2009 CarswellOnt 43
Ontario Superior Court of Justice

R. v. Riley

2009 CarswellOnt 43, [2009] O.J. No. 62, 184 C.R.R. (2d) 209, 81 W.C.B. (2d) 557

HER MAJESTY THE QUEEN and TYSHAN RILEY, PHILLIP ATKINS and JASON WISDOM

M. Dambrot J.

Heard: July 21-November 20, 2008
Judgment: January 5, 2009
Docket: P299-07

Counsel: Suhail Akhtar, Maureen Pecknold, Scott Childs, Michael Passeri, Lesley Pasquino for Crown
David Midanik, Kenneth Jim for Tyshan Riley
David Berg, Jody Matthew for Philip Atkins
Maurice Mirosolin, Emma Rhodes for Jason Wisdom

Subject: Criminal; Constitutional; Evidence

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Criminal law --- Charter of Rights and Freedoms — Charter remedies [s. 24] — Exclusion of evidence

Accused were charged with first degree murder, attempted murder, committing murder and attempted murder for benefit of criminal organization — It was concluded that police had violated rights of accused R and A guaranteed by s. 8 of Canadian Charter of Rights and Freedoms by intercepting their private communications through purported use of warrantless emergency wiretap power in s. 184.4 of Criminal Code — Accused brought application for exclusion of evidence — Application granted in part — Application was granted to extent that private communications intercepted pursuant to s. 184.4 of Code and items of evidence seized were excluded — Remainder of application dismissed — Admitting evidence intercepted pursuant to s. 184.4 of Code would bring administration of justice into disrepute — Breach was very serious.

Table of Authorities

Cases considered by *M. Dambrot J.*:

British Columbia (Securities Commission) v. Branch (1995), 1995 CarswellBC 171, 1995 CarswellBC 638, [1995] 5 W.W.R. 129, 4 B.C.L.R. (3d) 1, 7 C.C.L.S. 1, 38 C.R. (4th) 133, 123 D.L.R. (4th) 462, 97 C.C.C. (3d) 505, 180 N.R. 241, 27 C.R.R. (2d) 189, [1995] 2 S.C.R. 3, 60 B.C.A.C. 1, 99 W.A.C. 1 (S.C.C.) — referred to

R. v. Burlingham (1995), 38 C.R. (4th) 265, 97 C.C.C. (3d) 385, 181 N.R. 1, 124 D.L.R. (4th) 7, 58 B.C.A.C. 161, 96 W.A.C. 161, 28 C.R.R. (2d) 244, [1995] 2 S.C.R. 206, 1995 CarswellBC 71, 1995 CarswellBC 639 (S.C.C.) — referred to

R. v. Collins (1987), [1987] 3 W.W.R. 699, [1987] 1 S.C.R. 265, *(*sub nom. *Collins v. R.)* 38 D.L.R. (4th) 508, 74 N.R. 276, 13 B.C.L.R. (2d) 1, 33 C.C.C. (3d) 1, 56 C.R. (3d) 193, 28 C.R.R. 122, 1987 CarswellBC 94, 1987 CarswellBC 699 (S.C.C.) — followed

R. v. Fliss (2002), 163 B.C.A.C. 1, 267 W.A.C. 1, [2002] 1 S.C.R. 535, 2002 SCC 16, 2002 CarswellBC 191, 2002 CarswellBC 192, 99 B.C.L.R. (3d) 1, 283 N.R. 120, 161 C.C.C. (3d) 225, 49 C.R. (5th) 395, [2002] 4 W.W.R. 395, 209 D.L.R. (4th) 347, 91 C.R.R. (2d) 189 (S.C.C.) — followed

R. v. Goldhart (1996), 1996 CarswellOnt 2739, 1996 CarswellOnt 2740, 48 C.R. (4th) 297, 28 O.R. (3d) 480, 107 C.C.C. (3d) 481, 136 D.L.R. (4th) 502, 198 N.R. 321, 37 C.R.R. (2d) 1, [1996] 2 S.C.R. 463, 92 O.A.C. 161 (S.C.C.) — followed

R. v. Grant (1993), [1993] 8 W.W.R. 257, 84 C.C.C. (3d) 173, 159 N.R. 161, [1993] 3 S.C.R. 223, 24 C.R. (4th) 1, 35 B.C.A.C. 1, 57 W.A.C. 1, 17 C.R.R. (2d) 269, 1993 CarswellBC 1168, 1993 CarswellBC 1265 (S.C.C.) — followed

R. v. Hyatt (2003), 171 C.C.C. (3d) 409, 2003 CarswellBC 59, 2003 BCCA 27, 9 C.R. (6th) 378, 176 B.C.A.C. 216, 290 W.A.C. 216, 106 C.R.R. (2d) 168 (B.C. C.A.) — followed

R. v. Jacoy (1988), [1989] 1 W.W.R. 354, [1988] 2 S.C.R. 548, 89 N.R. 61, 45 C.C.C. (3d) 46, 66 C.R. (3d) 336, 38 C.R.R. 290, *(*sub nom. *Jacoy v. R.)* 2 T.C.T. 4120, *(*sub nom. *Jacoy v. R.)* 18 C.E.R. 258, 1988 CarswellBC 763, 1988 CarswellBC 1314 (S.C.C.) — referred to

R. v. Kokesch (1990), [1990] 3 S.C.R. 3, [1991] 1 W.W.R. 193, 121 N.R. 161, 51 B.C.L.R. (2d) 157, 61 C.C.C. (3d) 207, 1 C.R. (4th) 62, 50 C.R.R. 285, 1990 CarswellBC 255, 1990 CarswellBC 763 (S.C.C.) — followed

R. v. Plaha (2004), 2004 CarswellOnt 3424, 123 C.R.R. (2d) 18, 188 C.C.C. (3d) 289, 189 O.A.C. 376, 24 C.R. (6th) 360 (Ont. C.A.) — followed

R. v. Ricketts (2000), 2000 CarswellOnt 1309, 73 C.R.R. (2d) 189, 131 O.A.C. 195, 144 C.C.C. (3d) 152, 33 C.R. (5th) 292 (Ont. C.A.) — considered

R. v. S. (R.J.) (1995), 1995 CarswellOnt 2, 36 C.R. (4th) 1, 26 C.R.R. (2d) 1, 177 N.R. 81, 21 O.R. (3d) 797 (note), 96 C.C.C. (3d) 1, 1995 CarswellOnt 516, [1995] 1 S.C.R. 451, 78 O.A.C. 161, 121 D.L.R. (4th) 589 (S.C.C.) — referred to

R. v. S. (S.) (2008), 2008 ONCA 578, 2008 CarswellOnt 4675 (Ont. C.A.) — considered

R. v. Stillman (1997), [1997] 1 S.C.R. 607, 42 C.R.R. (2d) 189, 1997 CarswellNB 107, 1997 CarswellNB 108, 113 C.C.C. (3d) 321, 144 D.L.R. (4th) 193, 5 C.R. (5th) 1, 185 N.B.R. (2d) 1, 472 A.P.R. 1, 209 N.R. 81 (S.C.C.) — followed

R. v. Strachan (1988), 1988 CarswellBC 699, 1988 CarswellBC 768, [1989] 1 W.W.R. 385, 56 D.L.R. (4th) 673, 37 C.R.R. 335, [1988] 2 S.C.R. 980, 90 N.R. 273, 46 C.C.C. (3d) 479, 67 C.R. (3d) 87 (S.C.C.) — considered

R. v. Therens (1985), 38 Alta. L.R. (2d) 99, 1985 CarswellSask 851, 1985 CarswellSask 368, [1985] 1 S.C.R. 613, 13 C.R.R. 193, [1985] 4 W.W.R. 286, 18 D.L.R. (4th) 655, 59 N.R. 122, 40 Sask. R. 122, 18 C.C.C. (3d) 481, 45 C.R. (3d) 97, 32 M.V.R. 153 (S.C.C.) — considered

R. v. Wittwer (2008), 2008 CarswellBC 1091, 2008 CarswellBC 1092, 2008 SCC 33, 57 C.R. (6th) 205, 375 N.R. 217, [2008] 2 S.C.R. 235, 231 C.C.C. (3d) 97, 294 D.L.R. (4th) 133, *(*sub nom. *R. v. D.H.W.)* 430 W.A.C. 1, *(*sub nom. *R. v. D.H.W.)* 255 B.C.A.C. 1, 173 C.R.R. (2d) 174 (S.C.C.) — considered

United States v. Ceccolini (1978), 435 U.S. 268 (U.S. N.Y.) — considered

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

Generally — referred to

s. 8 — considered

s. 10(b) — referred to

s. 24(2) — pursuant to

Criminal Code, R.S.C. 1985, c. C-46

s. 184.4 [en. 1993, c. 40, s. 4] — referred to

s. 184.4(a) [en. 1993, c. 40, s. 4] — referred to

s. 184.4(b) [en. 1993, c. 40, s. 4] — referred to

s. 188 — referred to

APPLICATION by accused for exclusion of evidence in trial of accused for first degree murder, attempted murder, committing murder and attempted murder for benefit of criminal organization.

***M. Dambrot J.*:**

1 Tyshan Riley, Phillip Atkins and Jason Wisdom are being tried by me, with a jury, on charges of first degree murder, attempt murder, and committing murder and attempt murder for the benefit of a criminal organization. The charges relate to the shooting of Brenton Charlton and Leonard Bell on March 3, 2004, resulting in the death of Mr. Charlton and the wounding of Mr. Bell.

2 In a ruling released on July 21, 2008, I concluded that the police had violated the rights of Riley and Atkins guaranteed by s. 8 of the *Charter* by intercepting their private communications through the purported use of the warrantless emergency wiretap power in s. 184.4 of the *Criminal Code*. Based on that conclusion, Riley and Atkins now seek the exclusion of a body of evidence that the Crown proposes to introduce against them at this trial pursuant to s. 24(2) of the *Charter*. More precisely, they seek both the exclusion of such evidence from their trial, and also the excision of such evidence from affidavits sworn in support of subsequent judicial authorizations to intercept private communications upon a challenge to the constitutional validity of those authorizations that I am hearing presently.

3 Of course, s. 24(2) of the *Charter* authorizes the exclusion of evidence, and only evidence that was "obtained in a manner that infringed or denied any rights or freedoms guaranteed by the *Charter*." As a result, in considering this application, I must determine first what items of the evidence that the Crown proposes to tender, or that is contained in the affidavits in support of the authorizations can properly be considered to have been obtained in a manner that infringed s. 8, and second, what if any of that evidence should be excluded from these proceedings?

The Breach

4 In considering this application, it is necessary to bear in mind with some precision what lead me to conclude that the intercepting of the private communications of Riley and Atkins pursuant to s. 184.4 of the *Criminal Code* violated their rights under s. 8 of the *Charter*. In my earlier ruling, by way of summary, I concluded that the police violated s. 8 of the *Charter* in the following ways:

> (1) Although I suspect that Ramer [Staff Inspector Ramer of the Toronto Police Service, who made the decision to intercept private communications pursuant to s. 184.4] believed, on reasonable grounds, that Riley was going to commit an unlawful act that would cause serious harm to some person, and although I am satisfied that reasonable grounds existed for such a conclusion, the fact that Ramer neither remembers nor has any record of what he was told about the investigation prevents me from being satisfied that his belief was based on reasonable grounds. As a result, he did not satisfy this aspect of the prerequisite to intercepting in s. 184.4(b).
>
> (2) Although I am satisfied that Ramer believed that the use of s. 184.4 would likely be effective to prevent harm, I am not satisfied that he had reasonable grounds for this belief. I do not accept that there was an objective basis for the belief that the use of s. 184.4 would likely be effective in the prevention of harm. As a result, he did not satisfy this second aspect of the prerequisite to intercepting in s. 184.4(b).
>
> (3) By deciding not to arrest Riley unless he was located in Scarborough, the police declined to make use of a more effective means of preventing harm, and so violated this third aspect of the prerequisite to intercepting in s. 184.4(b).
>
> (4) Although it might not have been possible to obtain a judicially authorized emergency wiretap authorization pursuant to s. 188 by April 19, 2004, nevertheless, because the Attorney General had not designated any police officer to make such an application, the police were unable to fully comply with the requirement to put in motion an effort to obtain judicial authorization with dispatch. As a result, the police violated s. 184.4(a).
>
> (5) Ramer did not adequately monitor the intercepting that he approved.
>
> (6) The interception of one of Atkins' private communication was unlawful, and in violation of s. 8 of the *Charter*.

The Evidence Said to Have Been Obtained in a Manner That Infringed the Charter and That Should Be Excluded

5 Mr. Midanik, on behalf of Riley, argues that the evidence outlined in the following list found in Appendix B to his factum was obtained in a manner that violated the s. 8 of the *Charter* and should be excluded:

> 1. all conversations recorded April 15 to 19, 2004, pursuant to s. 184.4;
>
> 2. all information contained in the said conversations including his closeness to Dana Williams and Heather Riley;
>
> 3. all information gleaned from the information in the said wiretaps;
>
> 4. all evidence relating to the arrest of Riley, Atkins, and Wilson on April 19, 2004, and all evidence flowing therefrom;
>
> 5. all evidence relating to the Hyatt and Patrong shooting as it relates to Riley, Atkins or Wilson;
>
> 6. all real evidence seized as a result of the search warrants of April 20, 2004, and the seizure of the Audi on April 19, 2004;
>
> 7. all fingerprint and gunshot residue tests resulting from the April 19, 2004,arrests and testing results there from;
>
> 8. all statements of Marlon Wilson;
>
> 9. all "evidence" of Marlon Wilson given at the preliminary hearing;

10. all evidence of Marlon Wilson to be given at trial;

11. all information learned by the police from Marlon Wilson's statements and evidence at the preliminary hearing;

12. a 357 Glock seized on September 24, 2004;

13. all conversations recorded pursuant to the judicial authorizations of June and August, 2004, where:

a. any of Riley, Atkins or Wilson were party to the conversations;

b. any conversations resulting from those conversations in paragraph a, *supra*;

c. any conversations resulting from Riley, Atkins or Wilson being in custody at the Toronto East Detention Centre;

d. any conversations relating to the Hyatt and Patrong shooting or attempt to obstruct justice with regard to same;

e. any conversations relating to attempt to obstruct justice in relation to Marlon Wilson or to cause him harm;

f. any conversations relating to harming Roland Ellis;

g. any conversations relating to the "drug toss" at Toronto East Detention Centre;

h. the identity of "Burns" (Damian Walton) and all evidence obtained thereby; and

i. all evidence obtained as a result of sub-paragraph a-g;

14. all *viva voce* evidence the Crown intends to call with regard to Paragraph 13, *supra*, including but not limited to those portions of the evidence of any former co-accused, Heather Kerr, Maureen Macpherson or anyone else who may give testimony about the contents of the impugned conversations;

15. all the evidence of Roland Ellis; and

16. all the evidence of Phillip Reid as it relates to or is admissible against Riley.

6 Mr. Midanik also prepared a detailed list of the information that he argued should be excised from the affidavits sworn in support of the subsequently order authorizing the interception of private communications. I will not repeat the content of that list.

7 For his part, Mr. Berg, on behalf of Atkins, argues that the following evidence was obtained in a manner that violated the s. 8 of the *Charter* and should be excluded:

1. the evidence of Philip Omar Reid; and

2. a private communication of Atkins intercepted on April 19, 2008.

8 As is apparent, the evidence that Mr. Midanik proposes that I exclude is awesome in its sweep. In the Crown's factum, Mr. Childs observed that "Riley argues that virtually all of the evidence collected by the police following the 184.4 intercepts was obtained in a manner that infringed a *Charter* right, or was obtained from evidence that was obtained in a manner that infringed a *Charter* right. While this is hyperbolic, it does not miss the mark by much.

9 In his factum, Mr. Childs usefully organized the various requests made by Mr. Midanik and Mr. Berg into six blocks, as follows:

1. the private communications of Tyshan Riley and Phillip Atkins intercepted between April 15-19, 2004, pursuant to section 184.4 of the *Criminal Code*;

2. the evidence collected by the police investigation of the April 19, 2004 shooting of Christopher Hyatt and Kofi Patrong at 70 Alford Crescent, other than that related to Marlon Wilson;

3. the evidence of Marlon Wilson;

4. the private communications of Tyshan Riley, Phillip Atkins, Jason Wisdom and others intercepted pursuant to the judicial authorizations of June 7, 2004 and August 4, 2004, and related evidence;

5. the evidence of Phillip Omar Reid; and

6. the remaining evidence uncovered by the Project Pathfinder investigation after the takedown in October, 2004.

10 I propose to organize my consideration of the requests for exclusion in conformity with Mr. Childs' blocks.

What Evidence Was Obtained in a Manner That Infringed Section 8 of the Charter?

The Basic Approach

11 The Supreme Court first considered the proper approach for trial judges to take when determining whether evidence was obtained in a manner that infringed a *Charter* right in *R. v. Therens* (1985), 18 C.C.C. (3d) 481 (S.C.C.). A majority of the Court made it clear that approaching the issue strictly on the basis of whether or not a causal connection existed between the breach and the impugned evidence will often be unhelpful in determining whether that evidence can attract the application of s. 24(2) of the *Charter*. Le Dain J., speaking for the majority on this point, stated, at p. 509-10:

> It is not necessary to establish that the evidence would not have been obtained but for the violation of the *Charter*. Such a view gives adequate recognition to the intrinsic harm that is caused by a violation of a *Charter* right or freedom, apart from its bearing on the obtaining of evidence. I recognize, however, that in the case of derivative evidence, which is not what is in issue here, some consideration may have to be given in particular cases to the question of relative remoteness.

12 The Supreme Court elaborated on the issue in *R. v. Strachan* (1988), 46 C.C.C. (3d) 479 (S.C.C.). Dickson C.J. rejected the Crown's argument that the words "obtained in a manner" in s. 24(2) imposed a requirement that there be a causal connection between the *Charter* infringement and the discovery of the impugned evidence before the evidence can be excluded. He stated, at para. 46:

> In my view, all of the pitfalls of causation may be avoided by adopting an approach that focuses on the entire chain of events during which the *Charter* violation occurred and the evidence was obtained. Accordingly, the first inquiry under s. 24(2) would be to determine whether a *Charter* violation occurred in the course of obtaining the evidence. A temporal link between the infringement of the *Charter* and the discovery of the evidence figures prominently in this assessment, particularly where the *Charter* violation and the discovery of the evidence occur in the course of a single transaction. The presence of a temporal connection is not, however, determinative. Situations will arise where evidence, though obtained following the breach of a *Charter* right, will be too remote from the violation to be "obtained in a manner" that infringed the *Charter*. In my view, these situations should be dealt with on a case by case basis. There can be no hard and fast rule for determining when evidence obtained following the infringement of a *Charter* right becomes too remote.

13 It should not be thought from these remarks that causation was eliminated entirely from consideration when applications are brought for exclusion of evidence on *Charter* grounds. Causation remains the basis for exclusion of evidence that would not have been discovered "but for" the existence of compelled testimony": *R. v. S. (R.J.)* (1995), 96 C.C.C. (3d) 1 (S.C.C.) and *British Columbia (Securities Commission) v. Branch* (1995), 97 C.C.C. (3d) 505 (S.C.C.). It is also a factor when considering exclusion under section 24(2) as the underpinning of the principle of discoverability: *R. v. Collins* (1987), 33 C.C.C. (3d) 1 (S.C.C.). Finally, despite the "pitfalls of causation identified in *Strachan*, the decision of the Supreme Court in *R. v. Goldhart* (1996), 107 C.C.C. (3d) 481 (S.C.C.) makes it clear that causation remains a consideration when determining whether or not evidence was obtained in a manner that infringed a *Charter* right.

14 In *Goldhart*, Sopinka J. noted that the Court had rejected causation as the sole touchstone of the application of s. 24(2) of the *Charter* by reason of the pitfalls that are inherent in the concept, particularly the fact that the happening of an event can be traced to a whole range of causes along a spectrum of diminishing connections to the event. He made clear, however, that although *Therens* and *Strachan* warned against over-reliance on causation and advocated an examination of the entire relationship between the *Charter* breach and the impugned evidence, causation was not entirely discarded. He went on to say that cases decided by the Court subsequent to *Therens* and *Strachan* confirm the wisdom of the case-by-case approach.

15 Sopinka J. made clear that while the case-by-case approach includes consideration of both the temporal and causal connection between the breach and the evidence, the presence of neither one is determinative of the issue. In this regard, he stated, at para. 40:

> Accordingly, while a temporal link will often suffice, it is not always determinative. It will not be determinative if the connection between the securing of the evidence and the breach is remote. I take remote to mean that the connection is tenuous. The concept of remoteness relates not only to the temporal connection but to the causal connection as well. It follows that the mere presence of a temporal link is not necessarily sufficient. In obedience to the instruction that the whole of the relationship between the breach and the evidence be examined, it is appropriate for the court to consider the strength of the causal relationship. If both the temporal connection and the causal connection are tenuous, the court may very well conclude that the evidence was not obtained in a manner that infringes a right or freedom under the *Charter*. On the other hand, the temporal connection may be so strong that the *Charter* breach is an integral part of a single transaction. In that case, a causal connection that is weak or even absent will be of no importance. Once the principles of law are defined, the strength of the connection between the evidence obtained and the Charter breach is a question of fact. Accordingly, the applicability of s. 24(2) will be decided on a case-by-case basis as suggested by Dickson C.J. in *Strachan*.

16 Sopinka J. further noted at para. 42 that even where a causal connection exists between the breach and the evidence, the trial judge must go on to evaluate the strength of the connection between the breach and the evidence, and consider the entire relationship between them. This includes an analysis of remoteness or attenuation.

17 The approach that should be taken by a trial judge when considering whether or not evidence was obtained in a manner that infringed a *Charter* right was summarized succinctly by Doherty J.A. in *R. v. Plaha* (2004), 188 C.C.C. (3d) 289 (Ont. C.A.) at paras. 44 and 45, where he stated:

> 44 There are two components to s. 24(2). The first is a threshold requirement. The impugned evidence ... must be obtained "in a manner that infringed" a right under the *Charter*. If the threshold is crossed, one then turns to the evaluative component of s. 24(2) — could the admission of the impugned evidence bring the administration of justice into disrepute?
>
> 45 The jurisprudence establishes a generous approach to the threshold issue. A causal relationship between the breach and the impugned evidence is not necessary. The evidence will be "obtained in a manner" that infringed a *Charter* right if on a review of the entire course of events, the breach and the obtaining of the evidence can be said to be part of the same transaction or course of conduct. The connection between the breach and the obtaining of the evidence may be temporal, contextual, causal or a combination of the three. The connection must be more than tenuous: *R. v. Goldhart* (1996), 107 C.C.C. (3d) 481 at 492-97 (S.C.C.).

18 Doherty J.A. repeated these remarks in *R. v. S. (S.)*, [2008] O.J. No. 3072 (Ont. C.A.), and added, at para. 69, "Ultimately, the sufficiency of the connection between the *Charter* breach and the subsequent obtaining of the evidence for the purposes of engaging s. 24(2) can only be determined by a case-specific factual inquiry."

19 All of this was neatly summarized recently by Fish J. in *R. v. Wittwer*, [2008] 2 S.C.R. 235 (S.C.C.), where he stated, at para. 21, albeit in connection with a statement given by an accused to the police upon being confronted with an earlier statement obtained in violation of his right to counsel:

In considering whether a statement is tainted by an earlier *Charter* breach, the courts have adopted a purposive and generous approach. It is unnecessary to establish a strict causal relationship between the breach and the subsequent statement. The statement will be tainted if the breach and the impugned statement can be said to be part of the same transaction or course of conduct: *Strachan*, at p. 1005. The required connection between the breach and the subsequent statement may be "temporal, contextual, causal or a combination of the three": *R. v. Plaha* (2004), 189 O.A.C. 376, at para. 45. A connection that is merely "remote" or "tenuous" will not suffice: *R. v. Goldhart* [1996] 2 S.C.R. 463, at para. 40; *Plaha*, at para. 45.

20 I turn then to the blocks of evidence sought to be excluded pursuant to s. 24(2).

1. The 184.4 Intercepts

21 In the list reproduced at paragraph 5, above, Mr. Midanik seeks, under this heading the exclusion of:

- all conversations recorded from April 15, 2004 to April 19, 2004, pursuant to s. 184.4;
- all information contained in those conversations including Riley's closeness to Dana Williams and Heather Riley; and
- all information gleaned from the information in those wiretaps.

22 The Crown concedes, as it must, that the private communications of Riley and Atkins intercepted pursuant to s. 184.4 of the *Criminal Code* were obtained in a manner that infringed the *Charter*. This disposes of item one from Midanik's list, and leaves to be considered the "information" mentioned in items 2 and 3.

23 Of course, s. 24(2) provides for the exclusion of evidence, and not information. To the extent that item 2 refers to the exclusion of the specific content of some of Riley's private communications, it is redundant. To the extent that it has some other meaning, it was not explored on the *voir dire*. As a result, I cannot consider it.

24 With respect to item 3, I presume it refers to the derivate use of what the police learned from the intercepted private communications. To the extent that such information can be linked to specific evidence that Riley seeks to exclude, it can form the basis of an application under s. 24(2). I am aware of two pieces of evidence that Riley seeks to exclude on this basis, and will deal with them in due course. But to the extent that it is meant to have some exclusionary effect on evidence gathered subsequent to the interceptions because the strategic approach taken by the police was tailored to some extent by the content of the interceptions, the request is both unexplored in the evidence and far too amorphous and undefined to be taken seriously. I cannot give effect to it.

2. The Hyatt and Patrong Evidence

25 Under this heading, Mr. Midanik seeks the exclusion of:

- all evidence relating to the arrest of Riley, Atkins, and Wilson on April 19, 2004, and all evidence flowing "there from";
- all evidence relating to the Hyatt and Patrong shooting as it relates to Riley, Atkins or Wilson;
- all real evidence seized as a result of the search warrants of April 20, 2004, and the seizure of the Audi on April 19, 2004; and
- all fingerprint and gunshot residue tests and results flowing from the April 19, 2004, arrests.

26 The lynchpin of all of these requests is the argument that the evidence of the arrest of Riley was obtained in a manner that violated his rights under s. 8 of the *Charter*. A reference to some of the evidence is necessary to make sense of this argument.

The Evidence

27 On March 3, 2004, at 5:20 p.m., Brenton Charlton was driving a Chrysler Neon southbound on Neilson Road in Toronto. Leonard Bell was in the front passenger seat. Charlton came to a stop in the passing lane at a red light at Finch Ave. Based on their investigation, Det. Comeau and Det. Banks, the Toronto Police Service ("TPS") homicide detectives assigned to the case came to the conclusion that a black Nissan Pathfinder pulled up in the curb lane, slightly behind the Neon, and that three men who were in the Pathfinder began shooting at the Neon. Charlton got out of his vehicle and attempted to run, but was shot in the back and killed. Bell, who remained on the car, was shot several times, but survived.

28 At the time of the shooting, the police believed that Riley, Atkins and Wisdom were members of the Galloway Boyz, a criminal organization operating in the Galloway area of Scarborough. One of the gang's fiercest rivals was the Malvern Crew, a gang operating in the Malvern area of Scarborough. In October 2002, one of the leaders of the Galloway Boyz was murdered. Members of the Galloway Boyz believed that the murder was committed by a member of the Malvern Crew. As a result, the Galloway Boyz, led by Mr. Riley, formed "Ride Squads" that drove into the Malvern area and shot at people they believed to be Malvern Crew members.

29 Following the shooting, Det. Comeau and Det. Banks, came to suspect that Riley had participated in the shooting of Charlton and Bell. The motive for the killing, they believed, was to avenge the death of the murdered member of the Galloway Boyz, and to enhance the reputation of the gang. They believed that Riley had mistaken Charlton and Bell for members of the Malvern Crew. They also had reason to believe that Riley intended to shoot other members of the Malvern Crew for the same reason, and arranged for surveillance to be conducted on him.

30 By the morning of April 19, 2004, the police had reasonable grounds to believe that Riley was going to commit an unlawful act that would cause serious harm to some person. These grounds included:

(1) Riley's membership in the Galloway Boyz, the Malvern-Galloway gang dispute and the Malvern shootings;

(2) Riley's suspected involvement in the February 19 shooting of Mark Jones;

(3) Riley's suspected involvement in the March 3 murder of Brenton Charlton and the attempted murder of Leonard Bell;

(4) the Galloway Boyz' suspected involvement in the April 12 shooting on Empringham; and

(5) the nature and success of Riley's counter-surveillance tactics.

31 As a result, from April 15, 2004, to April 19, 2004, the police intercepted his private communications without judicial authorization, relying on s. 184.4 of the *Criminal Code.* The purpose of listening to Riley pursuant to s. 184.4 was said to be to determine his location so that the police could keep tabs on him, and to determine what he was doing and who his next target might be.

32 In addition to arranging for the interception of Riley's private communications, Det. Banks detailed the Mobile Support Services ("M.S.S.") to locate Riley. M.S.S. commenced its surveillance on April 19, 2004 at 567 Scarborough Golf Club. During its surveillance, the M.S.S. team was informed, based on information obtained that morning from Heather Kerr, a friend of Riley's, that Riley might be driving a silver vehicle with the symbols "A" and "S" on the back. At 10:07 a.m., the surveillance team located an unoccupied silver Audi A6, bearing licence ATDD 851, parked on the street directly behind 567 Scarborough Golf Club Road, a building that Riley was known to frequent. Someone moved the Audi without being observed by the surveillance team, but the vehicle was located again shortly after 11:00 a.m. in a nearby strip mall. It was again unoccupied, and was parked in front of a beauty salon.

33 At 12:35 p.m., a male believed to be Riley based on his physical description was observed emerging from the beauty salon and boarding the Audi with another male. After dropping off the other male, the male believed to be Riley drove north at an extremely high rate of speed into the Malvern area and lost the surveillance team.

34 Minutes later, at about 12:52 a.m., Christopher Hyatt and Kofi Patrong were shot numerous times in the nearby townhouse complex at 70 Alford Crescent.

35 The police investigation of the Hyatt and Patrong shooting commenced almost immediately, when one of the victims placed a 911 call to the police, saying he had been shot. The police rushed to the scene and commenced locating and interviewing witnesses. The police learned that the suspect vehicle had been observed fleeing the scene by witnesses, and was described variously as a "silver grey car", "new", "fairly clean" and "poss[ibly] an Audi". Within three minutes, the police had broadcast the first description of the suspect vehicle, a "silver grey car" seen fleeing the scene. Considerable resources were deployed to assist, including investigative units, street crime units, Emergency Task Force tactical units, canine units and traffic units. Within 30 minutes, the surveillance efforts of the M.S.S. crew and the Audi became known to the investigators of the Hyatt and Patrong shooting, and the Audi's description and licence plate were broadcast.

36 In addition, information from witnesses was collected by arriving investigators and disseminated via the police force's Mobile Work Stations, which were described in the evidence as mobile computers in the various police cars throughout the division and the force, capable of displaying reports generated by a computer-assisted dispatching system. This information included a growing narrative of the incident, the suspect vehicle's description, and the suspected involvement of the silver Audi bearing licence ATDD 851 that was being followed by M.S.S.

37 At 1:17 p.m., Det. Banks ordered the arrest of the Audi's occupants. Ultimately, this "broadcast" was also transmitted via the Mobile Work Stations, albeit in a "diluted" form, identifying the Audi (with its licence plate) as a "possible" suspect vehicle for the shooting, and urging extreme caution, to all the police cars in 42 Division and 41 Division, which are jointly responsible for policing all of Scarborough — including the approximately 25 to 30 uniform scout cars, the traffic enforcement units, investigative units, street-crime units, canine units and Emergency Task Force units. It was purposefully not transmitted over the radio for fear of interception by the suspects.

38 It was not until 1:55 p.m., 38 minutes after Banks had ordered the arrest of the Audi's occupants, that the M.S.S. crew received its first information from a 184.4 interception. The wiretap monitors had learned that Riley intended to go to the Morningside Mall. As a result, the M.S.S. team was informed that the Audi and its occupants were in the area of the Morningside Mall. The M.S.S. crew found the Audi at that location at 2:05 p.m. and positively identified its driver as Tyshan Riley. The other two occupants were eventually identified as Phillip Atkins and Marlon Wilson. The Audi was followed to another address in eastern Scarborough before it headed for Oshawa, where it was stopped by police at 2:45 p.m. Riley, Atkins and Wilson were arrested while attempting to flee.

39 After the arrest, the fingerprints of Riley and Atkins were found inside the Audi. In addition, a small amount of gunshot residue was found on Riley's hands.

40 As the Crown concedes in its factum, it is uncontroversial that the 184.4 interceptions of Riley on April 19, 2004 assisted the police in finding the Audi and its occupants (Riley, Atkins and Wilson) at the Morningside Mall. The Crown submits, however, based on the facts that I have just outlined, that the 184.4 interceptions did not form the only basis for the arrest of the Audi's occupants. In addition, they had the grounds to arrest Riley whether or not he was found in the Audi, without reference to any 184.4 interceptions. These included:

> (1) the grounds upon which it was believed that Riley was about to commit an unlawful act that would cause serious harm to some person;
>
> (2) the information from Heather Kerr during the morning of April 19, 2004 that Riley was now driving a silver car with the symbols "A" and "S" on the rear;
>
> (3) the subsequent discovery shortly thereafter of the silver Audi "A6" bearing licence number ATDD 851 by the M.S.S. crew, first behind 567 Scarborough Golf Club (a building Riley was believed to frequent) and thereafter a short distance away;

(4) the observation, by the M.S.S. crew, of a male fitting Riley's physical description boarding the Audi in front of the hair salon and driving off;

(5) the nature of the Audi's high speed "flight" northbound on Morningside Avenue, into the Malvern "turf" from the Galloway "turf";

(6) the timing of the shooting of Hyatt and Patrong, mere minutes later;

(7) the location of the shooting of Hyatt and Patrong, a short distance from the area in which the surveillance crew misplaced the Audi;

(8) the observations by eyewitnesses at the scene (including Portia Joseph), who described the suspect vehicle variously as "silver grey car", "new", "fairly clean" and possibly "an Audi"; and

(9) the nature of the shooting, *i.e.* two young black men shot in the Malvern area in broad daylight.

Analysis

41 In all of the circumstances, it is fair to say that the interceptions only expedited the inevitable arrest of the occupants of the Audi, and in particular, Riley, on April 19, 2004. As a result, as I will explain, I would not characterize the evidence of the arrest of Riley as being obtained in a manner that violated his rights under s. 8 of the *Charter*.

42 I acknowledge and endorse the principle that the characterization of what is obtained in a manner that infringes a *Charter* right should be given a liberal interpretation to avoid the possibility of exempting from consideration for exclusion under s. 24(2) evidence that may affect trial fairness. But I do not think that the application of that principle should result in a finding that the evidence of Riley's arrest was obtained in a manner that violated his rights.

43 One can readily construct a continuum of circumstances where there is at least some connection between the unlawful interception of the private communications of some person and the subsequent arrest of that person. On one end of that continuum would be the case where the police learn of the existence of a crime, the identity of the perpetrator, the grounds for believing that that person committed the crime, and that person's location from the unlawful interception of the private communications of the perpetrator. Next might be the case where the police know of the crime, but learn of the identity of the perpetrator, the grounds for believing that that person committed the crime, and that person's location from the interception. At the extreme opposite end of the continuum is this case.

44 In this case, the police knew of the shooting entirely independent of the interceptions. The ongoing police investigation, including both surveillance and witness interviews, gave the police strong reason to believe that the occupants of the silver Audi bearing licence plate number ATDD 851, and in particular Riley, were the perpetrators. While there was an interception of Reilly's communication that associated him with the crime, the police involved in the arrest, and the officer who made the decision to make the arrest, were unaware of it at the time of the arrest. In these circumstances, the connection between the breach and the arrest is highly attenuated. The causal connection is tenuous, and, in all of the circumstances, the temporal connection is not determinative. Upon an examination of the whole of the relationship between the breach and the arrest, I conclude that evidence of the arrest was not obtained in a manner that infringed a *Charter* right.

The Causal Connection

45 With respect to the causal connection, Sopinka J. noted in *Goldhart*, at para. 40, that "it is appropriate for the court to consider the strength of the causal relationship." In the circumstances here, I find as a fact that the causal connection between the breach and arrest is not strong. On the contrary, it is tenuous. I recognize, of course, that the information about Riley's location contributed to the precise timing of the arrest, but it did no more than that. On the basis of the evidence I heard, I am satisfied, on a balance of probabilities, that the arrest was about to happen in any event. It was inevitable. I say that having regard to the reality of the situation.

46 It is not unfair to describe the arrest in this way: a very serious crime had been committed in Scarborough shortly before the arrest. The police had reasonable grounds to believe that the perpetrators were fleeing in a silver Audi bearing licence plate number ATDD 841. They threw every resource they could into finding and stopping that car, and arresting its occupants. Twelve surveillance officers were dedicated exclusively to locating the Audi after the shooting. The particulars of the shooting and the suspect Audi information were transmitted to virtually every police car in Scarborough at that point, including, as I have noted, 25 to 30 uniform scout cars, the traffic enforcement units, investigative units, street-crime units, canine units and Emergency Task Force units. Those not dedicated exclusively to searching for the Audi still possessed its particulars and could be expected to stop the vehicle and investigate its occupants.

47 The only reasonable inference is that the arrest of the occupants of the Audi was inevitable. Scarborough was literally crawling with police intent on accomplishing this goal. Scout cars, surveillance crews, traffic officers, homicide investigators and other investigative unit officers, street-crime unit officers, Emergency Task Force officers, and even canine units were either assigned to the case or at least committed to providing assistance. The police cars were all equipped with radio communication equipment and sophisticated mobile work stations. The prospect that the Audi would be stopped, and its occupants arrested, is overwhelming — if not at the precise time that they were actually arrested, then within a short time afterward.

48 Mr. Midanik argued that a conclusion that the arrest would inevitably have been made without the aid of the intercepted private communication would be based on mere speculation. I do not agree. I note that in *R. v. Ricketts* (2000), 144 C.C.C. (3d) 152 (Ont. C.A.), in a slightly different context, the Court stated, at para 21:

> Consideration of the "inevitable discovery" doctrine will necessarily involve some degree of speculation as to what might have happened. That speculation cannot, however, proceed in the absence of any evidence as to alternative investigative options open to the police in the particular circumstances. The crown did not discharge the burden of showing on the balance of probabilities that apart from the appellant's admissions the police would have obtained a warrant to search the appellant's apartment, executed that warrant and obtained the incriminating evidence.

49 Here there is a substantial body of evidence outlining the steps that were being undertaken by the police to ensure that the occupants of the Audi would be arrested. Based on that evidence, I am of the view that the conclusion I have reached involves no more than a permissible degree of speculation.

50 I recognize that my approach could be seen to be an application of the inevitable discovery doctrine. That doctrine has been applied in two circumstances: first, in determining what is derivative evidence in cases involving compelled testimony (*R. v. S. (R.J.)*, *supra* and *British Columbia (Securities Commission) v. Branch* *supra*) and second, as a factor when considering the trial fairness component of the test for exclusion of evidence under section 24(2) of the *Charter* (*R. v. Collins*, *supra*, and *R. v. Burlingham* (1995), 97 C.C.C. (3d) 385 (S.C.C.).)

51 I do not consider, however, that my approach is properly characterized as an application of the doctrine of inevitable discovery. What I have found, instead, is that the constitutional violation provided only an inconsequential component of the information that resulted in the arrest of the accused, and as a consequence, the causal connection between the breach and the evidence is tenuous. The difference may be subtle, but I have no doubt that it is real. In any event, whether my approach is properly characterized as an application of the inevitable discovery doctrine or not, it finds support in the other cases, specifically in the cases involving the effect of unconstitutional information that forms a part of the reasonable grounds for a search warrant or wiretap authorization.

52 In *R. v. Grant* (1993), 84 C.C.C. (3d) 173 (S.C.C.) at para. 50, Sopinka J. stated, for the Court:

> In *Kokesch*, *supra*, this Court determined that evidence obtained during a search under warrant had to be excluded under s. 24(2) of the Charter where the warrant was procured through an information which contained facts solely within the knowledge of police as a result of a *Charter* violation. However, in circumstances such as the case at bar where the information contains other facts in addition to those obtained in contravention of the *Charter*, it is necessary for reviewing courts to consider whether the warrant would have been issued had the improperly obtained facts been excised from the

> information sworn to obtain the warrant: *Garofoli*, *supra*. In this way, the state is prevented from benefiting from the illegal acts of police officers, without being forced to sacrifice search warrants which would have been issued in any event. Accordingly, the warrant and search conducted thereunder in the case at bar will be considered *constitutionally sound* if the warrant would have issued had the observations gleaned through the unconstitutional perimeter searches been excised from the information. It has been admitted that the police had reasonable grounds for the issuance of a warrant before undertaking either of the perimeter searches. This admission on the part of the respondent is eminently proper given the following independent reasonable grounds identified in the information sworn to obtain the warrant. (Emphasis added.)

53 It is clear from this paragraph that the sufficiency of the remaining information after the unconstitutionally obtained information was excised resulted in the search warrant being constitutionally sound. As a result, no finding that the evidence seized pursuant to the warrant was obtained in a manner that violated the *Charter* could be based on a causal connection.

54 Lest there be any doubt about it, it is also clear from *R. v. Kokesch* (1990), 61 C.C.C. (3d) 207 (S.C.C.) that when examining the connection between an underlying *Charter* breach, and the fruits of a subsequent search undertaken pursuant to a search warrant or wiretap order, the Court is determining whether the evidence was obtained in a manner that infringed a *Charter* right. I say this based on the following comments of Dickson C.J.C., at pp. 219-220:

> 24 Having found that the s. 8 *Charter* right of the appellant was infringed by the warrantless search, the second issue raised on appeal to be examined is whether the Court of Appeal erred in failing to find that the administration of justice would be brought into disrepute by admitting evidence obtained through a subsequent search undertaken pursuant to a valid search warrant.
>
> 25 In my view, the nexus between the warrantless and unconstitutional search of the perimeter of the dwelling-house, and the subsequent discovery of the evidence, is sufficiently close that it can be concluded that the evidence was "obtained in a manner that infringed or denied" s. 8 of the *Charter*. This threshold issue in s. 24(2) was considered by this Court in *R. v. Strachan* [1988] 2 S.C.R. 980, and the Court adopted a case-by-case approach to the issue (p. 1006). Moreover, the Court stated the following general principle (at p. 1005):
>
> > ... the first inquiry under s. 24(2) would be to determine whether a Charter violation occurred in the course of obtaining the evidence. A temporal link between the infringement of the Charter and the discovery of the evidence figures prominently in this assessment...
> >
> > . . . . .

55 I note that Dickson C.J.C. was in dissent in *Kokesh*, but the dissent related to the second phase of the s. 24(2) analysis. There is no suggestion that the majority disagreed with the Chief Justice on the quoted portion of his judgment.

56 I see no reason why the approach referred to in *Grant* should not be equally applicable here. In the context there, it ensured that "the state is prevented from benefiting from the illegal acts of police officers, without being forced to sacrifice search warrants which would have been issued in any event." In this context, it ensures that "the state is prevented from benefiting from the illegal acts of police officers, without being forced to sacrifice arrests that would have been made in any event."

57 Applying the approach endorsed in *Grant* to this case, I conclude that if the information obtained from the unlawful interception is removed from consideration, the police would still have been left with information that gave them the grounds to arrest the occupants of the Audi, and that armed with that information, they would have arrested the occupants of the Audi, including Riley. The arrest was not unlawful, and the arrest was not unreasonable. Evidence of the arrest was not obtained in a manner that violated the *Charter* as a result of any causal connection between the breach and the evidence. That leaves for consideration the temporal connection.

The Temporal Connection

58 I have said that temporal connection between the breach and the arrest is weak. I acknowledge that the arrest of Riley took place within an hour of the interception, and the chain of events leading to the arrest began within 15 minutes of the interception. As a result, there is a temporal connection between the breach and the arrest.

The Same Transaction or Course of Conduct

59 The fact that there is a temporal connection between the breach and the arrest is not determinative of the question whether evidence of the arrest was obtained in a manner that infringed a *Charter* right. This point was first made by Dickson C.J. as early as 1988 in *Strachan*. To repeat, he stated, at para.46:

> A temporal link between the infringement of the *Charter* and the discovery of the evidence figures prominently in this assessment, particularly where the *Charter* violation and the discovery of the evidence occur in the course of a single transaction. The presence of a temporal connection is not, however, determinative. Situations will arise where evidence, though obtained following the breach of a *Charter* right, will be too remote from the violation to be "obtained in a manner" that infringed the *Charter*. In my view, these situations should be dealt with on a case by case basis. There can be no hard and fast rule for determining when evidence obtained following the infringement of a *Charter* right becomes too remote.

60 This point was repeated in *Goldhart*. To repeat again, Sopinka J. stated, at para 40:

> Accordingly, while a temporal link will often suffice, it is not always determinative. It will not be determinative if the connection between the securing of the evidence and the breach is remote. I take remote to mean that the connection is tenuous. The concept of remoteness relates not only to the temporal connection but to the causal connection as well. It follows that the mere presence of a temporal link is not necessarily sufficient. In obedience to the instruction that the whole of the relationship between the breach and the evidence be examined, it is appropriate for the court to consider the strength of the causal relationship.

61 He further stated, at para. 39, that in the end, what was determinative was whether or not the breach and the subsequent seizure evidence, "formed an integral part of a single investigatory transaction." As a result, in *Grant*, despite the fact that the causal connection between the breach and the seized evidence was tenuous, the evidence was obtained in a manner that infringed a *Charter* right because it was temporally connected to the breach, *and* formed an integral part of a single investigatory transaction.

62 Doherty J.A. made the same point in *Plaha* and *R. v. S. (S.)*. In each case he said that evidence will be "obtained in a manner" that infringed a *Charter* right only if, on a review of the entire course of events, "the breach and the obtaining of the evidence can be said to be part of the same transaction or course of conduct."

63 In this case, the wiretapping under s. 184.4 was undertaken prior to the shooting of Hyatt and Patrong. It was in no sense a response to it. It was a preventative measure. It was not undertaken as a step in the investigation of the Hyatt and Patrong shooting. The arrest, on the other hand, was a direct response to the shooting. It was the culmination of a quickly developing investigation. Undoubtedly the two were related. The surveillance officers who effected the arrest were in the field initially for the same reason as the wiretapping was being conducted. But when they began looking for the Audi, and hoping to make an arrest, it was entirely as a response to the shooting, and without reference to the wiretapping. The effort to find the Audi, and arrest the occupants, was quite different than the perimeter search and the search warrant considered in *Grant*. There, both were undertaken as part of an investigation of the same crime. One followed the other. In fact, although the search warrant did not stand or fall on the results of the perimeter search, the results of the perimeter search undoubtedly lead the police to continue their investigation, and ultimately seek a warrant. Here, the wiretapping and the arrest came together entirely fortuitously. They had different purposes. I would not classify them as forming an integral part of the same investigation, or as being part of the same transaction or course of conduct.

Conclusion with respect to the Hyatt and Patrong shooting

64 I am of the view that the evidence of the arrest was not obtained in a manner that violated Riley's *Charter* rights. As a result, evidence flowing from that arrest was not obtained in a manner that violated his rights, including fingerprint and gunshot residue tests resulting from the April 19, 2004 arrests, the seizure of the Audi on April 19, 2004, and the seizure of additional real evidence pursuant to search warrants on April 20, 2004 flowing from the arrests.

3. Marlon Wilson

65 Under this heading, Mr. Midanik seeks the exclusion for evidence of the following:

- all statements of Marlon Wilson
- all "evidence" of Marlon Wilson given at the preliminary hearing
- all evidence of Marlon Wilson to be given at trial
- all information learned by the police from Marlon Wilson's statements and evidence at the preliminary hearing

The Evidence

66 As I have indicated, Marlon Wilson was arrested with Riley and Atkins on April 19, 2004, and charged with the shooting of Hyatt and Patrong. He was taken to a police station, where he gave a recorded, unsworn statement to Dets. Barsky and Bydal. In it, he told the officers that he wasn't going to go to jail for something he didn't do. He went on to implicate both Riley and Atkins in the Hyatt and Patrong shootings. He also provided information about the Get Mad Gang and its alleged members. He specifically identified Riley and Atkins as part of the Galloway Guys.

67 Wilson provided a second unsworn statement on April 20, 2004, this time to Det. Woodhouse. In this statement, Wilson provided more details about the shooting.

68 After the arrests of Riley, Atkins and Wilson, several search warrants were executed. One of these was executed at 567 Scarborough Golf Club Road apartment 1607, the residence of Riley's girlfriend, Dana Lee Williams, and a quantity of drugs was seized. Williams was charged with various drug offences and possession of proceeds of crime. In the course of making disclosure to Williams, the Crown inadvertently disclosed that Wilson had made statements to the police implicating Riley in the shooting of Hyatt and Patrong. Williams showed this disclosure to Riley while he was in custody.

69 On October 25, 2004, Dets. Banks and Comeau visited Wilson in custody at the Toronto West Detention Centre, and had him sign a consent to a Judge's order to have him removed from the facility for an interview at 23 Division. That order was obtained.

70 On October 27, 2004, Wilson was transported to 23 Division for an interview. In the course of the interview, which was taped, Comeau and Banks played a number of intercepted communications to Wilson, asking him to identify the parties in the call and what they were talking about. These interceptions were made pursuant to an authorization granted by McRae J. on June 7, 2004. In these communications, Riley spoke to family members and friends, including Atkins, about silencing Wilson. In particular, in one of the interceptions, Riley and Atkins discussed "slooing" Wilson. "Slooing" means harming or killing. In another interception, Riley spoke to his mother about killing Wilson. In still another interception, Riley told Wilson to change his testimony. In still another interception, Riley's mother told one of Riley's brothers that something had to happen to Wilson. In another, one of Riley's brothers told Riley's mother that he was going to hurt Wilson. In another, Riley's mother and his girlfriend discussed seeing someone to make sure that something happened to Wilson. In another, Riley's mother and girlfriend discuss having talked to people about killing Wilson.

71 After these calls were played to Wilson, he provided more information about Riley telling him to change his testimony. He also provided information regarding the Charlton and Bell murders. In particular, he said that Riley confessed to him at Maxine McPherson's apartment that he had participated in the shooting of Charlton and Bell.

72 On December 16, 2004 Det. Burks visited Wilson at the Toronto East Detention Centre and briefly discussed the Witness Protection Program with him. He told Wilson hat he would be commencing the paperwork to initiate the process, and left his contact number with him.

73 On December 22, 2004, the charges against Wilson arising out of the Hyatt and Patrong shooting were withdrawn, and Wilson was released from custody. Witness Protection Program officers were in attendance at court and had put a preliminary safety plan into effect for Wilson. Wilson, however, refused the assistance of the Witness Assistance Program and left the courthouse on his own. He left the impression that there would be some follow-up conversations with the officers who were in attendance that day, but that didn't happen. He left the police with a temporary address, but never stayed there. He ignored repeated attempts by the police to get in touch with him through intermediaries.

74 In fact, on December 26, 2004, Wilson left Toronto and drove to Vancouver without notifying the police. He remained there until February 10, 2005, when he was arrested on a material witness warrant issued out of this Court. Dets. Burks and Lindquist transported him back to Ontario.

75 Before returning Wilson to Toronto, Dets. Burks and Lindquist interviewed him in an interview room at a Vancouver police station. The interview was recorded. During the recorded interview, Wilson stated that he was very upset with the detectives, and wanted to know what would happen once he was brought back to Toronto. Burks indicated that if Wilson cooperated with police and stayed in touch about his whereabouts, witness protection could be an option. During the interview, Wilson repeatedly told the officers that if he was going to stay in jail, he would refuse to testify against Riley. Wilson declined the offer of witness protection. The officers encouraged Wilson to cooperate. Burks promised to try and accommodate Wilson getting back to Vancouver if he did. Wilson ultimately admitted that he was just trying to "piss off" the officers, and that he would cooperate.

76 Wilson was interviewed again on February 11, 2005 upon his return to Toronto. He was released from custody once again on February 23, 2005. He gave another statement to the police that day, after being released.

77 In June, 2005, Wilson committed an assault. On August 15, 2005, he was brought back to Ontario from Montreal to face the assault charge. He contacted Det. Burks for assistance. Wilson told the police that if they helped him out, he would help them out. Wilson asked the police to help him get bail. Wilson appeared at 1000 Finch Court on August 16, 2005 and was remanded to September 23, 2005. On August 29, 2005, while being held in custody at the Lindsay jail, Wilson was paid a visit by Dets. Tighe and Caracolo. Wilson asked what would happen if he did not testify. The police told him that he would be treated as a hostile witness, and his statements would be played. Witness protection was also discussed. On September 9, 2005, Dets. Tighe and Handsor went back to Lindsay to arrange for Wilson's September 23 remand date.

78 On September 23, 2005, Wilson met with Det. Burks and Assistant Crown Attorney Maureen Pecknold. Wilson indicated to them that he did not feel good about testifying and believed he was in a no win situation. Pecknold explained to Wilson that whatever he was to say on the stand would not be used against him later.

79 Sometime in November of 2005, Wilson was released on bail once again.

80 On January 16, 2006, Wilson was arrested in a car in which marijuana was located. Wilson was released for this incident and was not charged, because he provided a false name. Wilson provided a false name because he did not want the other three occupants of the car to know who he was. Wilson indicated to the Cst. Gillis, the arresting officer, that he knew Burks from homicide and that he would turn himself in on January 17, 2006 to 55 division in relation to a charge of obstructing a peace officer arising out of his providing a false name to police.

81 On January 26, 2006 Wilson was convicted of failing to comply with a recognizance and obstructing a peace officer. He was sentenced to 45 days imprisonment in addition to seven days of pre-trial custody. On February 1, 2006 Wilson was convicted of another charge of failing to comply with a recognizance and another charge of obstructing a peace. He was sentenced to an additional 30 days imprisonment. Each of the fail to comply charges involved the violation of a term of a recognizance

imposing a curfew on Wilson. Each of the obstruction charges related to giving the police a false name in an effort to avoid detection of the curfew breach.

82 Wilson was interviewed again by the police on March 20, 2006, while serving sentence.

83 Wilson testified for eight days in April, 2006, at the preliminary inquiry into a great many charges relating to alleged members of the Galloway Boyz, including the charges being tried by me. During the preliminary inquiry, Wilson was in custody on aggravated assault and assault with a weapon charges.

The Argument

84 Mr. Midanik argued that neither Riley nor Wilson would have been arrested for the Hyatt and Patrong shooting on April 19, 2004 but for the police knowing Riley's location through the unlawful interception of his private communications. Even if Riley had ultimately been arrested, he argued, it is extremely unlikely that he would have been in the company of Wilson, and so it is unlikely that Wilson would have been arrested. If Wilson had not been arrested, he would not have implicated Riley in the shooting. If he had not implicated Riley in the shooting, Riley would not have made threats against Wilson. If Riley had not been in custody, the police would not have been wiretapping him. If the police had not been wiretapping him, they would not have recorded his threats. If his threats were not recorded, the police would not have been able to play them for Wilson. If they had not played them for Wilson, and if Wilson were not in custody, Wilson would not have implicated Riley in the Charlton and Bell shooting. If Wilson had not implicated Riley in the Charlton and Bell shooting, he would not be a witness in these proceedings, and the police would not have obtained the evidence that they did obtain as a result of Wilson's cooperation with them. Accordingly, the argument runs, Wilson's statements, his testimony, and evidence obtained as a result of Wilson's cooperation were all obtained in a manner that infringed Riley's rights under the s. 8 of the *Charter*.

Analysis

85 I have already found that evidence of the arrest of Riley and Wilson was not obtained in a manner that infringed Riley's rights under the *Charter*. That finding removes the fundamental underpinning of Mr. Midanik's argument concerning Wilson. But in case I am wrong, I will consider the argument on the assumption that the evidence of the arrests was obtained in a manner that violated Riley's *Charter* rights.

86 I repeat the succinct formulation of the approach to the question of whether evidence is obtained in a manner that infringes a *Charter* right found in the judgment of Doherty J.A. in *Plaha*, at para 45:

> The jurisprudence establishes a generous approach to the threshold issue. A causal relationship between the breach and the impugned evidence is not necessary. The evidence will be "obtained in a manner" that infringed a *Charter* right if on a review of the entire course of events, the breach and the obtaining of the evidence can be said to be part of the same transaction or course of conduct. The connection between the breach and the obtaining of the evidence may be temporal, contextual, causal or a combination of the three. The connection must be more than tenuous: *R. v. Goldhart* (1996), 107 C.C.C. (3d) 481 at 492-97 (S.C.C.).

The Temporal Connection

87 In examining the temporal connection between the breach and the evidence of Marlon Wilson, it is first necessary to consider what event the breach is being connected to. In other words, when was Wilson's testimony secured? Was it on Aril 19, 2004, when Wilson first implicated Riley in the Hyatt and Patrong shooting? Was it on October 27, 2004, when Wilson first implicated Riley in the shooting of Charlton and Bell? Was it when Wilson first agreed to testify against Riley? Was it at the preliminary inquiry, when Wilson first testified against Riley? Or will it be when he takes the witness stand at trial and first begins to testify, assuming he does? The temporal connection may be viewed quite differently depending on which of these events is the appropriate one to consider for analytical purposes.

88 Guidance on this issue must be sought from the decision in *Goldhart*, since that case involved an attempt to exclude the testimony of a witness who had been a co-accused of the accused on trial, and whose arrest followed a *Charter* breach. But different passages in *Goldhart* can be interpreted in a manner that leads to different results. Perhaps the clearest passage with respect to this issue is in paragraph 45, where Sopinka J. says:

> In order to find a temporal link the pertinent event is the decision of Mayer to cooperate with the Crown and testify, and not his arrest. Indeed the existence of a temporal link between the illegal search and the arrest of Mayer is of virtually no consequence.

89 Clearly then, in this case, a temporal link between the unconstitutional interception of Riley's private communications and the arrest of Wilson is of virtually no consequence. Similarly, a temporal link between the unconstitutional interception of Riley's private communications and the decision to cooperate with the police and give a statement implicating Riley in the Hyatt and Patrong shooting is of virtually no consequence. The pertinent event is the decision of Wilson to testify.

90 But that does not solve the problem. First, it is not easy to know when Wilson actually decided to testify. And second, is it enough to look for the point in time when Wilson decided to testify against Riley in relation to the Hyatt and Patrong shooting, or should I focus on his decision to testify against Riley in relation to the Charlton and Bell shooting?

91 The idea that Wilson might testify against Riley did not arise when he gave his first statement on April 19, 2004. That statement was recorded, and no formal caution was given. Almost immediately after the interview began, Wilson explained that he was not involved in the shooting, and repeated several times that he wasn't going to go to jail for something he didn't do. It is apparent that at that stage, Wilson hoped to convince the police not to charge him at all. Det. Barsky then made it clear to Wilson that he was under arrest, and that charges would be laid against him regardless of what he said. Barsky told Wilson that their discussion was not about not being charged. He said that was recording what Wilson said, as he had done with Riley and Atkins, and intended to give evidence of what each of them told him at the trial of the offences against the three of them arising out of the Hyatt and Patrong shooting. Wilson then outlined the events of April 19 in some detail, in the hope, no doubt, that by telling them his version of what happened, they would be convinced of his innocence and not proceed to trial against him.

92 Similarly, there is no evidence before me that the idea of Wilson testifying against Riley arose when he gave his second statement on April 20, 2004. On that occasion, Det. Woodhouse made it clear to Wilson from the outset that whatever he said could be used as evidence at his trial. Wilson again repeated that he wasn't "going down for this." He didn't do any shooting. Wilson was then taken to the Kingston Road and Morningside Avenue area and pointed out an address where, he said, Riley and Atkins had gotten rid of their gun after the shooting. Once again, I have no doubt, Wilson cooperated with the police in hopes that they would be convinced of his innocence and not proceed to trial against him.

93 But in the affidavit of Det. Comeau sworn on August 3, 2004, in support of the second authorization to intercept private communications in this investigation (but not in his affidavit sworn on June 7, 2004 in support of the first authorization), Det. Comeau describes Wilson as a "future witness." Mr. Midanik argues that this is an indication that Wilson had agreed to testify in relation to the Charlton and Bell shooting by that time. I cannot agree. The conclusion seems entirely illogical. After all, no one had been charged with the Charlton and Bell shooting at that time — hence the asserted need for an authorization to intercept private communications. Of even greater importance, no officer involved in the investigation of the Charlton and Bell shooting had spoken to Wilson as yet. It is hard to imagine with whom Wilson had made an agreement to testify about the Charlton and Bell shooting. It seems obvious to me that by August 3, 2004, Wilson had agreed to testify about the shooting of Hyatt and Patrong, but not about the shooting of Charlton and Bell.

94 Similarly, when Wilson spoke to the police on October 27, 2004, and implicated Riley in the Charlton and Bell shooting, Wilson spoke only about his intention to testify for the Crown at the preliminary inquiry concerning the Hyatt and Patrong shooting. Although Wilson provided the police with a good deal of information about the Charlton and Bell shooting, there was not a word spoken about him ultimately testifying if charges were laid in respect of that shooting. In fact, although Wilson had already begun to implicate Riley and Atkins in the Charlton and Bell shooting, and would immediately continue to do so

without hesitation, when asked in the course of the interview if he had anything else to say in relation to testifying against Riley and Atkins, he said that he had already told the police everything that he knew. I have reference here to the following exchange:

> COMEAU: Okay. Alright. Is there anything else in relation to uh your testifying in court against Tyshan Riley and Philip Atkins that you can tell us that would assist us in our investigation?
>
> WILSON: Not really, I told you guys everything that I knew already.

95 On the other hand, given the information he provided to the police on October 27, 2004 about the Charlton and Bell shooting, given that his statement was made under oath and recorded, and given that he had already agreed to testify about Hyatt and Patrong, it could hardly have escaped Wilson's mind that the police would expect him to testify if there ultimately was a prosecution. I am far from convinced, however, that Wilson truly intended to testify against Riley at that time in relation to either shooting. I have no doubt that he would not testify if he could avoid it. His goal, as ever, was to secure his release from custody. He was quite prepared to offer to testify to achieve that goal. He hoped that testifying would not prove to be necessary in the end.

96 This is consistent with his hasty and unannounced departure to Vancouver when he was released from custody, and his unresponsiveness when the police tried to reach him. His attitude is also clear from his statement to the police on February 10, 2005, when he was arrested in Vancouver and brought back to Toronto. He told the police repeatedly that if he was going to stay in jail, he would refuse to testify against Riley. He obviously was hoping that this would deter the police from keeping him in custody. When this didn't work, he said that he was just trying to "piss off" the officers, and that he would cooperate. He realized that the assertion of a willingness to testify remained his only bargaining chip.

97 Finally, when it came to the preliminary hearing in relation to the Charlton and Bell shooting in April, 2006, Wilson was in custody once again. He had no escape, and he did in fact testify. He had no choice but to testify if he had any hope that the police might assist him to secure his liberty.

98 As I see it, the police had not truly secured Wilson's testimony in relation to the Charlton and Bell shooting until he began testifying on April 4, 2006. There is much to be said, however, for the idea that his evidence was effectively secured on October 27, 2004. On that date, he first gave the police information that implicated Riley in the shooting of Charlton and Bell, and he gave it under oath. As a result, the police not only knew what Wilson could say, and apparently was prepared to say at Riley's trial, but they also had his statement in a form that might be admitted into evidence if Wilson were to refuse to testify.

99 But even if October 27, 2004, and not April 26, 2006, was the date that Wilson's evidence was secured, the temporal connection between the breach and the evidence is a weak one. It is further weakened by at least one important intervening event. Wilson was motivated to discuss the Charlton and Bell shooting with the police because of the threats made against him by Riley and those associated with him. Riley substantially contributed to Wilson's willingness to testify against him. It is a matter of pure speculation whether or not Wilson would have provided evidence about this shooting without Riley's intervention.

100 Finally, to the extent that the Crown seeks to adduce evidence from Wilson that arises out of his statements of April 19 and 20, 2004, the temporal connection between the breach and the evidence is stronger. At that point in time, he had not yet been faced with Riley's threat, and the breach was relatively fresh. The temporal connection even then, however, is significantly weakened by Wilson's voluntary decision to assist the police. I will explain this point more fully when I discuss the causal connection.

The Causal Connection

101 I begin my consideration of the causal connection between the breach and the securing of the evidence with a reminder that the connection must be viewed quite differently when it is testimony that has been secured rather than real evidence. Sopinka J. expressed the difference as follows in *Goldhart*, at para 43:

> In order to assess properly the relationship between the breach and the impugned evidence, it is important to bear in mind that it is the *viva voce* evidence of Mayer that is said to have been obtained in a manner that breaches the *Charter*. A

distinction must be made between discovery of a person who is arrested and charged with an offence and the evidence subsequently volunteered by that person. The discovery of the person cannot simply be equated with securing evidence from that person which is favourable to the Crown. The person charged has the right to remain silent and in practice will usually exercise it on the advice of counsel. The prosecution has no assurance, therefore, that the person will provide any information let alone sworn testimony that is favourable to the Crown. In this regard it has been rightly observed that testimony cannot be treated in the same manner as an inanimate object. As Brooke J.A. observed in his dissenting opinion, at p. 85:

> Testimony is the product of a person's mind and known only if and when that person discloses it. It cannot be obtained or discovered in any other way. Testimony which is heard for the first time some months after a search cannot be equated with or analogized to evidence of an inanimate thing found or seized when an illegal search is carried out.

102 I take from this discussion that the outcome in *Goldhart* should not be thought of as remarkable, turning on the unusual facts of the case. Rather, it is the outcome that will ordinarily come about in cases involving testimony discovered after a *Charter* breach. I am comforted in this view by the decision of the British Columbia Court of Appeal in *R. v. Hyatt* (2003), 171 C.C.C. (3d) 409 (B.C. C.A.).

103 In that case, Hyatt was convicted of robbery and other related offences. A vehicle in which he was a passenger was stopped and searched by the police. The loot from the robbery was seized. Bennett was the driver of the car. Hyatt and Bennett were questioned, and their rights under s. 10(b) of the *Charter* were violated. Both were arrested and taken into custody. After twelve hours of persistent questioning, Bennett provided a recorded statement in which she disclosed her knowledge of the relevant events. She was released three days later. The charges against her were subsequently stayed, and she was subpoenaed to testify for the Crown at the trial. Her testimony contributed to Hyatt's conviction. The Court of Appeal upheld the conviction, and concluded that Bennett's evidence was not obtained in a manner that infringed Hyatt's *Charter* rights. In reaching this conclusion, Smith J.A. stated, at para 23:

> The causal and temporal connections between the discovery of a witness and the subsequent testimony of the witness are *generally* tenuous and remote, as Sopinka J. pointed out (at para. 45), because the material event for purposes of the *Charter* analysis is not the discovery of the witness but the intervening decision of the witness to testify, and because the knowledge of the witness cannot be discovered unless and until the witness voluntarily discloses it. (Emphasis added.)

104 As I see it, there is nothing in this case that distinguishes it from *Goldhart* with respect to this issue. The police had no assurance when they discovered Wilson in the Audi on April 19, 2004, that he would provide any information to them about the Hyatt and Patrong shooting, far less agree to provide sworn testimony that is favourable to the Crown. And they had no idea that six months later he would provide information and ultimately agree to provide testimony to their colleagues about an earlier homicide. In fact, the officers who arrested Wilson had no involvement in the investigation of the Charlton and Patrong shooting, and no knowledge that Wilson had anything to say about it. As a result, the causal connection between the breach and the evidence is tenuous at best.

105 Mr. Midanik makes much of the fact that in *Goldhart*, the witness Mayer pleaded guilty to the charge against him "to get the matter off his chest" as a result of a recent religious conversion, and made a decision to testify against Goldhart that was "the product of a detached reflection and an expression of a sincere desire to cooperate." It was the intervening religious conversion, he reasons, that weakened the connection between the breach and the evidence. This case, he says, is quite different. There is nothing like a religious conversion here to weaken the chain of causation.

106 I do not share Mr. Midanik's view of the significance of Mayer's religious conversion. The outcome of the case did not turn on this unusual feature. What weakens the chain of causation in most cases of witness testimony, and distinguishes those cases from cases involving real evidence, is the fact that the information and resulting testimony are voluntarily given.

107 After making this very point in paragraph 43 of *Goldhart*, reproduced above, Sopinka J. went on to quote Rehnquist J., as he then was, in *United States v. Ceccolini*, 435 U.S. 268 (U.S. N.Y. 1978), who explained the difference between testimony and real evidence as follows, at pp. 276-77:

> Witnesses are not like guns or documents which remain hidden from view until one turns over a sofa or opens a filing cabinet. Witnesses can, and often do, come forward and offer evidence entirely of their own volition. And evaluated properly, the degree of free will necessary to dissipate the taint will very likely be found more often in the case of live-witness testimony than other kinds of evidence.

108 It seems apparent to me that it was not the religious conversion, *per se*, that contributed to the result in *Goldhart* . It was Mayer's voluntary decision to testify that weakened both the temporal and the causal connection between the breach and the evidence. In this regard, Sopinka J. stated, at para 45:

> Moreover, any temporal link between the illegal search and the testimony is greatly weakened by intervening events of Mayer's voluntary decision to cooperate with the police, to plead guilty and to testify. The application of the causal connection factor is to the same effect. The connection between the illegal search and the decision by Mayer to give evidence is extremely tenuous. Having regard, therefore, to the entire chain of events, I am of the opinion that the nexus between the impugned evidence and the Charter breach is remote.

109 Mr. Midanik also argues that the cooperation, information and expressions of willingness to testify provided by Wilson to the police on April 19, April 20 and October 27, 2004, and thereafter, were not provided voluntarily, having regard to the fact that Wilson remained in custody on the Hyatt and Patrong charges without interruption until December 22, 2004, and was subjected to police questioning and, on October 27, a police stratagem. I do not agree.

110 I have read the transcripts that have been prepared of some of Wilson's statements, particularly those made on April 19, 2004 and October 27, 2004. I have read the evidence concerning his statement of April 20, 2004. And I have watched a video recording of his statement of February 10, 2005. It is apparent that Wilson's cooperation with the police throughout was deliberate. It was not born of a sincere desire to cooperate, as in *Goldhart*. Rather it was born of a determination on the part of Wilson to do all he could to secure his liberty. Wilson was a veteran of the criminal process to say the least. He knew the implications of assisting the police. His decision to cooperate with the police was entirely voluntary.

111 I acknowledge that were Wilson free on bail, he would not likely show up in court to testify without the active encouragement of the police. But this does not detract from the deliberateness and voluntariness of his cooperation with them in providing his version of events and agreeing to testify.

112 It is important not to confuse the fact of voluntariness with the motive for voluntariness. Mayer's decision to cooperate was altruistic. Wilson's decision to cooperate was self-interested. But both decisions were voluntary — the product of free will. Wilson's voluntary decision to cooperate significantly weakens both the temporal and the causal connection between the breach and the evidence.

113 I conclude that the causal connection between the breach and Wilson's evidence is tenuous.

The Same Transaction or Course of Conduct

114 As I have already noted, the fact that there is a connection between the breach and the arrest is not determinative of the question whether evidence of the arrest was obtained in a manner that infringed a *Charter* right. Evidence will be "obtained in a manner" that infringed a *Charter* right only if, on a review of the entire course of events, "the breach and the obtaining of the evidence can be said to be part of the same transaction or course of conduct." With respect to Marlon Wilson's evidence, I have concluded that both the temporal connection and the causal connection are tenuous. But in any event, I am satisfied that the breach and the obtaining of the evidence cannot be said to be part of the same transaction or course of conduct. In my view, the unlawful interception of Riley's private communications under the direction of homicide officers, and the questioning of

Wilson by officers investigating the Hyatt and Patrong shooting were entirely separate transactions, for reasons similar to those I outlined in respect of the Hyatt and Patrong evidence. The questioning of Wilson about the Charlton and Bell shooting six months later was also a separate transaction.

Conclusion with respect to Marlon Wilson

115 I am of the view that Wilson's evidence was not obtained in a manner that violated Riley's *Charter* rights. As a result, evidence flowing Wilson's cooperation with the police was not obtained in a manner that violated his rights.

4. The Judicially Authorized Interceptions of Private Communications

116 Mr. Midanik argued that the private communications of Tyshan Riley, Phillip Atkins, Jason Wisdom and others intercepted pursuant to the judicial authorizations of June 7, 2004 and August 4, 2004, and certain related evidence, was obtained in a manner that infringed Mr. Riley's rights under the *Charter*, because the interceptions would not have been made if not for the unconstitutional interception of the Riley's private communications under s. 184.4.

The Approach

117 I begin my analysis of this argument by recalling that I have already discussed the proper approach to determining the validity of an order authorizing the interception of private communications, and the constitutional treatment of evidence obtained pursuant to such an order, where unconstitutionally obtained evidence was included in the affidavit sworn in support of the application for the order. Where the affidavit contains other facts in addition to those obtained in contravention of the *Charter*, it is necessary for the reviewing court to consider whether the order could have been issued had the improperly obtained facts been excised in a *Garofoli* application. The order, the private communications intercepted pursuant to it, and any evidence derived from those interceptions will not be found to have been obtained in a manner that infringes the *Charter* if the order could still have issued had the unconstitutionally obtained evidence been excised from the affidavit. (See *R. v. Grant*, *supra*, and *R. v. Kokesch*, *supra*.)

118 I note, however, that this does not exhaust the possibilities for finding that the interception of private communications pursuant to a valid authorization violates the *Charter*, or that evidence of private communications intercepted pursuant to a valid authorization was nonetheless obtained in a manner that infringed a *Charter* right. I say this because even where a valid authorization is in place, the manner of interception must be reasonable within the meaning of s. 8 of the *Charter*. If it is not, then the *Charter* will be violated.

119 As a result, insofar as Mr. Midanik's arguments are properly the subject of a *Garofoli* application, they should not be considered in this application. But if they relate to the manner of interception flowing, in some fashion, from the s. 184.4 breach, then they are properly considered in this application. It is necessary to examine these allegations closely in order to determine if any of them should in fact be considered in this application.

The Argument

120 Mr. Midanik made the following submissions:

> 1. The interceptions of the private communications of Riley, Atkins and others in the Toronto Detention Centre, including interceptions of Riley threatening to do harm to Wilson, threatening Hyatt and Patrong if they wouldn't change their story, telling Wilson to change his story, and about a "drug toss," were obtained in a manner that violated the *Charter* because the targets would not have been in the detention centre were it not from their arrests, which in turn flowed from the unconstitutional interception of Riley's communications pursuant to s. 184.4, and also because the authorizations would not have been granted without the inclusion of the information given to the police by Wilson on April 19 and 29, 2004, again flowing from the unconstitutional interception of Riley's communications pursuant to s. 184.4.

2. Evidence obtained directly or indirectly as a result of the interceptions made of the private communications of Riley, Atkins and others in the Toronto Detention Centre, including a Glock firearm seized from the apartment of Denise Nichols were also obtained in a manner that violated the *Charter*, for the same reason.

3. The interceptions of the private communications of Dana Lee Williams were obtained in a manner that violated the *Charter* because, without the 184.4 interceptions and the statements of Wilson, there were no grounds to name her in the authorization.

Analysis

121 In my view, to the extent that Riley seeks exclusion of these interceptions, and evidence obtained as a result of them, on the grounds I have described, in each case exclusion falls to be considered on the *Garofoli* application, and not on this one. None of these submissions has to do with the manner of execution of the authorizations. Each, in reality, is an attack on the sufficiency of the authorization, or a part of the authorization, after excision of unconstitutionally obtained information.

122 With respect to the first submission, it is important to note that the each of the authorizations listed the East Detention Centre as a place of interception, on the basis that it was the "residence" of Riley and Atkins as a result of their arrest for the Hyatt and Patrong shooting. If information about the arrest was obtained in a manner that infringed s. 8 of the *Charter*, then the proper remedy would be excision of that evidence from the affidavits on the *Garofoli* application, accompanied by an argument that as a result, there remained no basis to authorize the interception of their communications at that location. It is not an argument that can be made on this application.

123 Similarly, with respect to the first argument, the question of whether or not Wilson's information should be excised from the affidavit in support of the authorizations, and the sufficiency of the affidavits after excision, is a classical example of an argument that can be made on a *Garofoli* application. It is not an argument that can be made on this application.

124 The same analysis obviously applies to Mr. Midanik's second submission, concerning evidence obtained directly or indirectly as a result of the interceptions made of the private communications of Riley, Atkins and others in the Toronto Detention Centre.

125 The same analysis once again applies equally to Mr. Midanik's third submission. If Wilson's evidence was obtained in a manner that infringed the *Charter*, it would be excised from the affidavit, and a determination would be made on the *Garofoli* application whether what remains in the affidavit would be sufficient to permit naming Williams in the order.

126 As a result, I will not consider whether or not any of the intercepted private communications were obtained in a manner that infringed a *Charter* right on this application. That determination should be made in the *Garofoli* application, subject to the obvious observation that the underpinning of much if not all of these arguments is eliminated by my determination that the evidence of the arrest of Riley, and the evidence of Wilson were not obtained in a manner that infringed the *Charter*.

5. Phillip Omar Reid

127 Mr. Berg submitted on behalf of Atkins that the evidence of Phillip Omar Reid was obtained in a manner that violated his *Charter* rights.

The Evidence

128 Atkins was arrested for the attempted murder of Patrong and Hyatt on April 19, 2004, and has remained in custody ever since.

129 From August 26, 2004 to September 6, 2004, and again from October 14, 2004 to October 24, 2004, Atkins shared a cell with Reid at the Toronto East Detention Centre. During this time, Reid alleges that Atkins confessed to him that he had committed a number of crimes, including the offences being tried by me.

130 On August 31, 2005, Reid, who was then a confidential informant, told the police about Atkins' confessions.

131 On December 12, 2005, Reid was arrested by the Peel Regional Police and charged with certain armed robberies. Over the next few months, Reid supplied information to the Peel police about criminal activity unrelated to this case.

132 On February 22, 2006, Reid repeated the information about Atkins to the Peel police.

133 On April 3, 2006, Toronto police officers took a formal witness statement from Reid, in which he reiterated and expanded on his information about Atkins, waived his confidential informant status and agreed to testify against Atkins.

The Argument

134 Mr. Berg argued that had it not been for the interception of Riley's private communication on April 19, 2004 which disclosed his location shortly after the shooting of Hyatt and Patrong, and which resulted in Atkins' arrest, it is pure speculation as to whether or when he would have been arrested for those offences. But for Atkins's arrest on that date, he would not have been in a position to confess to Reid, who in turn would not have been in a position to initially tell the police about the confession on a confidential basis, and later agree to testify about it at Atkins's trial. Accordingly, the evidence of Reid was obtained in a manner that violated the *Charter*.

Analysis

Standing

135 I note first of all that the *Charter* infringement of which Atkins complains was a violation of Riley's rights under s. 8 of the *Charter*. It is doubtful that Atkins has standing to complain of it. But the issue wasn't raised by the Crown, and I will not determine the admissibility of Reid's evidence on that basis.

Temporal Connection

136 The temporal connection between the breach and Reid's evidence is even more tenuous than the connection between the breach and the evidence of Marlon Wilson. In this case, unlike the case of Wilson, the date when Reid agreed to waive his confidential informant status and to testify against Atkins is clear: it was on April 3, 2006, almost two years after the *Charter* breach. As a result, the police secured the evidence of Reid almost two years after the breach. Accordingly, the temporal connection between the breach and the evidence is exceptionally weak.

Causal Connection

137 The causal link between the breach and Reid's evidence is virtually non-existent. The confession of Atkins to Reid is barely connected to the unlawful interception. While the interception was a factor in the timing of Atkins' arrest, I am of the view that Atkins' arrest that day was inevitable. In addition, Atkins' decision to confess to a cellmate between August 26, 2004 and October 14, 2004, four to six months after his arrest, was entirely an exercise of free will. It had nothing to do with any police action. What is more, the fact that Reid was Atkins's cellmate, and that the confession was made to him, was a matter of complete chance. The police had nothing to do with it.

138 In any event, the police did not secure knowledge of the confession at the time that it was made, far less Reid's testimony. They first learned of the confession approximately one year later, on August 32, 2005, when, for reasons that have not been disclosed to me, but which obviously have nothing to do with the breach of Riley's s. 8 rights, Reid was acting as a confidential police agent. And, as I have noted, Reid didn't agree to testify until another seven months had passed, and again for reasons having nothing to do with the *Charter* breach. In the circumstances, I conclude that there is virtually no causal connection between the breach of the *Charter* and the securing of Reid's evidence.

The Same Transaction or Course of Conduct

139 Upon a review of the entire course of events, not surprisingly in the absence of any real temporal or causal connection, I conclude that the breach and the obtaining of the evidence cannot be said to be part of the same transaction or course of conduct.

Conclusion with respect to Phillip Reid

140 I am of the view that Reid's evidence was not obtained in a manner that violated Riley's *Charter* rights.

6. Other Evidence

141 In the course of his written and oral arguments, by dint of his prodigious preparation and his ability to analyze outside of the box, Mr. Midanik was able to advance arguments that so many pieces of the evidence secured by the police in this investigation were obtained in a manner that infringed the *Charter* that I fear I will not address them all. But I am confident that after I address this basket category, I will have dealt with all of the significant ones. Any that I omit, I am sure, are readily dealt with by analogy to other arguments that I have adjudicated.

Search Warrants

142 Mr. Midanik argued that items seized from a number of premises pursuant to search warrants issued after the arrest of Riley, Atkins and Wilson should be excluded because the grounds for each of these warrants, as can be seen in each case from the information sworn in support of the application for the warrant, was evidence obtained in a manner the infringed the *Charter*, specifically, information derived from the s. 184.4 interceptions, information derived from the arrest, and information obtained from Marlon Wilson. The force of this submission is weakened by my finding that of the three categories of evidence alleged to flow from *Charter* violations, only one, information obtained from the s. 184.4 interceptions, represents evidence actually obtained in a manner that infringed the *Charter*.

143 When the informations sworn in support of the various search warrants are examined, for the most part it is obvious that a basis for the issuance of the warrant would remain after information obtained from the s. 184.4 interceptions is excised. No argument was made to the contrary except in respect of the information sworn in support of the warrant issued to search 567 Scarborough Golf Club Road, apartment 1607 on April 20, 2004. I turn then to consider whether the items seized pursuant to that warrant were obtained in a manner that infringed the *Charter*.

Items Seized at 567 Scarborough Golf Club Road

144 In April, 2004, Dana Williams resided at 567 Scarborough Golf Club Road, apartment 1607. On April 20, 2004, a search warrant was obtained to search that residence for a gun. A review of the information sworn in support of the warrant discloses that the basis for the belief that a gun would be found in that residence was an intercepted private communication of Riley telling Ms. Williams to hide a gun. Upon the execution of the warrant, no gun was found. Instead, the police found and seized approximately 300 grams of cocaine powder. A small vial of hash oil, a black pocket scale, $14,330 in cash and two 45 calibre Winchester bullets.

145 In view of the fact that the justification for the search was exclusively information obtained from the s. 184.4 interceptions, there is an exceptionally strong causal connection between the breach and the evidence. There is, as well, a strong temporal connection. It is difficult to resist the conclusion that the items seized from Williams' residence were obtained in a manner that infringed the *Charter*.

146 The only response that the Crown could muster was that no application has been made for the exclusion of this evidence on the basis that the search of Williams' residence violated s. 8 of the *Charter*, and so no application to exclude the fruits of that search was properly before me. This response ignores the judgment of the Supreme Court of Canada in *R. v. Kokesch* (1990), 61 C.C.C. (3d) 207 (S.C.C.), where the Supreme Court concluded that upon a showing that a warantless perimeter search of a premises was undertaken in violation of s. 8 of the *Charter*, evidence seized upon the execution of a search warrant based on information learned from the warrantless search was obtained in a manner that infringed the *Charter*, and could be excluded

pursuant to s. 24(2). In this regard, Dickson C. J., who dissented on the ultimate issue of exclusion, but spoke for the Court on this issue, stated, at para. 25:

> In my view, the nexus between the warrantless and unconstitutional search of the perimeter of the dwelling-house, and the subsequent discovery of the evidence, is sufficiently close that it can be concluded that the evidence was "obtained in a manner that infringed or denied" s. 8 of the *Charter*. This threshold issue in s. 24(2) was considered by this Court in *R. v. Strachan*, [1988] 2 S.C.R. 980, and the Court adopted a case-by-case approach to the issue (p. 1006). Moreover, the Court stated the following general principle (at p. 1005):
>
> > ... the first inquiry under s. 24(2) would be to determine whether a Charter violation occurred in the course of obtaining the evidence. A temporal link between the infringement of the Charter and the discovery of the evidence figures prominently in this assessment...
>
> In the case at bar, observations made by police officers during an unconstitutional search formed the foundation for a search warrant obtained the following day to search the observed premises. The temporal link was not broken by any intervening events and it follows that the evidence was obtained in a manner that violated the constitutional rights of the appellant. Consequently, it is necessary to engage in an inquiry, pursuant to s. 24(2) of the Charter, to determine the admissibility of evidence obtained during the subsequent constitutional search.

147 In other words, where evidence is seized during a search pursuant to a warrant that was issued on the basis of an information which depended on facts solely within the knowledge of the police as a result of a *Charter* violation, the seized evidence is obtained in a manner that infringes a *Charter* right. That is precisely what happened here. Accordingly, I conclude that the evidence seized on April 20, 2004 at 567 Scarborough Golf Club Road, apartment 1607, was obtained in a manner that infringed s. 8 of the *Charter*.

Roland Ellis and the Drug Toss

148 In one of Riley's private communications intercepted pursuant to the authorization granted by McCrae J., Riley asked Roland Ellis to deliver drugs to him in the Toronto East Detention Centre by throwing them over the barbed wire fence. Ellis refused. Riley then made a threat against Ellis's life. In another of Riley's intercepted private communications, Ellis reneged on an earlier agreement to take responsibility for the drugs seized from Dana Williams's residence on April 20, 2004. In subsequent intercepted private communications, Riley discussed killing Ellis as a result of these actions on his part.

149 In February, 2005, Ellis agreed to be interviewed by the police. On February 22, 2005, in the course of the interview, the interceptions in which Ellis's life was threatened were played for him. Following this, Ellis gave a statement to the police and testified for the Crown at Riley's preliminary inquiry.

150 On this meager record, Mr. Midanik argues that Ellis's testimony was obtained in a manner that infringes the *Charter*. Once again, he seeks to connect this evidence to the warrantless interception of Riley's private communications. But for the interceptions, he says, Riley would not have been in jail, Riley would not have asked Mr. Ellis to deliver drugs to him, Riley would not have asked Ellis to take responsibility for the drugs found in Williams residence, Ellis would not have refused these requests, Riley would not have threatened Ellis, the police would not have intercepted Riley's communications, the police would not have had tapes of Riley's threats to use to induce Ellis to cooperate, Ellis would not have cooperated with the police and the police would not have obtained Ellis's testimony.

151 Whatever causal and temporal connection there may be between the breach and the evidence is so remote that no more need be said in support of my conclusion that Ellis's evidence was not obtained in a manner that violated the *Charter*. I find it ironic that Riley raises his own threat against Ellis, just as he did with respect to his threats against Wilson, as a link in the chain of causality, instead of the bar to causality that it so obviously is.

What Evidence Should Be Excluded under Section 24(2) of the Charter?

152 There remains to be decided the fate under s. 24(2) of the *Charter* of the only two categories of evidence that I have found were obtained in a manner that infringed a right protected by the *Charter*: the private communications intercepted pursuant to s. 184.4 of the *Criminal Code*, and the items seized from the residence of Dana Williams at 567 Scarborough Golf Club Road, apartment 1607. I will deal with them together.

The Factors

153 In *R. v. Fliss* (2002), 161 C.C.C. (3d) 225 (S.C.C.), Binnie J. summarized the approach to the exclusion of evidence pursuant to s. 24(2) of the *Charter* first developed in *R. v. Collins* (1987), 33 C.C.C. (3d) 1 (S.C.C.), as follows, at para. 75:

> Section 24(2) provides that evidence obtained in violation of the Charter "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". While the constitutional direction is to balance all of the circumstances, these circumstances are generally grouped around three primary considerations:
>
> 1. Does the admission of the evidence affect the fairness of the trial?
>
> 2. How serious was the Charter breach?
>
> 3. What would be the effect of excluding the evidence on the repute of the administration of justice?

154 I will consider each of these factors in turn.

Trial Fairness

155 With respect to trial fairness, in *R. v. Stillman* (1997), 113 C.C.C. (3d) 321 (S.C.C.), Cory J. stated, for the majority of the Court, at para. 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.

156 Unlawfully intercepted private communications constitute non-conscriptive evidence, and do not affect trial fairness. (See *R. v. Fliss*, *supra*, at paras. 78-81.) The same may be said for the items seized at residence of Dana Williams. Accordingly, I move on to the second factor.

The Seriousness of the Breach

157 Relevant to this factor is whether the violation was committed in good faith, whether it was inadvertent or of a merely technical nature, whether it was motivated by urgency or to prevent the loss of evidence, and whether the evidence could have been obtained without a *Charter* violation. (See *R. v. Jacoy* (1988), 45 C.C.C. (3d) 46 (S.C.C.) at para. 17.)

158 The interception of private communications is an extraordinarily intrusive investigative technique. The authority to intercept private communications without judicial authorization is highly exceptional, and calls for particular care on the part of the police in making the decision to exercise it. The use of this authority in circumstances that do not satisfy the statutory prerequisites, even when undertaken in good faith, is a most serious violation of the *Charter*. The seriousness of the violation is equally relevant to the consideration of evidence seized solely on the basis of information obtained as a result of the violation.

159 Moreover, while I would not attribute bad faith to the police in this case, neither would I conclude that the use of s. 184.4 in the circumstances amounted to good faith. The failure of Staff Inspector Ramer and his advisors to fully understand

the prerequisites of s. 184.4, to keep a record of the basis for Inspector Ramer's decision to utilize that section and to ensure that the use that was made of it was properly monitored militate against a finding of good faith.

160 It is true that the police obtained legal advice before embarking on the use of s. 184.4. This usually results in a finding of good faith. But the circumstances here make such a conclusion difficult. In this case the advice was obtained over the telephone, from counsel who took the call while in the middle of a meeting and considered this very serious matter only briefly, and who was given an inadequate summary of the circumstances. Moreover, the advice actually given was limited to the sufficiency of the grounds. Good faith cannot be acquired that easily.

161 Next, I note that the breach was neither inadvertent nor of a merely technical nature. While it was motivated by urgency, the urgency could have been eliminated by the simple arrest of Riley. Finally, the evidence could not have been obtained without a *Charter* violation.

162 I can only conclude that the breach was very serious, and that other considerations do not materially lessen the seriousness of the breach.

The Effect of Excluding the Evidence on the Repute of the Administration of Justice

163 On the one hand, the charges here, a murder and attempt murder alleged to have been committed for the benefit of a criminal organization, are most serious. On the other hand, the breach, far from trivial, is very serious, and the evidence under consideration is not essential to substantiate the charge. I do not believe that the administration of justice will be brought into disrepute by excluding this evidence.

Conclusion

164 Doing my best to balance all of the circumstances, I reach the conclusion that the admission of this evidence in these proceedings would bring the administration of justice into disrepute. Accordingly, I exclude the private communications intercepted pursuant to s. 184.4, and the evidence seized from the residence of Dana Williams.

165 Having concluded that the remaining evidence challenged by the accused was not obtained in a manner that infringed a *Charter* right, I don't know how helpful my thoughts would be on the exclusion of that evidence had I concluded otherwise. I will content myself with saying that even if the remoteness of the other evidence from the breach was not sufficient to avoid the classification of some or all of it as evidence obtained in a manner that infringed the *Charter*, that remoteness would, nonetheless tip the balance in favour of inclusion.

Disposition

166 The application is granted to the extent that the private communications intercepted pursuant to s. 184.4, and the items of evidence seized from the residence of Dana Williams are excluded. The remainder of this application is dismissed.

Application granted in part.

End of Document