides an example of how this two-step process prevents all conscripted evidence from being automatically excluded. I should note, in passing, that "inevitably" discoverable evidence may be subsumed in the consideration of evidence obtained by alternative non-conscriptive means.

[107] In summary, where it is established that either a non-conscriptive means existed through which the evidence would have been discovered or that its discovery was inevitable, then the evidence was discoverable; it would have been discovered in the absence of the unlawful conscription of the accused. The Crown must bear the onus of establishing discoverability on a balance of probabilities. Where the evidence was "discoverable," even though it may be conscriptive, its admission will *not*, as a general rule, render the trial unfair. The Court should therefore proceed to consider the seriousness of the violation.

WHERE THE EVIDENCE WOULD NOT HAVE BEEN DISCOVERED IN THE ABSENCE OF THE UNLAWFUL CONSCRIPTION OF THE ACCUSED

[108] There will be cases where the evidence would not have been discovered in the absence of the unlawful conscription of the accused. That is to say there will be no independent source of evidence nor could it be established that it would inevitably have been discovered. The *Burlingham* case illustrates a situation where the discovery of the murder weapon was anything but inevitable. It would be safe to say that the police would never have found the gun but for the accused's conscripted statement. Their investigation would not have led them to discover the weapon at the bottom of a frozen river. To admit the gun in evidence would render the trial unfair.

[109] Another example is provided by *Borden*, *supra*. A sample of the accused's blood was taken in order to link him to a sexual assault. In the process his ss. 8, 10(a) and (b) Charter rights were violated. The evidence was conscriptive and was *not* discoverable in any event. The accused had no legal obligation to provide the blood sample and the police could not obtain it without his consent or his unlawful conscription. Accordingly, the evidence was excluded on the basis that its admission would render the trial unfair.

[110] Thus it can be seen that in situations where the evidence would not have been discovered in the absence of the conscription of the accused in violation of the Charter, its admission would render the trial unfair. In those circumstances it is not necessary to consider the seriousness of the violation or the repute of the administration of justice since a finding that the admission of the evidence would render the trial unfair indicates that the

administration of justice would necessarily be brought into disrepute if the evidence were not excluded under s. 24(2).

[111] Perhaps it would be helpful to set out a summary of the approach that should be taken when the trial fairness factor is being considered.

(III) TRIAL FAIRNESS SUMMARY

[112] A simple method by which trial judges may approach the trial fairness factor is to divide the analysis into two steps. First, the evidence must be classified as either "conscriptive" or "non-conscriptive." The classification will be based on the manner in which the evidence was obtained.

CLASSIFICATION

[113] **If the evidence, obtained in a manner which violates the Charter, involved the accused being compelled to incriminate himself either by a statement or the use as evidence of the body or of bodily substances it will be classified as conscriptive evidence. See *Manninen*, supra; *Ross*, supra, and *Bartle*, supra. On the other hand, if the evidence, obtained in a manner which violates the Charter, did not involve the accused being compelled to incriminate himself either by a statement or the use as evidence of the body or of bodily substances it will be classified as non-conscriptive evidence. See *R v. Silveira*, [1995] 2 SCR 297, and *Evans*, [[1996] 1 SCR 8].**

[114] Conscripted or self-incriminating evidence may lead to what has been termed derivative evidence. This phrase has been used to describe "real" evidence which has been "derived" from, that is to say found as a result of, the conscriptive evidence. The evidence discovered should be classified as conscriptive, since the accused's compelled statement was a necessary cause of its discovery. In those cases, the courts must carefully review the events leading up to the finding of the evidence rather than simply considering whether the ultimate piece of evidence which the Crown is seeking to introduce is "real" evidence. As an example of derivative evidence that was conscripted from the accused, see *Burlingham*, supra.

[115] **Where evidence is determined to be non-conscriptive, its admission generally will not render the trial unfair and the court should proceed to consider the seriousness of the violation. However, where evidence is found to be of a conscriptive nature the court must proceed to the second step, which involves an assessment of whether the evidence would have been discovered in the absence of (but for) the Charter violation.**

DISCOVERABILITY

[116] There are two bases upon which it may be demonstrated that the evidence would have been discovered absent a Charter violation: (a) if the evidence would have been obtained, in any event, from an *independent source*; in other words, there were alternative non-conscriptive means by which the police could have seized the evidence and the Crown has established, on a balance of probabilities, that the police would have availed themselves of those means (see, for example, *Colarusso*, supra); or (b) if the evidence would *inevitably have been discovered*. See, for example, *Black*, supra, and *R v. Harper*, [1994] 3 SCR 343. In both circumstances, even though it is conscriptive evidence, the probability of its discovery means that its admission will not render the trial unfair. However, in determining the admissibility of the evidence that would have been discovered by the alternative means, the

court will have to consider the seriousness of the Charter breach and the effect of exclusion on the repute of the administration of justice.

[117] On the other hand, there will be cases where the evidence would not have been discovered in the absence of the conscription of the accused in violation of the Charter. In those situations it will be apparent that the police could not have obtained the evidence in the absence of the unlawful conscription of the accused. See as examples, *Burlingham*, supra, and *Borden*, supra.

[118] Therefore, where the conscriptive evidence would not have been discovered in the absence of the unlawful conscription of the accused, its admission would generally tend to render the trial unfair. In those circumstances it is not necessary to consider the seriousness of the violation, or the repute of the administration of justice, as a finding that the admission of the evidence would render the trial unfair means that the administration of justice would necessarily be brought into disrepute if the evidence were not excluded under s. 24(2): *R v. Hebert*, [1990] 2 SCR 151; *Mellenthin*, supra.

[119] The summary itself can be reduced to this short form:

1. Classify the evidence as conscriptive or non-conscriptive based upon the manner in which the evidence was obtained. If the evidence is non-conscriptive, its admission will not render the trial unfair and the court will proceed to consider the seriousness of the breach and the effect of exclusion on the repute of the administration of justice.
2. If the evidence is conscriptive and the Crown fails to demonstrate on a balance of probabilities that the evidence would have been discovered by alternative non-conscriptive means, then its admission will render the trial unfair. The Court, as a general rule, will exclude the evidence without considering the seriousness of the breach or the effect of exclusion on the repute of the administration of justice. This must be the result since an unfair trial would necessarily bring the administration of justice into disrepute.
3. If the evidence is found to be conscriptive and the Crown demonstrates on a balance of probabilities that it would have been discovered by alternative non-conscriptive means, then its admission will generally not render the trial unfair. However, the seriousness of the Charter breach and the effect of exclusion on the repute of the administration of justice will have to be considered.

(IV) APPLICATION OF THE PRINCIPLES DISCUSSED TO THIS CASE

THE SAMPLES OF HAIR, THE DENTAL IMPRESSION AND BUCCAL SWABS: WAS THIS EVIDENCE CONSCRIPTED FROM THE APPELLANT?

[120] The police had no right to obtain the hair samples, teeth impressions or buccal swabs from the appellant without his informed consent. The appellant clearly expressed his refusal to provide bodily samples. Yet, by threat of force the police obtained the sample of scalp hair, buccal swabs and compelled the appellant to pluck his pubic hair to provide as a sample. They proceeded with the lengthy and intrusive process of taking impressions of his teeth. There can be no doubt that the police, by their words and actions, compelled the appellant to participate in providing the evidence. Equally there can be no doubt that the evidence of bodily samples constituted conscriptive evidence.

[121] As Iacobucci J noted in *R v. S. (R.J.)*, [1995] 1 SCR 451: "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" (para. 188 (emphasis in original)).

WOULD THE EVIDENCE HAVE BEEN DISCOVERED IN THE ABSENCE OF THE UNLAWFUL CONSCRIPTION OF THE ACCUSED?

[122] It is apparent that the impugned evidence would not have been discovered had it not been for the conscription of the accused in violation of s. 7 and s. 8 of the Charter. The appellant was not obliged to provide the hair samples, teeth impressions or buccal swabs. His Charter guarantee of security of the person and the inviolability of his body meant that in the absence of statutory authority the Crown could not undertake the impugned procedure. Quite simply, the police could not, in the absence of valid statutory authority, lawfully obtain the samples without his consent. No independent source existed by which the police could have obtained the impugned evidence. Since the appellant expressly refused to consent to provide samples, the evidence was not discoverable by the state without the conscription of the accused in violation of the Charter. It follows that the admission of the evidence would render the trial unfair. This finding is sufficient to resolve the s. 24(2) issue as the evidence must be excluded: *Hebert*, supra. However, something should be said of the seriousness of the Charter violation which occurred in this case.

(b) Seriousness of the Charter Violation

[123] The violations of ss. 7 and 8 of the Charter, pursuant to which this evidence was obtained, were of a very serious nature. The police acted with blatant disregard for the fundamental rights of the appellant. Notwithstanding the appellant's express refusal to provide bodily samples or to give a statement, the police purposely waited until the appellant's lawyers had left and then immediately proceeded, through the use of force, threats and coercion to take his bodily samples and to interrogate him in an effort to obtain a statement. They pulled and cut samples of the appellant's scalp hair and made him pull his own pubic hair. They forced a plasticine mold into his mouth in order to obtain dental impressions and later, had a dentist conduct a two-hour procedure to take more accurate impressions.

[124] Reprehensible as these actions were in themselves they become intolerable in these circumstances when the police were aware that the appellant was a young offender at the time, and that he was entitled to the special protection provided by the *Young Offenders Act*. The police knew the Act provides that a young person must be given a reasonable opportunity to have a lawyer, a parent, or a chosen adult present when the police seek to take a statement. All this was flagrantly disregarded.

[125] The respondent argued that the police acted in good faith since they asked the Crown Attorney whether they had authority to seize bodily samples. I cannot accept this submission. The police were aware that, without the DNA evidence, they did not have enough to charge the appellant with murder. Under the circumstances, the comments of Sopinka J in *R v. Kokesch*, [1990] 3 SCR 3, at p. 28, are apposite:

... the unavailability of other, constitutionally permissible, investigative techniques is neither an excuse nor a justification for constitutionally impermissible investigative techniques.

(c) The Administration of Justice

[126] The Charter rights of the accused were infringed by the actions of the police. Those actions could be taken to be abusive. It is easy to understand the sense of frustration of the police officers. They were attempting to obtain evidence implicating the person they suspected had murdered a young girl. Yet Charter rights are the rights of all people in Canada. They cannot be simply suspended when the police are dealing with those suspected of committing serious crimes. Frustrating and aggravating as it may seem, the police as respected and admired agents of our country, must respect the Charter rights of all individuals, even those who appear to be the least worthy of respect. Anything less must be unacceptable to the courts. The words of Iacobucci J in *Burlingham*, supra, at para. 50, bear repeating:

... we should never lose sight of the fact that even a person accused of the most heinous crimes, and no matter the likelihood that he or she actually committed those crimes, is entitled to the full protection of the Charter. Short-cutting or short-circuiting those rights affects not only the accused but also the entire reputation of the criminal justice system. It must be emphasized that the goals of preserving the integrity of the criminal justice system as well as promoting the decency of investigatory techniques are of fundamental importance in applying s. 24(2).

[127] In this case, it would certainly shock the conscience of all fair minded members of the community that the police rode roughshod over a young offender's refusal to provide his bodily samples. As a result, the evidence of the hair samples, dental impressions and buccal swabs must be excluded.

(2) *The Tissue Containing Mucous*

[128] In contrast to the hair samples, teeth impressions and buccal swabs, the police did not force, or even request, a mucous sample from the appellant. He blew his nose of his own accord. The police acted surreptitiously in disregard for the appellant's explicit refusal to provide them with bodily samples. However, the violation of the appellant's Charter rights with respect to the tissue was not serious. The seizure did not interfere with the appellant's bodily integrity, nor cause him any loss of dignity. In any event, the police could and would have obtained the discarded tissue. They would have had reasonable and probable grounds to believe that the tissue would provide evidence in their investigation and therefore would have sealed the garbage container and obtained a search warrant in order to recover its contents. Quite simply, it was discoverable. In my view, the administration of justice would not be brought into disrepute if the evidence obtained from the mucous sample were to be admitted.

VI. Disposition

[129] The appeal is allowed and a new trial is ordered in which the hair samples, dental impressions and buccal swabs are to be excluded, while the mucous sample may be admitted.

[Author note: Four justices wrote dissenting decisions in this matter: L'Heureux-Dubé, Gonthier, McLachlin, and Major, which shows that even smart people can disagree about fundamental rights.]