

Shifting ground: New approaches to Charter analysis in the criminal context

Over the last few years, the Supreme Court of Canada has released various decisions dealing with the scope and protection of Charter rights in the criminal context. The topics considered include the right to silence²; the principle against self-incrimination³; the right to full answer and defence at trial⁴; and the right to be secure against unreasonable search and seizure.⁵ These judgments answer specific legal questions, but some have a broader significance. Certain decisions disclose subtle, yet discernible, shifts in the court's more general approach to the analytical framework governing the assessment of Charter claims.

At first blush, some of the developments may appear inconsequential—the axis has turned ever so slightly. Yet, a shift in the foundation, however slight, can effect dramatic change. The court has revisited and, to some extent, redefined the relationship between s. 7 and other provisions of the Charter. It has further entrenched the role of third-party rights—including equality rights—in the constitutional equation. It has recognized a discrete and freestanding power to exclude evidence under s. 24(1) of the Charter. Each of these trends has the potential to influence and alter the course of future litigation. The following will explore these developments primarily as they arise in two recent cases: *R. v. Mills*⁶ and *R. v. White*.⁷

R. v. MILLS: SECTION 7 AND THE BALANCING OF INTERESTS

In *R. v. Mills*,⁸ the Supreme Court of Canada upheld the constitutional validity of ss. 278.1 to 278.9 of the *Criminal Code*. These provisions, enacted under Bill C-46, govern defence applications to access private records of complainants

BY RENEE M. POMERANCE¹

Renee Pomerance is counsel for the Crown Law Office—Criminal Department, Ministry of the Attorney General.

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in sexual offence prosecutions. This has long been a contentious area of litigation. In the earlier case of *R. v. O'Connor*,⁹ the Supreme Court of Canada had set out a number of principles that were to govern defence access to sensitive records, including therapeutic records. The court was divided on the approach to be taken, with a 5:4 majority represented by Lamer C.J. and Sopinka J. It was not long before Parliament waded into the debate, conducting consultations and ultimately enacting Bill C-46. The statutory regime attracted controversy from the outset. Critics attacked the legislation on the basis that it reflected the dissenting, as opposed to the majority, voice in *O'Connor*. Indeed, the

scheme enacted by Parliament was closely aligned with the dissenting judgment of Madam Justice L'Heureux Dubé. For a time, the fate of the scheme was unclear. Lower courts were divided on whether the provisions could survive Charter scrutiny. This debate was resolved when the issue came back before the Supreme Court of Canada in *R. v. Mills*. In *Mills*, the court acknowledged that the legislation deviated from the majority ruling in *O'Connor*.¹⁰ Nonetheless, the court found that the *O'Connor* regime was not the only route to a fair trial. The court observed that there may be a range of permissible options that can satisfy constitutional standards. Ultimately, it held that the records production regime, enacted by Parliament, struck a constitutional balance between the competing interests at stake in this context.

Mills derives its most obvious significance from its resolution of the "records debate," or, at least, certain aspects of it. Yet, other features of *Mills* extend beyond this particular battleground. The court's comments concerning the scope of s. 7 of the Charter; its interrelationship with other Charter rights; and the role of third-party rights in the constitutional equation, all have ramifications for a broad range of constitutional disputes. Accordingly, while the following will discuss *Mills*, it will endeavour to say relatively little about the terms and operation of Bill C-46.

The relationship between ss. 7 and 1 of the Charter

The majority of the court in *Mills* affirmed that s. 7 of the Charter envisages a balancing of both individual and societal interests. It is well-settled that the ultimate question under s. 7 is

whether the impugned deprivation of life, liberty, or security of the person is in accordance with the principles of fundamental justice. The notion that societal interests have a role to play in the s. 7 analysis is not, itself, a startling proposition. The Supreme Court of Canada has, on various occasions, held that the principles of fundamental justice encompass not only the rights of the accused, but also the broader community interests represented by the state. However, *Mills* has modified this principle. Suddenly, and apparently for the first time, the court has distinguished between different types of societal interests. Some are relevant to the s. 7 inquiry; others are reserved for consideration under s. 1. Of further significance is the court's express assertion that the balancing of interests under s. 7 of the Charter is quite different from the balancing of interests under s. 1. The implication of this is potentially profound. If the balancing is substantially different under the two provisions, it is now at least conceivable that a law that offends s. 7 may be saved under s. 1. If this is so, *Mills* may have resurrected s. 1 of the Charter as a viable haven for Crown litigants who have failed to defend against a s. 7 challenge.

The Supreme Court of Canada has not always been consistent in defining the phrase "the principles of fundamental justice." In earlier years, the court was ambivalent over the extent to which societal interests could properly be imported into the s. 7 analysis.¹¹ For example, in *R. v. Swain*,¹² Chief Justice Lamer, writing for the majority, stated: "It is not appropriate for the state to thwart the exercise of the accused's right by attempting to bring societal interests into the principles of fundamental justice and to thereby limit an accused's s. 7 rights." On the authority of *Swain*, societal interests were open for consideration only under s. 1. Over time, this position evolved. More recent judgments have espoused the contrary view—the principles of fundamental justice encompass the interests of society as much as they do the interests of the

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individual. For example, in *R. v. Seaboyer*,¹³ McLachlin J., writing for the majority, stated: "The principles of fundamental justice reflect a spectrum of interests from the rights of the accused to broader societal concerns." In the later case of *Cunningham v. Canada*,¹⁴ McLachlin J., writing for the court, observed, "The principles of fundamental justice are concerned not only with the interest of the person who claims his liberty has been limited, but with the protection of society. Fundamental justice requires that a fair balance be struck between these interests, both substantively and procedurally." Other cases reflect a similar approach.¹⁵

The inclusion of societal interests in s. 7 had implications for s. 1. The respective provisions employed different tests. However, for all intents and purposes, the analyses were the same. Both provisions envisaged a balancing of the individual and state interests—usually the *same* individual and state interests. While Crown litigants paid token heed to s. 1 in defending legislation, the practical reality was that the argument advanced under s. 1 was often no different from the argument under s. 7. It was merely cloaked in different language. Certainly, it was difficult to imagine that the balancing exercises could yield different conclusions. The Supreme Court of Canada had often observed that a violation of s. 7 could rarely, if ever, be saved under s. 1. In *R. v. Heywood*,¹⁶ Cory J. affirmed, "This Court has expressed doubt about whether a violation of the right to life, liberty, or security of the person which is not in accord-

ance with the principles of fundamental justice can ever be justified, except perhaps in times of war or national emergencies." If societal interests were already weighed under s. 7, the effect was to neuter s. 1.

In *Mills*, the court revisited the dynamic between ss. 7 and 1 of the Charter, and appeared to strike a middle ground between the stark alternatives of the past. On the approach in *Mills*, societal interests *can* be considered under s. 7; but societal interests *are not entirely spent* under s. 7. This approach, while interesting, is of uncertain application. The court identified "several important differences between the balancing exercises under ss. 1 and 7."¹⁷ However, it is difficult to gauge just how these differences will manifest in practice. For example, the court noted as one difference that the claimant must establish a violation under s. 7, whereas it falls to the state to establish justification under s. 1. It is true that the sections impose different burdens. But, where Charter litigation is concerned, few cases are so close as to turn on the placement of the burden of proof. This is particularly so where the issue in question is the validity of a legislative scheme or a settled common law rule.

Other distinctions seem even more illusory. For example, the majority ruled that the *type* of balancing contemplated under s. 7 is different from that under s. 1. The court stated: "Unlike s. 1 balancing, where societal interests are sometimes allowed to override Charter rights, under s. 7, rights must be defined so that they

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do not conflict with each other.” In another passage, the court noted, “The most important difference is that the issue under s. 7 is the delineation of the boundaries of the rights in question, whereas under s. 1 the question is whether the violation of these boundaries may be justified.” Does this mean that s. 7 is designed to reconcile conflicting rights, while s. 1 is driven by a more combative or hierarchical approach? If so, this conflicts with the tenor and spirit of *Re Dagenais et al. and Canadian Broadcasting Corp. et al.*,¹⁸ in which the court generally rejected the “clashing titans” model, even as it related to s. 1. Moreover, as a practical matter, this distinction is largely semantic. One can construe a right narrowly because of a conflicting interest, or one can construe the right broadly and then override it. Either way, the scope of the right is limited and the end result is the same.

In any given case, context is an important factor, both in defining the principles of fundamental justice and in applying s. 1 justification. But the fundamental question remains: Where does s. 7 end and s. 1 begin?

Part of the difficulty is that it is somewhat artificial to partition societal interests. It is particularly difficult to draw clear and meaningful distinctions between the basic tenets of our legal system and the basic tenets of our democracy. There is, at the very least, a substantial convergence of the two. In identifying a discrete ambit for s. 1, the court in *Mills* relied upon *dicta* from *Oakes* and *Keegstra*. Yet, these cases must be viewed in context. In *Oakes*, the court was concerned with the presumption of innocence under s. 11(d) of the Charter. *Keegstra* dealt with freedom of expression under s. 2(b) of the Charter. These rights are, on their terms, very different from s. 7. Neither the presumption of innocence nor the freedom of expression guarantee are structured so as to permit an internal balancing of individual and societal interests. Any balancing must, by necessity, occur under

s. 1. The situation is quite different where the language defining the right contains its own internal modifier, such as “the principles of fundamental justice.”¹⁹ For this reason, neither *Oakes* nor *Keegstra* is particularly instructive in determining the distinction between s. 7 and s. 1. The more pertinent authority may be *Re B.C. Motor Vehicle Act*,²⁰ wherein Lamer J. (as he then was) pointed out that s. 7 is concerned with “principles which have been recognized by the common law, the international conventions, and by the very fact of entrenchment in the Charter, as essential elements of a system for the administration of justice which is founded upon a belief in the dignity and worth of the human person and the rule of law.” Framed in this way, the principles of fundamental justice are very closely linked to the values underlying a free and democratic society.

This leads to the final point. Even if the societal interests covered by ss. 7 and 1 are not identical, it is nonetheless difficult to imagine that a law that operates in contravention of s. 7 could be rescued by s. 1. If a law offends fundamental justice, it is unlikely to be justified on democratic grounds. Stated differently, democratic values, however important, are unlikely to be capable of supporting practices that are fundamentally unjust. Accordingly, while the Supreme Court of Canada has altered the framework of analysis governing the s. 7–s. 1 relationship, it remains to be seen what, if anything, flows from this aspect of *Mills*. It may generate little impact. However, it does represent a departure from earlier analytical models, and it may invigorate s. 1 advocacy on the part of the prosecution. If nothing else, the approach of the court in *Mills* will likely renew litigation on the relationship between ss. 7 and 1, an issue that had previously been settled. It is curious that the court chose to reopen this issue, all the more so in a case that did not require actual resort to s. 1 in order to uphold the legislation in issue.

The relationship between sections 7 and 8 of the Charter

Another aspect of *Mills* that merits some mention concerns the court’s clarification of the relationship between ss. 7 and 8 of the Charter. Simply put, the court affirmed that, where s. 8 is engaged—in the sense that there is a search or seizure—s. 7 adds nothing further to the constitutional analysis. This point flows quite naturally from the settled principle that ss. 8 through 14 of the Charter are merely illustrations of the s. 7 right.²¹ Section 8 addresses one specific component of the right not to be deprived of life, liberty, or security of the person except in accordance with the principles of fundamental justice.

Although the above principle was asserted in the *B.C. Motor Vehicle Reference*, there has been some uncertainty over the role of s. 7 in search and seizure cases. Some of this uncertainty stemmed from *R. v. Stillman*.²² The issue in *Stillman* was whether police seizure of hair samples and dental impressions had infringed the accused’s Charter rights. The collection of the biological samples clearly constituted a seizure for the purposes of s. 8, and the issue was analyzed on this basis. However, having concluded that the police actions violated s. 8, the court nonetheless went on to conduct an independent analysis under s. 7. In a separate, albeit brief, portion of the judgment, Cory J., for the majority, held: “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.” *Stillman* suggested that there was a need to conduct both a s. 7 and a s. 8 analysis in cases involving seizure of physical evidence.

This suggestion has effectively been countered by the reasoning in *Mills*. If anything, *Mills* indicates that the s. 7 analysis conducted in *Stillman* was superfluous. First, in *Mills*, the court affirmed the breadth of the protections afforded by s. 8. While s. 8 is fundamentally concerned with the protection of

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“privacy,” this concept has, itself, been given a broad and purposive interpretation. Privacy has been held to encompass a global constellation of interests that might be affected by police search or seizure.²³ In *Mills*, the court considered, at some length, the varied factors that are included in the ambit of s. 8. Significantly, these factors included *security of the person*, the very interest that had been given separate treatment in *Stillman*. To the extent that disclosure of therapy records threatened to interfere with security of the person, the court in *Mills* saw this as a matter for consideration under s. 8, as opposed to s. 7, of the Charter.

Furthermore, the court in *Mills* pointed out that, given the parallel nature of the analyses, compliance with s. 8 will invariably denote compliance with s. 7. This statement was recently relied upon by the court of Appeal for Ontario in *R. v. F.(S.)*²⁴ In *F.(S.)*, the appellant challenged the constitutional validity of the DNA warrant scheme—ss. 487.04 to 487.09 of the *Criminal Code*—arguing that the legislation violated the principle against self-incrimination under s. 7 of the Charter. On the basis of *Mills*, Finlayson J.A. found that the appellant’s reliance on s. 7 was misconceived. He stated that “our analysis of whether the legislation relating to DNA warrants is constitutional begins and ends with s. 8.” Self-incrimination is often considered under the ambit of s. 7, but this is generally in cases where s. 8 has not been triggered.²⁵ *Mills* and *F.(S.)* indicate that, where there has been a search or seizure, s. 8 of the Charter will serve as the proper and, arguably, exclusive tool for assessing whether the state action comports with Charter standards.

The role of third-party rights

Since the case of *Re Dagenais et al. and Canadian Broadcasting Corp. et al.*,²⁶ it has been accepted that Charter analysis must accommodate the rights of persons and entities who, while participants in the criminal process, are not traditional parties to criminal litigation. The constitutional rights of third par-

ties—be they complainants, witnesses, or the media—must be given proper consideration within the constitutional equation. *Dagenais* also established that, where conflict ensues, the rights of third parties are not automatically subservient to those of the accused. The “clash model” was rejected in favour of an approach that seeks to reconcile and accommodate competing interests. This accommodation model was applied by the Supreme Court of Canada in *R. v. O’Connor*,²⁷ and it has now been further entrenched as a result of *R. v. Mills*.²⁸ Indeed, it was the central and defining feature of *Mills*. The majority introduced the case by noting: “The resolution of this appeal requires understanding how to define competing rights, avoiding the hierarchical approach rejected by this court in *Dagenais v. C.B.C.*”

In *Mills*, there were various rights at stake: the accused’s right to full answer and defence under s. 7; the complainant’s right to privacy under s. 8; and equality rights as reflected in ss. 15 and 28 of the Charter. On the issue of privacy, *Mills* recognized the acutely sensitive nature of therapeutic records, and other private records arising out of confidential trust-based relationships. The majority stated: “The values protected by privacy rights will be most directly at stake where the confidential information contained in a record concerns aspects of one’s individual identity or where the maintenance of confidentiality is crucial to a therapeutic, or other trust-like relationship.” This statement is consistent with prior case law dealing with the informational privacy under s. 8 of the Charter. Section 8 protects a “biographical core of personal informa-

tion” that “tends to reveal intimate details of the lifestyle and personal choices of the individual.”²⁹

Few could dispute that there is an aura of privacy surrounding therapy records, given the highly intimate disclosures that tend to be made in this context. Nor is it surprising that these privacy interests were accorded constitutional status. Section 8 of the Charter would be triggered were the police to obtain access to this material. Privacy is equally threatened where access is sought by a private party—the accused—who is the subject of a prosecution, and who seeks a court order to this end. It is accordingly fitting and appropriate that complainants’ privacy interests be given full weight in the constitutional equation. That said, this trend—which commenced some years ago—reflects a gradual drifting away from the strict requirement of state action in s. 32 of the Charter. A discretionary order made by a court does not qualify as state action on the terms of s. 32.³⁰ But even where Charter rights are not directly triggered through this mechanism, the concept of Charter values has been used to ensure that discretionary court orders can be reviewed on constitutional grounds.³¹ This approach is now so firmly entrenched as to be unquestioned. It was simply a given in *Mills* that the complainant’s privacy rights would be assessed on an equal footing with the accused’s right to full answer and defence.

One wonders how far this trend will extend. Consider the case of *R. v. Godoy*.³² In *Godoy*, the Supreme Court of Canada held that the police were entitled to enter a dwelling house, without warrant, in order to investigate a discon-

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nected 911 call. The entry led to an arrest of the accused for a domestic assault. In concluding that the police entry was justified, the court affirmed the common law duty of the police to protect life and safety. Given the public safety concerns in *Godoy*, the outcome was not surprising. But in the course of his reasons, Lamer C.J. made certain comments of curious import regarding the extent to which *the accused's crime* affected the complainant's Charter rights of privacy. Moreover, the court appeared to undertake a comparative analysis. Entry was justified, in part, because the police interference with the accused's privacy rights was less egregious than the accused's interference with the complainant's privacy rights. Yet, this is not the type of comparison that has traditionally been permitted under the Charter. The actions of the police and the accused cannot be placed on the same footing. One group is bound by the Charter; the other is not. Moreover, the gravity of the crime has never determined whether there has been a breach,³³ though it is a relevant factor under s. 24(2).

It is unlikely that the court intended, in these passing remarks, to effect dramatic change. *Godoy* was, first and foremost, a case about public safety concerns. Nonetheless, the language chosen by the court is interesting, and may suggest an increasing willingness to give effect to the constitutional rights of persons who are not in direct conflict with the state.

What about equality rights? The court in *Mills* has been criticized for introducing complainants' equality rights into the balancing equation.³⁴ Professor Don Stuart has pointed out that the court merely asserted equality rights on the part of complainants, without conducting any type of proper analysis in accordance with the s. 15 case law.³⁵ A review of the judgment confirms this to be the case. However, it is important not to overestimate the true purport of the equality component in *Mills*. While the court chose to invoke s. 15 of the Charter, the

points advanced in the name of equality were hardly controversial.³⁶ The court reiterated the need to eradicate pernicious myths and stereotypes from criminal trials involving sexual offences. This observation has been made in prior cases,³⁷ and is as much concerned with the integrity of the trial process as it is with equality issues. Similarly, the court admonished that records applications should not be used to intimidate or "whack"³⁸ the complainant. The point here was simply that complainants are entitled to be treated with dignity and respect. Even if s. 15 had not been introduced, it would be difficult to quarrel with the logic of these propositions.

On the other hand, the introduction of equality concerns may raise other issues. For one thing, a complainant or witness may claim only the heightened protections of Bill C-46 if the trial involves a sexual offence enumerated in s. 278.2. Absent a sexual offence, the legislation has no application and the process defaults to the *O'Connor* model. As was acknowledged in *Mills*, the *O'Connor* model does not offer the same degree of protection to complainants' privacy interests as does Bill C-46. This disparity is a by-product of policy choices made by Parliament. The preamble to Bill C-46 leaves little doubt that, in enacting this scheme, Parliament was primarily concerned with sexual crimes against women and children.³⁹ As a practical matter, these are the types of cases in which records applications tended to be brought by the defence. But the issue here is privacy. Presumably, a complainant who has been traumatized by a violent home invasion, or an aggravated domestic assault, has just as much privacy in therapy records as does a person traumatized by sexual violence. Yet, in these non-sexual cases, complainants are left to resist production under a less-protective regime. This is not to say that the victim of a non-sexual assault would necessarily have a claim under s. 15 of the Charter. It is only to say that, if the overarching goal

is equality, the records production scheme may, in some respects, fall short of achieving that objective.

The concept of equality may also work to the benefit of the defence. *Mills* was concerned with the effect of the legislation on the accused's right to full answer and defence. But the decision also has implications for suspects' privacy rights, particularly where the police or prosecution seek to obtain therapy records as evidence of crime under search warrant. There are definite parallels between the *Mills/O'Connor* regime and the search warrant process.

Where s. 8 of the Charter is concerned, an accused is arguably entitled to the same privacy protections as is a complainant. By virtue of ss. 15 and 28 of the Charter, Charter rights—including privacy rights—are guaranteed equally to male and female persons. The nature and degree of privacy attaching to intimate records cannot logically depend on gender; nor can it depend on the identity of the party seeking access. The expectation of privacy flows from the nature of the record, and the circumstances under which it was created. It ought not to matter whether the subject of the record is a suspect or a victim of crime. If anything, the Charter is even more directly engaged where the party seeking access to sensitive records is a police officer who wishes to use the evidence against the person in a criminal prosecution.

What flows from this? The defence might argue that the search warrant process is less protective of privacy than is Bill C-46. Defence advocates might argue that the requirement of reasonable and probable grounds—the standard of issuance for most search warrants—is akin to the "likely relevance" test and does not reflect the additional factors that are required to be balanced under Bill C-46. Section 278.5(1) of the Code governs the first stage of production under Bill C-46. It provides that the accused must demonstrate not only likely relevance, but also that production "is necessary in the inter-

ests of justice.” Section 278.5(2) sets out a broad range of rights and interests to be considered in applying this legal standard. Moreover, defence counsel challenging search warrants might point out that, under Bill C-46, records are initially disclosed to the judge for review; whereas under the search warrant regime, sensitive records are immediately accessible to police officers. In at least one case, *R. v. J.O.*,⁴⁰ it was held that a search warrant to seize medical records ought to contain special terms and conditions—including a sealing requirement—in order to protect the heightened expectations of privacy in this area. In reaching this conclusion, the court specifically considered and applied the principles set out in *R. v. O’Connor*.

On the other hand, Crown advocates can point out that the search warrant process *does* require a careful balancing of competing interests in a process similar to that contemplated under Bill C-46. In *Baron v. Canada*,⁴¹ the Supreme Court of Canada held that a justice asked to issue a search warrant has a residual discretion to decline to issue a search warrant, even where all of the statutory requirements have been made out. In exercising this discretion, the justice must carefully balance all of the relevant factors bearing on the invasion of individual privacy and the interests of law enforcement.⁴² Moreover, some, though not all, warrant provisions contain language similar to that employed in Bill C-46. For example, general warrants under s. 487.01 of the Code and DNA warrants under s. 487.05 of the Code require that the judge consider whether issuance of the warrant “is in the best interests of the administration of justice.”

It is difficult to make categorical comparisons between Bill C-46 and search warrants, given the myriad of circumstances in which search warrants are issued. A justice may, in his or her discretion, choose to impose a sealing requirement on a warrant to seize a suspect’s psychiatric records. However, this is less likely to occur where the medical records disclose nothing more than the suspect’s blood alcohol concentration.

While different rules may apply in the regulatory context, *White* confirms that the state cannot compel a statement under a regulatory scheme, only to then use that very utterance to prove guilt in a criminal proceeding.

In other cases, public safety concerns may require that the police obtain immediate access to the evidence in issue.⁴³ Ultimately, these issues will have to be canvassed on a case-by-case basis.

R. v. WHITE: EXCLUSION OF EVIDENCE UNDER SECTION 24(1)

In *R. v. White*,⁴⁴ the Supreme Court of Canada considered the principle against self-incrimination under s. 7 of the Charter. The accused was involved in a motor vehicle accident and, pursuant to s. 61 of the B.C. *Motor Vehicle Act*, was statutorily compelled to provide an accident report. She provided three such statements to the police. The central issue was whether these statements could be introduced as evidence against the accused at her criminal trial on a charge of failing to remain at an accident. The majority of the Supreme Court of Canada ruled that the admission of the compelled statements at the criminal trial would violate the principle against self-incrimination. It was held that the police are entitled to gather information under s. 61 of the *Motor Vehicle Act*. However, this information is subject to a use immunity, and cannot be used to incriminate the declarant in the commission of a criminal offence. The Supreme Court of Canada has often observed that, within the criminal context, it is fundamentally unfair to compel an accused to *create* evidence—such as a statement—that will then be used against him or her in a criminal trial.⁴⁵ While different rules may apply in the regulatory context,⁴⁶ *White* confirms that the state cannot compel a

statement under a regulatory scheme, only to then use that very utterance to prove guilt in a criminal proceeding.

The conclusion reached by the court under s. 7 was not entirely surprising, given earlier jurisprudence. The more interesting feature of the decision in *White* is the court’s exclusionary ruling, and the basis on which it purported to find the statements inadmissible. Simply put, the court in *White* found that the statements should be excluded under s. 24(1), as opposed to s. 24(2) of the Charter. The court expressly ruled that “s. 24(1) may be employed as a discrete source of a court’s power to exclude such evidence.”⁴⁷ The recognition of a discrete and freestanding exclusionary power in s. 24(1) flies in the face of earlier case law, most notably *R. v. Therens*.⁴⁸ In *Therens*, Le Dain J. had firmly rejected this suggestion, holding that “s. 24(2) was intended to be the sole basis for exclusion of evidence because of an infringement or denial of a right or freedom guaranteed by the Charter.” The court in *White* endeavoured to distinguish *Therens* and, in so doing, created a two-tiered scheme for the exclusion of evidence in Charter cases.

The distinction seems to be as follows. In some cases, the way the evidence was obtained will breach the Charter. For example, the police may obtain a statement or breath sample in violation of s. 10(b) of the Charter. The police may seize evidence in a manner that violates s. 8 of the Charter. In such cases, the rule in *Therens* will apply, and

the admissibility of the evidence will fall to be determined under s. 24(2). The second category operates differently. In these cases, the Charter is not violated by the *obtaining* of the evidence; rather, it is violated by the *use* of the evidence. Thus, for example, in *White*, the taking of the compelled statements, under statutory authority, did not itself result in a constitutional infringement. The Charter *was*, however, infringed when the Crown sought to admit the statements in a criminal prosecution. Using the statements in this manner infringed the accused's right to a fair trial. *White* indicates that, in this second category of cases, admissibility is to be assessed under s. 24(1), as opposed to s. 24(2).

This aspect of *White* is troubling. Earlier judgments had hinted at this approach but, as was noted by Iacobucci J., the court had "never affirmatively decided that s. 24(1) of the Charter may serve as the mechanism for the exclusion of evidence whose admission at trial would violate the Charter." It was further noted by Iacobucci J. that none of the parties in *White* had actually argued this point. Why, then, did the court find it necessary to create a discrete exclusionary doctrine? It was certainly not necessary in order to achieve the desired result in *White*. Exclusion of the statements in *White* was compelled on any number of other grounds. For one thing, the whole point of the case was to recognize a use immunity for the statutorily compelled statements made by Ms. White. A finding of use immunity, by its very nature, prohibits the Crown from using the statements against the accused. In other words, the exclusion of the evidence at trial flowed inexorably from the conclusion reached under s. 7 of the Charter.

Even beyond s. 7, various other mechanisms could have justified exclusion. The courts have consistently recognized that, at common law, trial judges have the power and discretion to exclude evidence that would render the trial unfair. In *R. v. Harrer*,⁴⁹ LaForest J.

recognized this common law authority and noted that it has been constitutionalized by virtue of s. 11(d) of the Charter. Thus, a trial judge can exclude evidence without resorting to s. 24 of the Charter at all.⁵⁰ Finally, if s. 24 was to be invoked, it is puzzling that the court did not content itself with the time-honoured and well-settled framework for exclusion under s. 24(2). Section 24(2) is certainly capable of accommodating fair trial concerns; this is the central and defining issue under the first set of factors. Whether the breach flows from the obtaining or the admission of the evidence, s. 24(2) is well-equipped to ensure that evidence affecting the fairness of trial will be excluded. It is true that s. 24(2) refers to evidence "obtained in a manner" that breached the Charter. However, this phrase has been given a broad interpretation. Section 24(2) is triggered whenever there is a sufficient tactical, temporal, or causal nexus between the evidence and the breach.⁵¹

The problem is this. The introduction of a new exclusionary power under s. 24(1) has the potential to generate vast uncertainty. After years and years of litigation—and countless Supreme Court of Canada judgments—Canadian law finally achieved some degree of clarity in applying the principles under s. 24(2).⁵² What is one to do with this body of established law? Are s. 24(2) principles to be simply grafted onto s. 24(1), or do different rules apply? Is there any balancing of factors under s. 24(1)? Does "fairness of trial" mean the same thing under both subsections? Under s. 24(2), the first set of factors is exclusively concerned with conscriptive evidence. Is this the case with s. 24(1), or does it encompass a broader range of considerations bearing on the fairness of trial?⁵³ Does s. 24(1) have any application to non-conscriptive evidence? Under s. 24(2), if conscriptive evidence was otherwise discoverable, its admission would not affect the fairness of trial. How does discoverability fit into the s. 24(1) framework? Would it have mat-

tered if Ms. White would have spoken to the police even absent the statutory compulsion? These are but a few of the questions that might be asked in this context. Given our experience with the incremental and piecemeal evolution of the law under s. 24(2), it might be some considerable time before the questions under s. 24(1) are given definite answers.

CONCLUSION

The Charter continues to have a significant impact on criminal litigation and the definition of legal rights. One can expect that these issues will continue to evolve. What is perhaps more surprising is the malleability of the overarching framework in which these analyses are to take place. Certain defining principles governing the relationship between Charter provisions have been called into question. Charter litigation is, by its nature, a fluid process and change is inevitable. But there is also some value in certainty, particularly when one is delineating the very contours of the dispute. It remains to be seen what, if any, impact will flow from the changes wrought in *Mills* and *White*. If nothing else, the cases signal a willingness on the part of the Supreme Court of Canada to shift ground, even on basic and apparently settled issues. Counsel arguing Charter cases should not feel unduly constrained by the prevailing model of constitutional analysis. Creative argument may well oil the hinges on doors that, by virtue of earlier case law, appeared to be nailed shut. ❁

- 1 The opinions are those of the author only, and do not necessarily reflect the views of the Ministry of the Attorney General.
- 2 See, e.g., *R. v. Liew*, [1997] S.C.J. no. 51.
- 3 See, e.g., *R. v. White*, [1999] 2 S.C.R. 417.
- 4 See, e.g., *R. v. Mills*, [1999] S.C.J. no. 68; *R. v. Rose*, [1998] 3 S.C.R. 262.
- 5 See, e.g., *R. v. Mills*, *ibid.*; *R. v. Godoy*, [1999] 1 S.C.R. 311; *R. v.*

Schreiber, [1998] 1 S.C.R. 841; *R. v. Cook*, [1998] 2 S.C.R. 597.

- 6 Above note 4.
- 7 Above note 3.
- 8 Above note 4.
- 9 [1995] 4 S.C.R. 411.
- 10 The court observed at para. 22 that “there are several important respects in which Bill C-46 differs from the regime set out in *O’Connor ...*”
- 11 For a review of the court’s approach to this issue, see Thomas J. Singleton, “The Principles of Fundamental Justice, Societal Interests, and Section 1 of the Charter” (Sept. 1995), 74 *Can. Bar. Rev.* 446-73.
- 12 [1991] 1 S.C.R. 933.
- 13 (1991), 66 C.C.C. (3d) 321 (S.C.C.).
- 14 (1993), 80 C.C.C. (3d) 492 (S.C.C.).
- 15 See, e.g., *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844, at 898 and 900; *R. v. Rodriguez*, [1993] 3 S.C.R. 519.
- 16 [1994] 3 S.C.R. 761.
- 17 *R. v. Mills*, above note 4, at para. 66.
- 18 (1994), 94 C.C.C. (3d) 289 (S.C.C.).
- 19 Other modifiers include the reference to “unreasonable search or seizure” in s. 8 and “fair trial” in s. 11(d).
- 20 (1985), 23 C.C.C. (3d) 289 (S.C.C.).
- 21 *Ibid.*
- 22 [1997] 1 S.C.R. 607.
- 23 See, e.g., *R. v. Dymont* (1988), 45 C.C.C. (3d) 244 (S.C.C.); *Schreiber v. Canada (A.G.)* (1998), 124 C.C.C. (3d) 129 (S.C.C.), at 141; and *R. v. Plant* (1993), 84 C.C.C. (3d) 203 (S.C.C.).
- 24 [2000] O.J. no. 60 (C.A.).
- 25 See, e.g., *R. v. Fitzpatrick*, [1995] 4 S.C.R. 154; *R. v. White*, above note 3.
- 26 Above note 18.
- 27 Above note 9.
- 28 Above note 4.
- 29 *R. v. Plant* (1993), 84 C.C.C. (3d) 203 (S.C.C.), at 213.
- 30 *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573.

The introduction of a new exclusionary power under s. 24(1) has the potential to generate vast uncertainty. After years and years of litigation—and countless Supreme Court of Canada judgments—Canadian law finally achieved some degree of clarity in applying the principles under s. 24(2).

- 31 See, e.g., *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130; *A.M. v. Ryan*, [1997] 1 S.C.R. 157; *Re Dagenais*, above note 18.
- 32 [1991] 1 S.C.R. 311.
- 33 This point is amply illustrated by the cases of *R. v. Stillman*, above note 22 and *R. v. Feeney*, [1997] 2 S.C.R. 13.
- 34 See Don Stuart, “*Mills*: Dialogue with Parliament and Equality by Assertion at What Cost?” 28 *C.R.* (5th) 275; Anil Kapoor, “The Supreme Court Recants” *Kapoor’s Criminal Appeals Review*, Issue 8, January 17, 2000 (Q.L.).
- 35 See Don Stuart, above note 34. In particular, Professor Stuart is critical of the court’s failure to apply the 10-part test set out in *Law v. Canada (Minister of Employment & Immigration)*, [1999] 1 S.C.R. 497.
- 36 See *R. v. Mills*, above note 4, at paras. 90-92.
- 37 See *R. v. Osolin*, [1993] 4 S.C.R. 595; *R. v. Seaboyer*, [1991] 2 S.C.R. 577.
- 38 This term was used by McLachlin and Iacobucci, J.J.A. at para. 90.
- 39 The preamble expressly refers to a recital that indicates that Parliament is concerned about the incidence of sexual violence and abuse in Canadian society and, in particular, the prevalence of sexual violence against women and children.
- 40 [1996] O.J. no. 4799 (Gen. Div.).
- 41 [1993] 1 S.C.R. 146.

- 42 *Baron* was one of the cases cited by the court in *Mills* when discussing the judge’s discretion to consider the full range of rights and interests. See *Mills*, above note 4, at para. 133.
- 43 See, e.g., *Smith v. Jones*, [1999] 1 S.C.R. 455.
- 44 [1999] 2 S.C.R. 417.
- 45 See, e.g., *R. v. Jones*, [1994] 2 S.C.R. 229; *R. v. S.(R.J.)*, [1995] 1 S.C.R. 451; and *R. v. Stillman*, above note 22.
- 46 See, e.g., *R. v. Fitzpatrick*, [1995] 4 S.C.R. 154.
- 47 *R. v. White*, above note 44, at para. 89.
- 48 [1985] 1 S.C.R. 613.
- 49 (1995), 101 C.C.C. (3d) 193 (S.C.C.).
- 50 In this regard, reference may be made to *R. v. Milne* (1996), 107 C.C.C. (3d) 118 (Ont. C.A.); *R. v. Coutts* (1999), 136 C.C.C. (3d) 225 (Ont. C.A.).
- 51 See, e.g., *R. v. Goldhart* (1996), 107 C.C.C. (3d) 481 (S.C.C.).
- 52 See *R. v. Stillman*, above note 22; *R. v. Feeney*, above note 33; and *R. v. Belnavis* (1997), 118 C.C.C. (3d) 405.
- 53 In *R. v. Harrer* (1995), 101 C.C.C. (3d) 193 (S.C.C.), McLachlin J. (as she then was) defined a fair trial as one “which satisfies the public interest in getting at the truth, while preserving basic procedural fairness to the accused.” (See para. 45.)