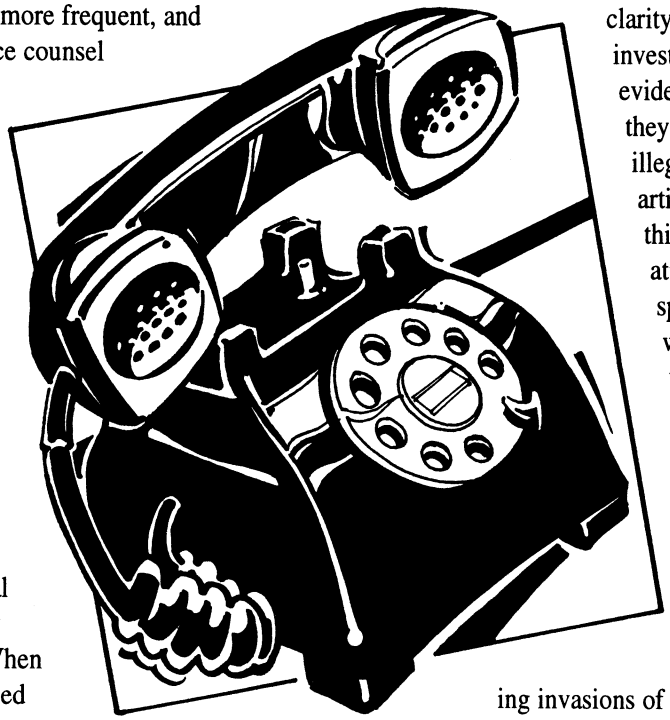
Listening In:

Should the state benefit from evidence derived from illegal wiretaps?

Truth, like all other good things, may be loved unwisely – may be pursued too keenly – may cost too much. *Pearse v. Pearse (1846), 1 De. G. & S. at 28, Knight Bruce*

I. INTRODUCTION

In recent years, the Supreme Court of Canada has been tightening the courts' control on the use of electronic eavesdropping by law enforcement officials. The exclusion at trial of illegal wiretap evidence has grown more frequent, and challenges by defence counsel to judicial authorizations of these wiretaps have become more successful. The exclusionary rules of evidence, which determine what information courts will *not* consider in making decisions, can be an important safeguard for privacy, one of the most fundamental freedoms enjoyed by Canadian citizens. When information is obtained by means that involve unacceptable intrusions into people's privacy, one protection of that freedom is to ensure that evidence is not later used in court. Increased control over electronic eavesdropping does restrict the invasion of individuals' privacy.



However, courts are still unclear on which wiretap evidence will be admissible in a criminal proceeding. This lack of clarity is exacerbated when investigators legally obtain evidence using information they *originally* procured illegally. The focus of this article is on evidence of this type, known as "derivative evidence." More specifically, this article will examine evidence which is derived from information obtained by police wiretaps for which the necessary judicial authorization was not obtained or was fraudulently obtained. Arguably, the courts are sanctioning invasions of privacy by law enforcement officers by letting them profit, directly or indirectly, from these illegal activities.

This article will consider the need to exclude

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such evidence from consideration at trial, and will suggest the precise circumstances in which it should be excluded. Based on those conclusions, this article will assess the current jurisprudence on derivative evidence to determine how effectively courts are dealing with the issue. It will be shown that, at least as far as the decisions of the Supreme Court of Canada in recent years are concerned, the rules which apply to the exclusion of derivative evidence are confusing and ineffective.

FACTS & FIGURES

Table I - Number of Criminal Charges in which Information Obtained as a Result of an Authorization to Intercept a Private Communication was Used (1989-93)

	1989	1990	1991	1992	1993
A)	425	277	127	25	10
B)	367	368	144	72	14

Source: Canada, Solicitor General, Annual Report on the Use of Electronic Surveillance, 1993 (Ottawa: Supply and Services Canada, 1995) Tables 13 and 14 at 24-25.

Row A of Table I shows the number of charges laid between 1989 and 1993 in which wiretap evidence was introduced at trial. Row B shows the number of charges laid following wiretap authorizations in which the evidence obtained from wiretaps ("primary evidence") was not placed before the court or the defence for examination. It must be noted that these figures include cases in which the suspects either were apprehended while committing a crime as a result of the information obtained, or confessed when confronted with the wiretap evidence. While these situations do not fall within most categorizations of derivative evidence, the table does serve to illustrate the number of charges obtained on the basis of wiretap authorizations which could not be examined at trial without some rule excluding all derivative evidence obtained from initial illegal wiretaps.

II. THE SCOPE OF THE PROBLEM

Although the admissibility of the evidence obtained from illegal wiretaps ("primary evidence") is subject to increasing judicial scrutiny, illegal wiretaps are still not subject to a great deal of legal control. (See sidebar above entitled "Facts and Figures".) There seems to be little difference in the likelihood of obtaining a conviction where the primary evidence is introduced relative to cases where wiretap evidence is *used* but *not introduced* in court. The average conviction rate over five years for cases where the wiretap is introduced is 82.1%.[1] Where the wiretap evidence is not used in court, the average conviction rate is 90.1%[2], an increase of eight per cent. Where wiretap evidence is not introduced at trial, the police actually have a greater chance of obtaining a conviction. In these cases, the police may engage in the interception of private communications even if the judicial authorization for the wiretap was obtained on the basis of fraudulent or misleading evidence.

Consequently, it is not surprising that from 1989 to 1993, of the total number of criminal charges brought using information obtained through a wiretap, an average of 54 per cent never introduced the wiretap evidence at trial.[3] This complete lack of subsequent judicial examination of more than half of wiretap authorizations suggests that they are being used *primarily* as investigative tools. In these cases, the defence has no way of challenging the legality of the wiretap or even knowing of its existence.[4] If judicial control over electronic eavesdropping is to be taken seriously, some steps must be taken towards allowing the defence to question the method by which police investigations have been conducted.

III. THEORETICAL FRAMEWORK - PURPOSE OF EXCLUSION

There are four main arguments raised by those who seek to justify rules which govern the exclusion of evidence at trial. First, exclusion of evidence at trial may control police behaviour by deterring future misuse of wiretaps. Second, exclusion may guarantee due process and the fairness of the trial. Third, the primacy of the right against unreasonable invasions of privacy might be ensured if the evidence is excluded. Finally, exclusion may preserve the integrity of the administration of justice. However, some of these arguments may be problematic or even tangential to the goal of protecting individuals from illegal invasions of privacy. Understanding the strengths and weaknesses of the different rationales gives us a better grasp on the means by which we attempt to protect our right to privacy and the interests at stake in doing so.

i) Control of Police Behaviour

The basis of this rationale for exclusion is that it signals to the police that unlawful investigations

will not be tolerated. This justification is common in the United States. According to this argument, even if no evidence directly obtained from an unlawful investigation is entered into court, *any* evidence which flows from the initial illegal act should be excluded.[5] To turn a blind eye to illegal wiretaps would be an indication that the courts sanction unlawful conduct so long as they are not directly confronted with the ill-gotten gains.

Surveys done on the effectiveness of excluding evidence as a deterrent to police misbehaviour show ambiguous results. Some surveys indicate that exclusion promotes police caution in observing individual rights, while others indicate the effect of exclusion is limited at best.[6] At the very least, it cannot be proven that exclusion works as an effective deterrent. But conversely, "it is not unreasonable to suggest that

an inclusionary rule such as we [had] in Canada positively encourages illegal and improper police practices."[7] Regardless of whether the exclusion has a noticeable effect on police conduct, strict rules of admissibility and legality communicate clear guidelines to police on how to appropriately conduct an investigation.[8] If the police choose in practice to ignore clear guidelines, then the problem is indeed beyond the reach of mere evidentiary rules to correct. However, the possibility that police may choose to ignore the law on a regular basis does not justify the courts remaining silent as to police conduct.

ii) Due Process and Fairness of Trial

The exclusion of evidence which the police have obtained unlawfully is supposed to preserve the fairness of the trial process. Such an exclusionary rule is often said to restore the status quo preceding the unlawful surveillance. In *R.* v. *Duarte* the Supreme Court of Canada pointed out that there is a "much more insidious danger" in intercepting a communication if a "permanent electronic recording" is made[9]. Unlike many investigative techniques in which illegality threatens to produce unreliable evidence[10], wiretaps provide a foolproof informer. The insidious danger to which Justice LaForest must have been referring is precisely that too much accurate information will be available. Unlike informants, wiretaps may be preserved indefinitely, and remain as credible as the day they were recorded. The database of personal information which authorities could compile about an individual would not only facilitate the accumulation of relevant evidence for trial, but would facilitate virtually any manipulation of the individual which an immoral police officer might devise. With informants, the police knowledge base is limited to that which the individual chooses to disclose to a few persons; a wiretap can collect all information which the suspect ever expresses. It seems, therefore, that the point that wiretaps are more insidious and should be excluded if they are illegal goes more to the protection of the need for privacy. Thus, neither due process nor the fairness of the trial are advanced through an exclusionary rule.

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However, it can be argued that due process is advanced if the exclusion of evidence at trial has an effect on judges who authorize wiretaps. Due process might in this manner be protected at the earlier stage of the application for a wiretap authorization. Correct attention at this stage must be given to an individual's privacy, as a wiretap authorization can be more intrusive than a physical search.[11] This intrusiveness arises because a wiretap authorization cannot specify the precise item sought and must therefore permit a much broader search. Also, the invasion of privacy is much less likely to be noticed by the suspect and thus he or she cannot protest its illegality, if at all, until long after the right has been extensively violated. Therefore, a wiretap ought only to be used as an investigative mechanism of last resort.[12] However, the exclusionary rule operates to the detriment of the prosecutor only. Since the judge granting the authorization has no particular interest in securing a conviction, he or she will not be influenced by such a rule when deciding whether to authorize a wiretap.[13] Thus, the exclusion of derivative evidence

cannot protect due process on this basis either.

In fact, fairness of the trial itself may not even be compromised by the use of wiretaps. For example, the fairness of the trial can only be affected by the evidence actually introduced there. Is the trial made unfair by the introduction of evidence discovered as a result of an initial unlawful act? If the evidence would not have existed if the police had not acted unlawfully, then it is unfair to the accused to admit it. A wiretap, however, can

be distinguished from other evidence in two ways: it cannot actually bring into existence any new evidence other than the recording itself; and, it is a foolproof informant.[14]

The first issue, where no new evidence is brought into existence, has been (uneasily) dealt with by Canadian courts through a distinction between "real" (pre-existing) evidence and "constructed" evidence. It is often said that real/pre-existing evidence should be admissible because it does not owe its physical existence to an unlawful act. This reasoning applies to real evidence which is obtained directly from the illegal act (*e.g.* what is found during an illegal search), and real evidence which is obtained indirectly from the illegal act (derivative evidence). (A gun found as the result of an illegal confession, for example, would be derivative evidence.) This analysis, which generally has been accepted by the Canadian courts, suggests that the inclusion of real evidence does not affect the fairness of the trial.[15]

Secondly, since a wiretap does not create new physical evidence or new witnesses, allowing police to gather more information brings more of the truth to the attention of the court. One cannot argue that it is unfair for the court to know too much of the truth (unless its probative value is grossly outweighed by its prejudicial effect, in which case it should be excluded on that ground).[16] To limit the evidence which the prosecution can gather does not make the trial any more fair — unless one believes the trial to be an elaborate game of hide and seek. Making information more difficult to obtain does not benefit an innocent accused, since it reduces the chances of the court arriving at a correct verdict. By making an investigation more onerous, the only beneficiary appears to be the guilty person who happens to be good at concealing his or her crime.

Thus, we have seen that the exclusion of evidence does not protect due process or the fairness of the trial in the case of evidence derived from electronic eavesdropping. Exclusion cannot cure the misuse of the information obtained, nor can it correct the use of wiretaps when another means of investigation is preferable. In particular, exclusion cannot protect the fairness of the trial since it only increases the chances of a correct verdict. It must be concluded, therefore, that ensuring the fairness of the trial is not actually a goal of the exclusionary rule where derivative evidence is concerned. Instead, the arguments usually made under the guise of guaranteeing the fairness of the trial have much more to do with guarding against the insidious danger of police misconduct overrunning the individual's need for privacy.

iii)Primacy of the Right to Privacy

Canada has followed the United States in constitutionalizing the right to be secure against unreasonable searches.[17] Presumably, the right to privacy in this context has been raised to the same

level as the government's constitutional right to enforce its criminal laws.[18] As a legal right, there is an inherent value in the right to privacy being inviolate:

> The guarantees to legal rights are breached each time that a Court ignores the sanctity of a right and considers only the evidentiary result. A guarantee secures one from risk; the extent to which one may rely on it is diminished each time it has no consequent effect.[19]

The introduction of derivative evidence at trial does not, in itself, threaten the individual's right of privacy; the method of obtaining the evidence has already violated the right. But how should the courts ensure that appropriate effect is given to the guaranteed right to privacy? Should a person whose rights have been violated be compensated? It is simplistic to argue that the exclusion of derivative evidence provides full compensation by restoring the accused to his or her pre-violation position. Unlike torts or contractual breaches, placing a value on an invasion of privacy by attempting to restore individuals to their original position serves only to devalue the invasion. As compensation for an infringement of a right to privacy, the higher probability of receiving an acquittal is no more appropriate than a cash award. Human rights have an inherent value which has nothing to do with criminal guilt or innocence. Thus, excluding evidence is only partial compensation for a breach of a person's right to privacy. It removes some of the consequences of the breach rather than making up for the value of the right itself.

Inadequate means of compensation, however, do not justify denial of compensation and so, once the right is violated, a remedy must be sought. Section 8 of the Charter of Rights and Freedoms does not guarantee a right to have the police stripped of the fruits of an unreasonable search. It guarantees security against such searches in every respect. The ideal remedy is to ensure that such a breach does not happen. To do this, police conduct must be controlled before the breach. Once breached, however, the right to be secure cannot be restored. It is artificial to attempt to precisely quantify the consequences. If one wants to compensate for a lost right, the causal chain following it is irrelevant. If an arbitrary rule is needed to quantify the loss, automatic acquittal would be a step closer to compensating for something priceless and would save the courts enormous time and expense. Simply put, the exclusionary rule as a remedy for the violation of a human right is arbitrary in that it is unrelated to the loss of the right. If the courts were to attempt to compensate the victim for his or her legal injury, a much larger inquiry into the circumstances would be appropriate. This is not a goal of the exclusionary rule. The rule must seek to assert the right by forcing police to respect it in the first place.

iv) Preserving the Integrity of the Administration of Justice

Since the purpose of an illegal search is to obtain evidence, its success depends on the courts' reaction. For the courts to involve themselves in an unlawful act would make the court an accomplice to precisely that which they are charged with condemning. It would be incongruous for the state to condone illegal conduct on the part of the police, and at the same time to require adherence to the law by others. Such incongruity would seriously undermine the perceived legitimacy of the courts[20] and would send the wrong message to the public: that it is acceptable to break the law when the end justifies the means.

The courts must ensure not only that police misbehaviour does not soil the appearance of purity in the judicial process, but also that such misbehaviour is not permitted.[21] Legitimization of the courts is only a valid objective if it is achieved through substantive legitimacy. That is, the courts must do as much as possible to protect the legal rights of which they are the guardians, and not simply appear to protect those rights. Thus, the question of whether or not to exclude derivative evidence must be approached with a view to deterring as much unlawfulness as possible, whether inside or outside of the courtroom.

A failure to exclude evidence derived from an illegal wiretap will not always impinge on the integrity of the administration of justice.[22] The argument that exclusion would bring the administration of justice into disrepute would only apply to those situations where the police did not know, and could not be expected to know, that they were violating a right of the accused. Thus, not all Charter violations will require exclusion of derivative evidence. Exclusion will be appropriate only if the police conduct was either deliberate or negligent and so could be deterred.

There is yet another argument in favour of inclusion of the evidence. The freeing of an *obviously* guilty person on the basis of the "operation of a technical rule of evidence" not related to the offence or the accused's guilt or innocence would bring the administration of justice into disrepute.[23] The argument has been made that "[r]outine exclusion of evidence necessary to substantiate charges may itself bring the administration of justice into disrepute".[24] However, such an argument, based as it is on the premise that there will be "routine" violations of constitutional rights by law enforcement officials (a premise one hopes is ill-founded) is not a justifiable reason for denying the exclusion of evidence. While it is clear the liberation of criminals is not likely to be popular, the characterization of the deterrence of deliberate police violations as a "technical rule of evidence" needs to be contested. The argument that criminals must be convicted at all costs has "too much of the philosophy of the end justifying the means."[25]

Canadian common law has long recognized several social and legal imperatives overriding society's need to convict the guilty; for example, attorney-client privilege.[26] In granting legal rights, we recognize that these imperatives are a cost society should bear in order to justify the title "rights" and give moral authority to the law.[27] Furthermore, allowing judges to decide whether or not society should bear this cost on a case-by-case basis would bring the administration of justice into even greater disrepute. To argue that we must not acquit the "obviously guilty" clearly violates the presumption of innocence,[28] precisely the value which our judicial system is supposed to protect against popular opinion.

The administration of justice, even if we incorrectly reduce this concept in scope to consider only the trial process,[29] will be brought into disrepute by a failure to apply a strict exclusionary rule to deliberate or negligent violations of individuals' rights by law enforcement officials. In order to preserve the legitimacy of the courts in the long term, rather than merely in tomorrow's news, they must preserve their role as an impartial defender of the law, broadly understood. To enforce one law by allowing another to be broken hearkens back to the days when there were no codified legal rights. It ensures that "justice" is done in the case in question, while "Justice" remains a privilege reserved for a select few. To allow the right to privacy to be overridden if a judge feels it is politically expedient to do so is contrary to the fundamental principle of the rule of law. The protection of the right in this way becomes merely a discourse to conceal the fact that the right does not exist at all.

v) Conclusions with Respect to the Goals of Exclusion

We must conclude that the exclusionary rule rests on two solid theoretical premises. First, the courts must act to deter unlawful police conduct. Second, failure to do so would seriously harm the courts' substantive, and thus perceived, legitimacy. The fairness argument is merely an outgrowth of these two goals. Further, exclusion of illegally obtained evidence cannot fully compensate an individual's lost privacy. The only instance in which derivative evidence should not be excluded is if the police conduct in question could not have been deterred. Thus, admission of the evidence is appropriate only if the police were reasonable in their efforts to respect the rights of the suspect. With this framework in mind, we might now proceed to assess the treatment of derivative evidence in our legal system.

IV. CANADIAN LAW UNDER THE CHARTER

Section 24(2) of the Charter deals with the exclusion of evidence. It states that:

> Where ... a court concludes that evidence has been 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 into the proceedings would bring the administration of justice into disrepute.

Given that an illegal wiretap is an unreasonable search in violation of section 8,[30] evidence obtained from such a violation may be ruled inadmissible.[31] It will be helpful to recall in this examination that only *real* evidence may be derived from a wiretap, and so the treatment of coerced statements and the like will only peripherally be noted. With this caveat, we can proceed to consider two issues: first, what evidence has been considered derivative under the Charter? and second, what are the circumstances

in which its admission is said to bring the administration of justice into disrepute?

i) What evidence is derivative under the Charter?

It is not immediately clear what evidence is covered by the words "has been obtained in a manner that infringes or denies any rights or freedoms. . ." in section 24(2). Early Supreme Court of Canada consideration of the scope of evidence covered by this section provided little in the way of guidance. In *R.* v. *Therens*, only Justice McIntyre gave much consideration to the issue, finding that it was "sufficient if the infringement or denial of the right or freedom has preceded, or occurred in the course of, the obtaining of the evidence."[32] McIntyre's exclusion provides authorities with the incentive to conduct themselves in an extremely careful manner when their acts could result in the "intrinsic harm that is caused by a violation of a Charter right." However, he proceeded to suggest that "relative remoteness" may be a necessary qualification on the exclusion of derivative evidence. Why this criterion is chosen, unrelated as it is to the intrinsic harm done to the right, is not explained.

Early lower court decisions required a "causal nexus" between the violation of the right and the discovery of the evidence. This requirement prevented almost all derivative evidence from falling within the exclusionary scope of 24(2). A British Columbia Supreme Court trial judge initially identified the purpose of the exclusionary rule in a manner consistent with the arguments made above in this article, namely, that police deterrence is a duty of the courts in such matters. The reasons, from which the Crown appealed, stated:

> The fact is, the Courts, as well as other bodies, have been somewhat remiss in the past in castigating this very common form of search. [The officer] was doing, I am quite sure, what has been done for years, and has been accepted, either explicitly or implicitly by persons in authority. One thing the Charter has done, I think, is to make us all direct our attention to conduct that may or may not be acceptable in our society.[33]

However, a majority of the British Columbia Court of Appeal found that the methods used to conduct the search and the fact of actually finding the object were sufficiently unrelated. The court found that the evidence was not derived from the violation, admitting that the "distinction is a fine one."[34]

When the Supreme Court of Canada finally considered this point directly in *R.* v. *Strachan* Chief Justice Dickson, speaking for a unanimous court, stated that:

> [s]o long as a violation of one of these rights precedes the discovery of evidence, for the purposes of the first stage of s. 24(2) it makes little sense to draw distinctions based on the circumstances surrounding the violation or the type of evidence recovered.[35]

The rejection of the causal requirement was affirmed in *R.* v. *Black* the following year, which explained that causality was not a necessary connection between the violation and obtaining the evidence[36]. Although both Supreme Court pronouncements defined the scope of derivative evidence covered by section 24(2) quite broadly, they accepted McIntyre's view in *Therens* (above) that some degree of proximity was a requirement.

Proximity/remoteness is not the only factor examined by the courts. The test applied in *R.* v. *Collins* and *R.* v. *Clarkson* allows real evidence to be admitted despite the existence of section 24(2). In those cases, the Supreme Court decided that real evidence should generally not be excluded.

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Put more succinctly, the first factor of proximity between the violation and the discovery of the evidence guides what derivative evidence may be excluded. The second factor of the pre-existence of the evidence determines whether real evidence will be excluded. The evidence with which this paper is concerned is *real* evidence which is *derived* from a wiretap. However, when the two factors of proximity and pre-existence of the evidence are taken together, it is unclear whether the scope of derivative evidence excluded by section 24(2) extends to real evidence. If it is accepted that the only real purpose of the exclusion of derivative evidence should be to deter police misconduct, the

considerations in the *Collins* and *Clarkson* cases of whether or not the evidence pre-existed the violation should be irrelevant.[37]

Recently a more defensible distinction has been made which is based on the concept of "inevitable discovery."[38] The principle of inevitable discovery holds that evidence should not be excluded if it would have been discovered even without the constitutional violation. This principle has been strengthened by cases in which physical evidence was found to fall within the scope of 24(2) protection because it did not exist *as evidence* prior to the Charter violation.[39] The inevitable discovery principle makes a distinction between evidence which was illegally *discovered* by the police, and evidence which was illegally *created* by the police. The principle holds that it is not unfair to introduce into court evidence which was merely discovered illegally, but that it would be unfair to introduce evidence which was actually created by the violation. However, such a distinction is still not consistent with the purpose of exclusion suggested in this article. That is, deterring police conduct which is unconstitutional should be the goal of exclusion. The police conduct is not made any more constitutional or acceptable if the evidence would have been discovered were it not for the violation. In fact, deterrence is more likely to be effective if the police stand to lose evidence which they otherwise would certainly have obtained.

Charter jurisprudence relating to which evidence will fall within the scope of 24(2) protection seems initially to include derivative evidence. This protection has been limited by a proximity requirement, which serves no purpose other than to limit the deterrent effect of exclusion. The requirement also leads courts to conduct an artificial exercise in determining remoteness. The protection may be limited by a further requirement that excludable evidence must be intangible. If this is the case, there is almost no deterrence imposed by section 24(2) on the illegal use of wiretaps as an investigatory technique. Police may not use the wiretap to extract a confession from the suspect, but its use in locating real evidence may be completely free of judicial scrutiny. Thus, it is to be hoped that the courts will do away with this distinction altogether.

ii) When is the administration of justice brought into disrepute?

With the advent of the Charter, the relevant question for the courts in relation to the administration of justice became whether they would be forced to *expressly* approve of disreputable police conduct. However, the question of whether the conduct itself would bring the administration of justice into disrepute was not actively pursued.[40] Instead of considering how shocking the police misconduct was, the Supreme Court of Canada in *Collins* clearly stated that the only disrepute to be considered was that which might result from the court's exclusion of the evidence, taken together with the seriousness of the offence.[41] This development has been the source of enormous confusion, since it bars most consideration of police misconduct when applying the 24(2) exclusionary rule. However, as has been argued above, the deterrence of police misconduct is the only purpose effectively served by the exclusion of derivative evidence.

Although early cases had focused on punishing "deliberate, wilful or flagrant" violations of the Charter,[42] *Collins* expressly reduced the deliberateness of the violation to a minor consideration to be weighed along with the disrepute resulting from the acquittal of a serious offender. However, the decision in *Collins* to adopt a fragmentary consideration of police and court conduct has been called problematic, particularly because Justice Lamer proceeded to base that decision primarily on the grounds of reprehensible police conduct.[43]

When considering real evidence which would not have been discovered but for the illegally obtained information, good faith conduct in obtaining it emerged for a time as a determinative factor. In *R.* v. *Simmons*[44] and *R.* v. *Jacoy*[45], the Supreme Court adopted the view that real evidence could be excluded having regard to nothing but the wrongfulness of police conduct. It seems, however, police negligence will only be grounds for exclusion[46] if it was gross negligence[47] or if the behaviour was part of "an established pattern of conduct."[48] This emphasis on deterrable police conduct is in keeping with what has been argued above regarding the purpose of the exclusionary rule. It is to be hoped that the emphasis placed on deterring police conduct in *Simmons* and *Jacoy* continues and remains a separate question from that of the effect of exclusion on the trial itself[49].

The issue which continues to confuse this useful consideration, however, is that of the "fairness of the trial." As has been argued above, this factor is not directly at issue in the case of evidence derived from that which is illegally obtained; the more the finder of fact knows, the more likely it is the finder of fact will be able to deliver the correct verdict. However, some illegally obtained evidence is said to "render the trial unfair, for it did not exist prior to the violation."[50] The majority of the Supreme Court of Canada in *R.* v. *Leclair* excluded "any evidence that could not have been obtained but for the participation of the accused in the construction of the evidence."[51] If this principle is supposed to flow from the protection of an individual against compelled self-incrimination, the concept has been stretched enormously so as not to require any consideration of whether the evidence is indeed incriminatory. Rather than granting "fairness" to the individual before them, the courts should be ensuring that police act fairly towards all suspects. As the Law Reform Commission of Canada has stated:

> . . . the problem of illegality is more than simply the sum of those individual conflicts brought before the courts. Rather, it may involve patterns of practice within police and judicial organizations as a whole.[52]

Instead, the Supreme Court has followed a fallacious line of reasoning and decided that if the evidence would inevitably have been discovered, penalizing the police would not have a deterrent effect.

In Canada, courts tend not to discuss the issue of police deterrence (although they may consider it as one factor among many in the test for exclusion) since it was so clearly ruled out as a goal of exclusion in *Collins*. The manner in which police investigations are conducted will bring the administration of justice into disrepute only if the accused has participated in producing the evidence, or if the evidence was obtained through an extremely serious violation of the accused's rights. The latter consideration, enunciated in *Simmons* and *Jacoy*, is a step towards attaining the goal of forcing police to respect the Constitution. However, the former consideration leads to enormous confusion by seeking to protect fairness to the individual on a case-by-case basis, with the effect that fairness to all accused is undermined in the long term by the courts' failure to prevent constitutional violations before they occur. Thus, rather than engage in absurd catalogues of as many as eighteen factors which may be relevant to the decision on exclusion,[53] courts should move instead towards making the categorical suppression of illegal police conduct its goal. This is accomplished by focusing on wilful or negligent conduct on the part of police.

IV. OBSERVATIONS

In recent years Canadian police have been making extensive use of wiretaps as an investigative tool.[54] There is both instrumental and inherent value in protecting the right of Canadians to control the information that becomes known about them. Thus, there is a need to effectively open police use of these wiretaps to judicial scrutiny. There must be a context in which an accused can at least make the case that his or her right to privacy has been infringed. Direct judicial monitoring of all wiretaps is simply not feasible. However, scrutiny of authorizations in those cases where police eventually lay charges is both practical and just. A *voir dire* to inquire into the means of investigation can be a great expense to the court,[55] but the trial itself is an even larger expense. The inquiry into guilt or innocence is such a fundamental right that Canadian society has chosen to expend the resources on a trial. The right to privacy is no less fundamental and requires significantly less expense. Society would be grossly remiss in its protection of citizens were it not to protect individuals' privacy for financial reasons.

The exclusion of evidence is an effective means of protecting this right if correctly applied with a view to its purpose. That purpose is to control police behaviour. This behaviour must be controlled not only because the law enforcement arm of the state is no more above the law than any other citizen, but because the protection of rights requires an attempt to prevent violations before they occur. The right to privacy must be protected before it is violated, by deterring police behaviour that will bring the administration of justice into disrepute. The administration of justice (including both the courts and the police) must be seen as protecting not only the innocent victim of crime, but the victim of violations of constitutional rights. The latter protection will only be effective if we protect the guilty along with the innocent.

The Charter of Rights and Freedoms sought to protect the right to privacy through section 8, in

part, by excluding evidence under section 24(2). The scope of derivative evidence within this exclusionary clause has been variously interpreted, but seems to be fairly broad. However, considerable confusion has resulted from Supreme Court decisions stating that the relevant issue in exclusion is the fairness of the trial. This confusion cannot be resolved easily since, simply put, the fairness of the trial is not affected by the exclusionary rule. The principal factor in the fairness of the trial has been the question of whether the evidence was created by the illegal act. In excluding only this type of evidence, the trial is condoning the police overriding rights if the conduct is merely an investigative shortcut to further evidence. The violation of a fundamental right is forbidden if anything new is created, but gets reduced to a technicality if done for the purposes of expediency. However the evidence is obtained, once it is obtained the damage is done. The only effective way to prevent that damage from being done is to deter those who knowingly cause it.

Therefore, the approach adopted by the Supreme Court in *Simmons* and *Jacoy* is a sound one. In those cases the court decided that real evidence could be excluded having regard to nothing but the wrongfulness of police conduct. The single goal of the exclusion of derivative evidence should be police deterrence, and the test of what evidence should be excluded to accomplish this is a relatively simple one. The courts should merely inquire whether the violation was done in a manner such that the officer knew, or ought to have known, that a constitutional right was being violated. Such an inquiry allows a certain discretion to the courts. It is not a discretion as to whether there is a great enough chance that the accused is guilty and that the evidence ought not be excluded. Rather, the inquiry focuses on whether society should accept this sort of police behaviour. Such a focus is in the interests of the administration of justice since it would allow citizens to go about their business more confident that their rights will not be trodden upon at the drop of a hat. Furthermore, it would present the police and the public with understandable and defensible criteria of what is, and what is not, going to be found to be admissible evidence. Finally, it would allow the courts to go about their legitimizing function, confident in the knowledge they are admitting evidence and convicting criminals as often as possible without victimizing the innocent and encouraging the police to break the law.

Clearly, these are desirable goals for the exclusionary rule, and one can only hope that our highest court picks up on these principles. Although they have not been expressly excluded, we have seen that the bulk of the court's analysis has been focused elsewhere. These important goals must be reaffirmed quickly before the exclusionary rule, which we have constitutionally enshrined, becomes an incomprehensible and unjustifiable maze of rules.

ENDNOTES

1 Canada, Solicitor General, *Annual Report on the Use of Electronic Surveillance, 1993* (Ottawa: Supply and Services Canada, 1995) Table 13 at 24.

2 See note 1, Table 14 at p. 25.

3 Table I (see sidebar entitled "Facts and Figures" on page 22) shows a total of 1829 cases over 5 years in which a wiretap had been used in the criminal investigation. In only 864 of these cases was the wiretap itself ever introduced as evidence.

4 *R.* v. *Chaplin*, [1995] 1 S.C.R. 727.

5 D.A. Wollin, "Policing the Police: Should *Miranda* Violations Bear Fruit?" (1992) 53 Ohio St. L.J. 805 at 843.

6 Exclusion as an effective deterrent: M.W. Orfield, "The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers" (1987) 54 U. Chi. L. Rev. 1016, cited in M.T. MacCrimmon, "Developments in the Law of Evidence: The 1986-87 Term" (1988) 10 Supreme Court L.R. 225 at 231n.

Exclusion as ineffective: J.D. Hirschel, *Fourth Amendment Rights* (Lexington: D.C. Heath, 1979) cited in Law Reform Commission of Canada, *Police Powers – Search and Seizure in Criminal Law Enforcement* (Working Paper 30) (Ottawa: Supply and Services Canada, 1983) at 309.

7 R. Penner, "Illegally Obtained Evidence and the Right to Privacy: Some Policy Considerations" in D. Gibson, ed., *Aspects of Privacy Law* (Toronto: Butterworths, 1980) at 358.

8 Wollin, see note 5 at 857-58.

9 *R.* v. *Duarte*, [1990] 1 S.C.R. 30, LaForest J.

[10] S.J. Whitley, *Criminal Justice and the Constitution* (Toronto: Carswell, 1989) at 339. For example, confessions extracted prior to the right to counsel may be coerced and thus are not conclusive of guilt.

[11] L. Schwartz, "On Current Proposals to Legalize Wiretapping" in M.G. Paulsen, ed., *The Problems of Electronic Eavesdropping* (Philadelphia: ALI-ABA, 1977) 11 at 12.

[12] *R.* v. *Playford* (1987), 40 C.C.C. (3d) 142 (Ont. C.A.).

[13] Law Reform Commission of Canada (Working Paper 30), see note 6 at 309.

[14] S.J. Whitley, *Criminal Justice and the Constitution* (Toronto: Carswell, 1989) at 339.

[15] J. A. Fontana, *The Law of Search & Seizure in Canada* (Vancouver: Butterworths, 1992) at 814; *R.* v. *Debot*, [1989] 2 S.C.R. 1140; *R.* v. *Clarkson*, [1986] 1 S.C.R. 383; *R.* v. *Collins*, [1987] 1 S.C.R. 265; *R.* v. *Black* [1989] 2 S.C.R. 138.

[16] *R.* v. *Wray*, [1971] S.C.R. 272.

[17] See section 8 of the Canadian Charter of Rights and Freedoms.

[18] See section 92(14) of the Constitution Act, 1982.

[19] Whitley, see note 14 at 337.

[20] Penner, see note 7 at 355.

[21] M. Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (Toronto: Wall & Thompson, 1989) at 143.

[22] *Collins*, Lamer J, see note 15.

[23] Otto Lang, Minister of Justice, *House of Commons Debates* (27 November 1973) at 8205 in Penner, see note 7 at 357.

[24] *R.* v. *Strachan* (1988), 67 C.R. (3d) 87 at 109 (S.C.C.), Dickson C.J.

[25] *R.* v. *Hogan*, [1975] 2 S.C.R. 574 at 597, Laskin C.J.

[26] Penner, see note 7 at 360.

[27] T. Quigley and E. Colvin, "Developments in Criminal Law and Procedure: The 1988-89 Term" (1990) 1 Supreme Court L.R. (2d) 187 at 236.

[28] F. Chevrette and A. Morel, "La protection constitutionelle contre les abus de la police" in *Droits de la police: actes du colloque conjoint des Facultés de droit de l'Université de Poitiers et de L'Université de Montréal tenu à Poitiers en mai 1988* (Éditions Thémis: Poitiers, 1990) at 201.

[29] C.A. Lachance, "L'exclusion de la preuve illégalement obtenue et la Charte" (1984) 62 Can. Bar Rev. 278 at 279 citing F. McGarr, "The Exclusionary Rule: An Ill Conceived and Ineffective Remedy" (1961) 52 J. Crim L.C. & P.S. 266 at 267.

[30] *Duarte*, see note 9.

[31] *Collins*, Lamer J., see note 15.

[32] *R.* v. *Therens*, [1985] 1 S.C.R. 613 at 649.

[33] *R.* v. *Cohen* (1983), 33 C.R. (3d) 151 at 158 (B.C.C.A.).

[34] See note 33 at 162-63.

[35] In [1988] 2 S.C.R. 980 at 1005.

[36] See note 15 at 162-3.

[37] Quigley and Colvin, see note 27; R.J. Delisle, "*Collins*: An Unjustified Distinction" (1987), 56 C.R. (3d) 216.

[38] *R.* v. *Mellenthin*, [1992] 3 S.C.R. 615; *R.* v. *Wise*, [1992] 1 S.C.R. 527.

[39] *R.* v. *S.(R.J.)*, [1995] 1 S.C.R. 451.; *R.* v. *Pohoretsky*, [1987] 1 S.C.R. 945; *R.* v. *Erickson* (1989), 49 C.C.C. (3d) 33 (B.C.C.A.).

[40] The "community standards" test was quickly rejected as an interpretation of the Charter version of the administration of justice. See *R.* v. *Simmons* (1984), 39 C.R. (3d) 223 (Ont. C.A.), affirmed [1988] 2 S.C.R. 495; see also *Therens*.

[41] In 56 C.R. (3d) 193 at 213, Lamer J.

[42] *Therens*, S.C.C. unanimous on this point.

[43] MacCrimmon, see note 6 at 232-33.

[44] See note 40 at 535.

[45] *R.* v. *Jacoy* (1988), 66 C.R. (3d) 336 at 341 (S.C.C.).

[46] *Strachan*, see note 24.

[47] *R.* v. *Dyment* (1988), 66 C.R. (3d) 348 at 369 (S.C.C.).

[48] *R.* v. *Genest* (1989), 45 C.C.C. (3d) 385 at 406-07 (S.C.C.).

[49] *R.* v. *Greffe*, (1990) 75 C.R. (3d) 257 (S.C.C.), Lamer J.; *R.* v. *Kokesch* (1990), 1 C.R. (4th) 62 (S.C.C.).

[50] *Collins* and *Debot*, see note 15.

[51] *R.* v. *Leclair* (1989), 67 C.R. (3d) 209 at 220-21, Lamer J.

[52] Law Reform Commission of Canada, (Working Paper 30), see note 6 at 309-10.

[53] *R.* v. *Gladstone* (1985), 22 C.C.C. (3d) 151 (B.C.C.A.) .

[54] See Section II, "The Scope of the Problem", at the beginning of this article.

[55] A *voir dire* in these circumstances would be a hearing to determine whether certain evidence, such as confessions or wiretaps, may be legally presented as evidence to the trier of fact, (i.e., the jury, or the judge if there is no jury).