# COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***R. v. Schedel,***
2003 BCCA 364

Date: 20030620
Docket: CA028605; CA028606

Docket: CA028605

Between:

**Regina**

Respondent

And

**Bradley Cecil Schedel**

Appellant

- and -

Docket: CA028606

Between:

**Regina**

Respondent

And

**Kuestan Hassen Schedel**

Appellant

Before: The Honourable Mr. Justice Esson
The Honourable Madam Justice Southin
The Honourable Mr. Justice Hollinrake

S. J. Tessmer — Counsel for the Appellants

C. Stolte — Counsel for the Respondent

Place and Date of Hearing: Vancouver, British Columbia
January 7, 2003

Place and Date of Judgment: Vancouver, British Columbia
June 20, 2003

**Written Reasons by**:
The Honourable Mr. Justice Esson

**Concurred in by:**
The Honourable Mr. Justice Hollinrake

**Reasons Concurring in the result:**
The Honourable Madam Justice Southin (P. 57, para. 80)

**Reasons for Judgment of the Honourable Mr. Justice Esson:**

[1] The appellants, who are husband and wife, appeal against their conviction by a Provincial Court judge on charges of unlawful production and possession of marijuana, and fraudulent consumption of electricity. The first two charges were laid under the ***Controlled Drugs and Substances Act***, S.C. 1996, c. 19, (the ***Drug Act***), and the third under ***Criminal Code,*** R.S.C. 1985, c. C-46, (the ***Code***) s. 326.(1)(a). The sole issue on appeal is whether the trial judge erred in refusing to exclude, on grounds of ***Charter*** breach, the whole body of incriminating evidence obtained by search and seizure in the appellants' residence. At the conclusion of the hearing, we allowed the appeal with reasons to follow.

[2] The trial judge found that several ***Charter*** breaches had taken place in the course of the entry and search but considered that none of them, either singly or in combination, was sufficiently serious to lead to the exclusion of the evidence. The most significant breach was that the entry into the residence was carried out without any compliance with the knock/ notice rule which has been part of the common law for centuries; a rule of fundamental importance in protecting residents of dwellings from unreasonable search and seizure. The specific

issue in respect of that breach is whether the trial judge erred in law in holding that the breach was not serious because it was carried out in compliance with a policy (The Policy), applied for several years by the Vancouver Police Department Drug Squad, of ignoring the knock/notice rule in effecting entry to dwellings believed to be used as marijuana grow operations.

**The Facts**

[3] The residence occupied by the appellants in May 1999 was a single family dwelling with a full basement. On 12 May, while investigating a suspected trafficking operation in a nearby residence, Detective Constable Thurber, a member of the Drug Squad, detected some of the usual symptoms of a marijuana grow operation, including the smell of growing marijuana, the sound of fans and covering of the basement windows.

[4] On the evening of that day, Det. Cst. Thurber mentioned to a B.C. Hydro technician, who had special responsibility for tracking down electricity theft, that he would be applying for a search warrant. The technician then conducted an investigation at the house about midnight into possible theft of electricity and, on 13 May, advised the officer that he believed theft of electricity was occurring at the appellants' residence. The officer promptly applied for and obtained a warrant to search for evidence of theft of electrical services. The warrant, which was applied for and granted under the ***Code*** rather than the ***Drug Act***, authorized entry between 6:30 p.m. and 8:55 p.m. on that day and included an order that the B.C. Hydro technician provide assistance to gather evidence relating to theft of electrical services and that he "dismantle the diversion". It made no reference to drug offences.

[5] Having obtained the warrant, Det. Cst. Thurber arranged for a team of eight officers, including him, to execute it. The team arrived at the residence at about 6:30 p.m. They entered through the front door without any prior warning or knock other than the impact of their battering ram, which was used to smash open the front door. Six officers entered through the front door with guns drawn. After entry, the third officer to enter shouted words to the effect that the police were there with a

search warrant. The other two members of the team stationed themselves outside the rear door of the house which was open at the time.

[6] The officers, at the time they entered the residence, had no information as to who might be in the house or as to whose house it was or by whom it was occupied. Upon entry, they found Mr. Schedel in the living room with two other persons, a Mr. Arsenault and Ms. Ho, who appear to have had no connection with the Schedel residence other than that they were visiting for social reasons. Just after the officers entered the house, Mrs. Schedel, wearing latex gloves, entered the kitchen through the door from the basement where the marijuana grow operation and a quantity of harvested marijuana were later found.

[7] All four occupants were arrested immediately after the entry, were handcuffed and ordered to lie on the floor. The grounds for arrest were stated to be the possession and production of a controlled substance. The arrests were made before the officers knew who the individuals were or what connection they had to the premises. Mr. Arsenault and Ms. Ho advised the police that they had been there for only ten minutes visiting their friends and that they had nothing to do with any marijuana operation. Nevertheless, they were taken along with the appellants to the police station where they were strip searched, booked into cells and held until 11:00 a.m. the next day. They were then released with no charges being laid or recommended. The Schedels were charged with the three offences of which they were convicted.

[8] The application to exclude evidence was heard on a number of days, spread over a number of months. A lengthy list of grounds was advanced. The trial judge, after reserving decision, delivered extensive reasons for rejecting the application. He found the search warrant to have validly authorized the search for not only the electrical devices referred to in it but also for the drugs and paraphernalia which established the ***Drug Act*** offences. That conclusion was based on ***Code,*** s. 489.(1) which authorizes a person executing a warrant under the ***Code*** to seize, in addition to the things mentioned in

the warrant, any other things which the officer believes on reasonable grounds are evidence of an offence against "any other Act of Parliament."

[9] That course of action was upheld in ***R. v. Middleton*** (2000), 150 C.C.C. (3d) 556 (B.C.C.A.), 2000 BCCA 660 in which, as in this case, Constable Thurber had obtained a warrant to search for evidence of electrical theft. There was, however, a distinguishing feature in that the facts stated by Finch J.A. (now C.J.B.C.) for the court in ¶14 included this finding:

> The officer did not believe that evidence of marihuana offences would be found at the subject address because he could not identify it as the source of the marihuana odour.

In this case, the trial judge found as a fact that Det. Cst. Thurber believed the dwelling to be the scene of marijuana production and that "was the crime he was mainly interested in investigating."

[10] In ***Middleton***, *supra*, the raid was carried out in the same manner as was the raid in this case. However, no point was raised in this Court as to the manner of the raid. That came about because the Crown appeal against acquittal was confined to the question of law whether the trial judge had erred in excluding the evidence because the officers, on detecting a grow operation, seized the drugs and paraphernalia without obtaining a second warrant under the ***Drug Act***. ***Middleton,*** *supra,* therefore cannot be regarded as a decision with respect to the "no knock/no notice" policy.

[11] The trial judge in this case relied on the decision in this Court in ***R. v. Yue*** (1995), 61 B.C.A.C. 215, a fraud case, in which the seizure under the "plain view" rule was upheld as valid notwithstanding that the officers had suspected that certain incriminating equipment would be found but had not applied for a warrant for anything other than handwriting samples for which they had stronger grounds.

[12] One of the grounds of appeal raised here is that the authority conferred by s. 489.(1) of the ***Code*** does not extend to authorize the seizure of things not named in the warrant, which the officer before entering had expected to find on a "plain view" search. I find it unnecessary to decide that question in this case.

[13] Apart from the breach of the knock/notice rule, the trial judge in his ruling on the *voir dire* found the following breaches to have been established:

- the appellants were not given their rights to counsel under s. 10(b) before being posed questions by authorities but only because the police were concerned to establish their identity;

- seizing documents by searching a dresser drawer, a living room cabinet, and shoe box in a bedroom cupboard, locations which could not have been in plain view and thus were within the scope of s. 489.(1);

- a possible breach by the B.C. Hydro technician in entering the house after the entry time in the warrant had expired by a few minutes;

- a breach in failing to comply with ***Code*** s. 489.1(1) which requires anything seized under a warrant to be reported to a justice. That breach of the ***Code*** provision was held not to be a breach of ***Charter*** rights.

[14] With respect to the treatment accorded to the visitors, the

judge held:

> [30] Because this complaint does not involve the rights of the accused themselves, they have no standing to seek exclusion of evidence for their breach. Nor has it been shown that police conduct in relation to the third parties amounted to an abuse of the court's process, so engaging rights personal to the accused themselves: ***R. v. Vereczki*** [1998] B.C.J. No. 3188. Strip searches are conducted on the vast majority of persons in custody at the Vancouver Jail both as a matter of safety, in order to discover potential weapons, and also to intercept contraband. ... They do not entitle the accused to ***Charter*** relief.

[15] Even if it is right to say that a wrong done to persons other than the accused cannot be a ground for exclusion, there may be a sense in which a wrong done to the guests of the accused is a wrong done to the hosts. The purpose of s. 8 of the ***Charter*** is to protect against unreasonable incursions upon the right to privacy. It is at least arguable that the right to privacy in one's dwelling is broad enough to include the right to not have one's guests exposed to harsh and degrading treatment. I note that Lamer J., in ***R. v. Collins***, [1987] 1 S.C. R. 265 at 276-77, 56 C.R. (3d) 193, raised, but left open, the question whether in circumstances such as those in this case the accused or the third party could apply for exclusion. Again, however, I find it unnecessary to decide those matters in this case.

[16] I come now to what I regard as the most serious issue, that as to the manner of entry. Most of the evidence relevant to The Policy was given by Det. Cst. Thurber, an officer of about 14 years experience who, in the several years before the raid in this case, appears to have been largely engaged in investigating grow operations. He said in direct evidence that the reason for using "this mode of entry" was that, in 1997, his unit had found that in executing about 120 search warrants, it had found "readily accessible" firearms in about 10 per cent of the

cases. He said that other kinds of weapons (clubs, knives, blunt instruments) were present in 50 to 60 per cent of grow operations. He expressed the opinion that unannounced entry is the safest method “to overcome any potential resistance by surprise and present a force level which does not allow the occupants any choice but to comply ... It’s safer for ourselves and for the occupants.” The practice of his unit at that time was to use the battering ram instead of knocking “based on previous experience, training.” He said that police generally do not know who is in the suspected grow operation prior to entry. At a later point in his evidence, he said that, in 1998, there were 131 marijuana grow searches, and three firearms were found. He did not know how many of those three were lawfully possessed, and did not know what proportion of houses not used for grow opera-tions contained guns. He could not recall any occasion when police had knocked and been attacked by the residents inside. He said that the practice of not knocking or giving notice had changed in the month or so before he gave evidence on 26 April 2000 and that the practice at the time of trial was to knock. He said that the reason for the change was “the nature of the people that are growing now.” “We’re noticing that more and more marihuana productions involve families with small children and elderly people.” He said that the change was a “unit decision.”

[17] Detective Tyldsley, who was also an officer of long experience, said that over half of the 400 searches he had done involved breached entries and that the considerations in deciding whether to enter in that way were:

- whether there were any children or elderly people on the scene;

- the safety of the suspects and of the officers entering;

- the destruction of evidence; and

- whether there were any weapons in the house.

Det. Cst. Thurber said that if they saw toys in the yard, they would know that children might be in the house but did not identify any other basis upon which the other questions could be answered before entering. He said that at the time of the execution of the warrant in this case, “the vast majority of the warrants that we were executing, we were finding weapons near the doors, in the living area.” He seemed to say that the approach was to make a “breached entry” unless there was evidence of the presence of children or elderly people. In response to a suggestion that the practice of breached entries with drawn guns would be extremely frightening to people in the house, he said:

> Well, I’m not agreeing that any guns were pointed at anybody’s face. And once the –- the inhabitants in the house realize that it’s the police that have just come through their door, then things are calmed down quite quickly. It’s the –- it’s the realization that who –- who has just breached the door and who are these people.

Neither he nor the other police witnesses seemed willing to accept that the danger of a violent response by persons inside would be less if they were made aware before entry that the persons seeking entry were police officers acting on a search warrant.

[18] As the trial judge remarked in his reasons, some of the officers involved in the search were surprisingly vague about the distinction between the search warrant provisions of the ***Code*** and the ***Drug Act***. In relation to that, it is of some interest that four of the officers engaged in this raid were aware that the warrant was issued under the ***Code***, while the other four thought they were acting under the ***Drug Act***.

[19] In holding that the manner of entry constituted unreasonable search and seizure but did not lead to the exclusion of the evidence, the trial judge said:

> **Failure to Comply with the Knock-Notice Rule**

[15] It is conceded by the Crown that I am bound by the judgment of Wong, J. in ***R. v. McAllister***, 2000 BCSC 223. ***McAllister*** was also a case involving a suspected marihuana production. The police forced entry into the home without notice or announcement, just as was done here. They did so for the same reason that was given to me: that it had become a matter of practice in Vancouver, in part because weapons were occasionally found at such marihuana productions, and the element of surprise was seen as a matter of safety for both the police and the occupants. Wong, J. concluded that such a manner of search was unreasonable, in the absence of information specific to the premises being searched that would warrant discarding the knock-notice rule.

***McAllister*** is binding upon me and I am obliged to reach the same conclusion in respect of the search at issue in this case. I hold that because it involved a forced entry in the absence of any infor-mation warranting such an entry of those premises at that time. It amounted to a breach of s. 8 of the ***Charter***. But I am also of the view that the manner of entry does not warrant exclusion of the resulting evidence, and for the same reasons stated by Wong, J. in ***McAllister***, at para. 89:

> I do not find this situation to be a serious breach. The police officers were operating according to an established policy that had not been previously ruled illegal, and there is no evidence of bad faith. They were motivated by a concern for both their own safety and the protection of evidence. By announcing their entry the police search of the premises would have found evidence of a grow operation in any event.

[20] ***R. v. McAllister*** (2000), 75 C.R.R. (2d) 141 (B.C.S.C.), 2000 BCSC 223, arose out of a search and seizure on 19 February 1997, more than two years before the seizure in this case. McAllister was charged with the same three offences as the present appellants. Counsel agree that the issue before us is

effectively whether ***R. v. McAllister***, *supra*, was rightly decided.

[21] The search in that case was carried out in a virtually identical fashion to that in this case, although only five officers and one resident were involved. The court heard extensive evidence as to the scope of the practice. Some of that evidence was summarized thus by Wong J.:

> [35] The use of forced entries in drug searches became the practice in Vancouver since late 1996, because of a significant increase in the numbers of weapons found in such searches. Previously police would knock on the door and announce their presence. Now the practice is to enter by force and gain control of the residence as quickly as possible. Since the practice of forced entry was adopted, over 300 such entries have been effected without injury to either the police or the occupants of the residence being searched.
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> [36] In 1997 the Vancouver Police Department conducted well over 200 entries and searches similar to the one in this case. The police found 37 firearms. In addition, in most other houses the police found various other weapons, such as baseball bats, golf clubs, machetes and knives placed in strategic locations.
>
> [37] Only in "very rare" instances would the police receive information in advance as to the presence of firearms or other weapons in a residence before the execution of a search warrant for drugs. There was no such information in this case.
>
> [38] When executing a search warrant such as the one in this case, the police assume there are weapons in the residence being searched.
>
> [39] In searches of suspected grow operations, there is a police concern for the preservation of evidence. This concern relates both to finding the grow operation intact and to the destruction of incriminating documents.

[22] After setting out the facts, Wong J. engaged in a lengthy and learned discussion of the authorities bearing on the question whether the manner of conducting the search was in breach of s. 8 of the ***Charter***. In concluding that it was, he emphasized, at para. 61, this passage from the reasons of Dickson J., later C.J.C., for the court in ***Eccles v. Bourque***, [1975] 2 S.C.R. 739 at 746-47, 50 D.L.R. (3d) 753:

> Except in exigent circumstances, the police officers must make an announcement prior to entry. There are compelling considerations for this. An unexpected intrusion of a man's property can give rise to violent incidents. It is in the interests of the personal safety of the householder and the police as well as respect for the privacy of the individual that the law requires, prior to entrance for search or arrest, that a police officer identify himself and request admittance. No precise form of words is necessary. In *Semayne's Case* [(1604), 5 Co. Rep. 91a] it was said he should "signify the cause of his coming, and to make request to open doors". In *Re Curtis* [(1756), Fost. 135; 168 E.R. 67], nine of the judges were of opinion that it was sufficient that the householder have notice that the officer came not as a mere trespasser but claiming to act under a proper authority, the other two judges being of opinion that the officers ought to have declared in an explicit manner what sort of warrant they had. In *Burdett* v. *Abbott* [(1811), 14 East. 1, 104 E.R. 501], Bayley J. was content that the right to break the outer door should be preceded simply by a request for admission and a denial. The traditional demand was "Open in the name of the King". In the ordinary case police officers, before forcing entry, should give (i) notice of presence by knocking or ringing the doorbell, (ii) notice of authority, by identifying themselves as law enforcement officers and (iii) notice of purpose, by stating a lawful reason for entry. Minimally they should request admission and have admission denied although it is recognized there will be occasions on

> which, for example, to save someone within the premises from death or injury or to prevent destruction of evidence or if in hot pursuit notice may not be required. . .
>
> [my emphasis]

[23] As a matter of historical interest, I will note that ***Eccles v. Bourque***, *supra*, arose in Vancouver, the defendant being a Vancouver City police officer who, without a warrant, had entered Mr. Eccles' apartment in what might be called a slightly warm pursuit of a suspect. Mr. Eccles succeeded at trial on his claim for damages but failed at both levels of appeal.

[24] After finding that the manner of the search was unreasonable, Wong J. went on to say:

> [87] In ***R.*** **v.** ***Stillman***, [1997] 1 S.C.R. 607, 113 C.C.C. (3d) 321, 5 C.R. (5th) 1, Cory J. defines evidence as non-conscriptive and conscriptive. At p. 219 C.R.R., p. 352 C.C.C., he said that "it may be more accurate to describe evidence found without any participation of the accused, such as...drugs found in a dwelling-house, simply as *non-conscriptive* evidence". At p. 219 C.R.R., p. 352 C.C.C., he also stated that non-conscriptive evidence will rarely operate to render the trial unfair, and if the evidence has been classified as non-conscriptive the court should move on to consider the seriousness of the ***Charter*** violation and the effect of exclusion on the repute of the administration of justice.
>
> [88] Whether the violation 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, were factors going to the seriousness of the violation: ***R.*** **v.** ***Jacoy*** [1988] 2 S.C.R. 548, 45 C.C.C. (3d) 56, 66 C.R. (3d) 336.
>
> [89] . . . I do not find this situation to be a

> serious breach. The police officers were operating according to an established policy that had not been previously ruled illegal, and there is no evidence of bad faith. They were motivated by a concern for both their own safety and the protection of evidence. By announcing their entry the police search of the premises would have found evidence of a grow operation in any event.

[25] I agree that the issue is whether "this situation" is a "serious breach". At the conclusion of the hearing, I was of the view that there could be no doubt that it was serious. The violation was anything but inadvertent or of a merely technical nature. Nor was it motivated by urgency. While there was reference to the need to prevent loss of evidence, there was no attempt to identify what evidence might have been lost. The situation was one where the evidence could have been obtained without ***Charter*** violation. The circumstance that the Vancouver Police Department deliberately adopted a policy of ignoring the most fundamental rule protecting citizens from an unreasonable invasion of their dwelling put this violation in my view at the most serious end of the spectrum. But, as will appear later in these reasons, consideration of the s. 24(2) jurisprudence as it has developed since the decision in ***R. v. Collins***, *supra*, has, while not altering my conclusion, led me to understand why Wong J. and other experienced judges have reached a different conclusion.

[26] My initial view was based primarily on the decision of the Supreme Court of Canada in ***R. v. Genest***, [1989] 1 S.C.R. 59, 45 C.C.C. (3d) 385 (S.C.C.), and, to a lesser degree, that in ***R. v. Gimson*** (1990), 54 C.C.C. (3d) 232, 77 C.R. (3d) 307 (Ont. C.A.), aff'd. [1991] 3 S.C.R. 692. Wong J. had referred to those decisions in his discussion of the question of whether the search was unreasonable, but not on the issue of exclusion. It is to that question that those cases are directly relevant. Indeed, ***Genest***, *supra*, is a considered decision of the Supreme Court of Canada which directly supports the conclusion that to admit the evidence in this case would bring the administration

of justice into disrepute.

[27] In ***Genest***, *supra*, the issue before the Supreme Court of Canada arose out of the second of two “no knock no notice” searches of Genest’s dwelling a few weeks apart. The earlier raid had been based on a warrant seeking evidence of possession of stolen goods. It was conducted in essentially the same manner as the raid in this case. Genest was believed by the police to be a member of the Hell’s Angels motorcycle gang and had a substantial criminal record. He had, after completing a term of imprisonment for trafficking in drugs, taken up residence in a house a few months prior to the first raid. On that raid, conducted on 15 May 1984, the police gave no demand for admission before breaking open the door with a battering ram and invading the house in force. They found no stolen goods, which was the purported object of the raid, but found a credit card in the name of someone other than Genest and a stolen camera and, on that basis, they arrested him.

[28] The raid which was the subject of the decision was based upon a warrant under the ***Narcotic Control Act***, R.S.C. 1970, c.N-1, authorizing a search for drugs. No drugs were found, but an assortment of weapons, the possession of which were the subject of the charges, were found.

[29] On the *voir dire*, as Dickson C.J.C. for the court said at p. 70 (S.C.R.), the police gave no evidence as to any fears that Genest would be dangerous or that the police searchers would be endangered. That finding, as will appear, was of crucial importance. In this case, of course, the police had no knowledge of who occupied the house and no information of any specific risk.

[30] The trial judge, in ***Genest***, *supra*, had excluded the evidence of the guns on the ground that the search warrant was defective in that it did not, as then required by s. 10(2) of the ***Narcotic Control Act***, authorize a peace officer “named therein” to enter the dwelling house and search for narcotics. The Quebec Court of Appeal, in a majority decision, set aside the verdict of acquittal.

[31] Genest's appeal as of right was allowed for the reasons of Chief Justice Dickson for the court. In the Supreme Court of Canada, the Crown conceded, as in this case, that the search violated s. 8 of the ***Charter*** and that the evidence was obtained in a manner that infringed or denied a ***Charter*** right. The sole issue, therefore, as it is here, was whether the admission of the evidence would bring the administration of justice into disrepute.

[32] Dickson C.J.C. agreed with the trial judge's finding that the warrant was invalid and the search illegal because of the failure to name the officer who was to execute the warrant. He then went on to consider the question whether the evidence should, in any event, have been excluded on the basis that the search was conducted in a manner which rendered the search and seizure unreasonable. It is the analysis of that ground which, in my view, is determinative of the issue in this case.

[33] The Chief Justice began his discussion of this issue by quoting from the court's decision in ***Eccles v. Bourque***, *supra*. He went on to say, at p. 86 (S.C.R.):

> In his book *The Law of Search and Seizure in Canada* (2nd ed. 1984), p. 44, James A. Fontana states:
>
> > A higher duty of propriety in execution seems to rest traditionally with an officer who is about to conduct a search of a dwelling house more than with one about to conduct a search of other types of premises such as warehouses, depots, garages and public buildings.
>
> And further, on the same page, he writes:
>
> > Clearly, where the place to be searched is a dwelling house there must first be made a formal demand to open before the officer is entitled to effect entry or use force. This applies to all search warrants executed upon a dwelling house, unless the authorizing statute clearly says that no

such demand need first be made.

Those passages were quoted with approval.

[34] Of particular relevance to the issues in this case is this passage in the Chief Justice's reasons at p. 89:

> In the passage from *Therens* [[1985] 1 S.C.R. 613] quoted earlier, Le Dain J. made the point that the assessment of the seriousness of a constitutional violation must take into account the reasons for the conduct. He gave the example of a situation of urgency, where rapid action is necessary to prevent the loss or destruction of evidence. To this I would add another factor that can be considered, whether the circumstances of the case show a real threat of violent behaviour, whether directed at the police or third parties. Obviously, the police will use a different approach when the suspect is known to be armed and dangerous than they will in arresting someone for outstanding traffic tickets. The consideration of the possibility of violence must, however, be carefully limited. It should not amount to a *carte blanche* for the police to ignore completely all restrictions on police behaviour. The greater the departure from the standards of behaviour required by the common law and the *Charter*, the heavier the onus on the police to show why they thought it necessary to use force in the process of an arrest or a search. The evidence to justify such behaviour must be apparent in the record, and must have been available to the police at the time they chose their course of conduct. The Crown cannot rely on *ex post facto* justifications.
>
> [my emphasis]

[35] In this case, the Crown relies on The Policy referred to in ***McAllister***, *supra*, as justifying failure to comply with the knock/notice rule. The reason why that submission cannot

prevail is, in my view, made clear from this paragraph in the reasons of Dickson C.J.C. in ***Genest***, *supra*, at p. 91:

> Overall, in my opinion, the search in this case was a serious breach of s. 8. Not only did the police have a facially defective warrant, they used an excessive amount of force to carry out the search. Well-established common law limitations on the powers of the police to search were ignored. No attempt was made to justify the amount of force used. There is strong reason to believe that this search is part of a continuing abuse of the search powers, since it follows so closely the pattern set the previous month. While the purpose of s. 24(2) is not to deter police misconduct, the courts should be reluctant to admit evidence that shows the signs of being obtained by an abuse of common law and *Charter* rights by the police. The infringement of s. 8 in this case was serious enough to lead ineluctably to the conclusion that the admission of the evidence would bring the administration of justice into disrepute.
>
> [emphasis added]

[36] The Crown seeks to distinguish ***Genest***, *supra*, on the basis that the search in that case was, because of the failure to name the officer in charge, held to be warrantless. But the statement of Dickson C.J.C. that the infringement was so serious as to require the conclusion that the admission of the evidence would bring the administration of justice into disrepute is clearly based upon the preceding sentence holding that the courts should be reluctant to admit evidence "obtained by an abuse of common law and ***Charter*** rights." That can only refer to the matter of carrying out the second search with unjustified force in breach of the common law and ***Charter*** rights of the accused. That is what was described by Dickson C.J.C. as an abuse of the common law and ***Charter*** rights of Genest. I consider that The Policy relied on here was equally an abuse of the same common law and ***Charter*** rights of these appellants.

[37] The discussion in ***Genest***, *supra*, of the manner of entering was undoubtedly *obiter*, but it was fully considered *obiter*. There is no reason, in my view, why it should not be regarded as a binding decision. Assuming, not without some doubt, that the warrant was valid to authorize the search for and seizure of the marijuana and related equipment, I would hold that the means by which the search was carried out were so clearly unreasonable, and the ***Charter*** breach so serious, that the evidence must be excluded.

[38] ***R. v. Gimson***, *supra*, while less in point than ***Genest***, *supra*, supports that conclusion. The charge was two counts of possession of cocaine and *cannabis* marijuana and one count of possession of cocaine for the purpose of trafficking. A search of Gimson's residence was carried out under a search warrant under s. 12 of the ***Narcotic Control Act***, R.S.C. 1985, c. N-1. The police had been told by a reliable source that Gimson was trafficking cocaine from his home and had boarded up the front door. The officers entered through the front door using a battering ram while others entered through the back door using a sledge hammer. On entry, they saw Gimson going to the washroom and attempting to flush a quantity of cocaine down the toilet. An officer testified that experience had shown that unless entry is effected within a few seconds, such evidence is usually destroyed in such a manner.

[39] The Ontario Court of Appeal set aside the acquittal which flowed from the exclusion of the evidence. In the reasons of Finlayson J.A. for the court, there is some emphasis upon the terms of s. 14 of the ***Narcotic Control Act*** which read:

> 14. For the purpose of exercising authority pursuant to any of sections 10 to 13, a peace officer may, with such assistance as that officer deems necessary, break open any door, window, lock, fastener, floor, wall, ceiling, compartment, plumbing fixture, box, container or any other thing.

[40] There was, as Finlayson J.A. emphasized, a distinction between ***Genest*** and ***Gimson***, *suprae,* in that in ***Gimson*** there was no defect in the warrant. But the more relevant distinction was in the facts. As Finlayson J.A. said at p. 245:

> While I appreciate that the factual situation following the execution of a search warrant cannot make legal an otherwise illegal search and seizure, I believe that, for the purposes of a s. 24(2) assessment, what transpired is relevant. It is evident here that the concerns of the police as to destruction of evidence were amply justified and that any notification of entry would have frustrated the execution of the search warrant. The drugs would have been destroyed.

[41] In ***Gimson***, *supra*, the officers entered without knocking and without notice acting upon information which reasonably led them to conclude that, if they gave any sort of notice, the evidence would be destroyed. Thus, they came squarely within the terms of ***Eccles v. Bourque***, *supra*, which exempts exigent circumstances from the requirement to make an announcement prior to entry. The examples of such circumstances given in that case include:

> . . . to save someone within the premises from death or injury or to prevent destruction of evidence or if in hot pursuit notice may not be required.
>
> [emphasis added]

[42] In this case, some of the officers referred to prevention of destruction of evidence as one of the reasons for The Policy but did not identify any specific circumstances which made that a matter of real concern. It is obvious that a cocaine dealer, with any notice at all, can destroy the evidence by flushing it away. None of the evidence in this case, and none of the evidence referred to by Wong J. in ***McAllister***, *supra*, explains why there could be any similar concern with respect to marijuana grow operations which, by their nature, are not susceptible of prompt destruction.

[43] In ***Gimson***, *supra*, the accused's appeal to the Supreme Court of Canada as of right was dismissed for the brief reasons of Iacobucci J. for the court. After stating that the court did not consider the case to be the right one to decide whether the ***Narcotic Control Act*** provided a blanket authorization to enter without a prior demand in drug searches, Iacobucci J. went on to briefly outline the history of the case, and to say at p. 693 (S. C.R.):

> . . . We are all of the opinion that, under all the circumstances of this case, the police were entitled to enter the appellant's dwelling to execute their search warrant in order to prevent the destruction of evidence. . .

That view obviously was based on the fact that the police had information from which they could infer that the occupant wished to have time to destroy any evidence. There were no grounds for such an inference in this case.

[44] Part of the background facts which ought to be considered in relation to the reasonableness of The Policy is the report of the Commission of Inquiry conducted by Mr. Justice Oppal into policing in British Columbia (*Closing the Gap, Policing and the Community*, v. 2, c. 2, 1994). Of the several concerns which led to the creation of that commission, a major one was the fatal shooting of a young man in the course of a no knock/no notice entry to a dwelling in a municipality near Vancouver. The raid was carried out with a view to apprehending a member of the family suspected of dealing in marijuana. That person no longer lived in the residence. The young man was amusing himself with a toy pistol when the police entered. An officer, mistaking the toy pistol for a real gun, shot and killed him.

[45] The final report of the commission was handed down in 1994. Giving evidence in this case in 2000, Det. Cst. Thurber was asked in cross-examination whether he agreed with the views of the Commissioner. He said that he did not but without any elaboration. Those views were included in the chapter entitled High-Risk Policing at pp. H-33 and H-34:

In the context of *Criminal Code* searches, the common law has always required, subject to important and contentious exceptions, that when executing a search warrant at a residential dwelling, the police must give notice of their presence to the occupant, the authority by which they seek entry, and the purpose for which entry is sought. This has come to be referred to as the knock-notice rule.

The rule protects both personal privacy and the safety of police and householders. That person's home is an inviolate centre of private life is unquestionable. This is reinforced by *Criminal Code* provisions authorizing people to use reasonable force to expel intruders and to defend their homes.

The knock-notice rule also reflects past experience, which indicates that when it is followed, the vast majority of people submit to the authority and presence of the police. The common law has long recognized that avoiding violent incidents advances both the personal safety of the householder and the police. With knowledge of the identity, authority and purpose of those who seek to enter, the householder is prepared to be detained and searched, rather than to respond instinctively and defensively, perhaps aggressively and violently, to the unknown danger represented by the forcible invasion of unidentified intruders.

Most people are aware of the instruments of force available to police, and the need to avoid even presenting the appearance of danger to entering officers. The knock-notice rule permits the householder, such as the young man shot in the 1992 drug raid, to prepare to be safely detained or arrested and to put down toy guns, channel changers, or other objects that have the potential to mistakenly signal life-threatening danger to the entering police officers.

In general, the safety of the police is also

> enhanced by compliance with the knock–notice rule. People are much less likely to act violently toward police when, before entering, they announce their presence, authority and purpose. This tells the householder not only that the police, as statutory peacekeepers, are present, but also that this specific police attendance has been explicitly authorized by a judicial official.

[46] Also of some relevance to the issues here are the facts in ***Glover v. Magark***, [1999] B.C.J. No. 472 (Q.L.) (S.C.), aff'd 2001 BCCA 390, and particularly the evidence given by police officers in that case which arose out of the shooting of Mr. Glover by one of several RCMP officers who entered his residence to execute a drug search warrant. Mr. Glover was shot because the officer apparently mistook the television channel changer which he was holding for a gun. A number of police officers, including members of the Vancouver Police Department, gave expert evidence on the issue of sound practice. Testifying during the time that The Policy was in effect, those officers gave evidence inconsistent with the "no knock/no notice" procedure which was basic to The Policy. That evidence is summarized thus in the reasons of the trial judge:

> ¶18 The evidence was overwhelming that a "knock and announce" method of executing a drug search warrant is routine in circumstances where the information the police have indicates that the amount of drugs involved are consistent with the suspect trafficking in drugs as opposed to mere possession. The evidence went so far as to indicate that experienced instructors of police would consider it a tactical error to proceed in any other way. The same is true in respect of having most if not all of the team members assigned to execute the warrant approach the entry through the door with guns drawn. While the policy and procedures written for the police to follow indicate that each police officer, particularly the officer leading an arrest team has discretion in how to execute that warrant, not one

> officer and neither of the experts who testified before the court, suggested that they had participated in any drug search in similar circumstances which was conducted differently.
>
> . . .
>
> ¶28 The plaintiff also took the following position with which I agree. The law of prior announcement protects the police as much as the citizen. It reduces violence based on mistaken identity. Both police experts testified that drug dealers have weapons in order to protect their stash. These weapons are much more likely to be used on robbers than against the police. There was evidence from Sgt. Horsely who was called as an expert from the Vancouver City Police force, that in his view, because of light sentences, traffickers fear a "rip off" more than the police. The R.C.M.P. expert, Cpl. Anctil, testified that the vast majority of citizens obey police commands. If the police give real notice of their identity, then they will avoid being mistaken for robbers and will be less likely to encounter violence. It seems reasonable that notice of a second or two may not be sufficient opportunity for the occupant of a house to identify the intruders as police officers, particularly when they are not in traditional police uniform.
>
> [emphasis added]

[47] That evidence, as I have said, was given during the time that The Policy was in effect. The trial was heard in two stages, one in 1996 and the second in 1998. So it appears that the assertions made in this and many other cases in which The Policy was applied as to what was sound practice runs directly contrary to the considered views expressed by Mr. Justice Oppal in 1994 and the opinions of the expert police witnesses who testified in ***Glover***, *supra*. It also, of course, ran directly contrary to what was said by Dickson J. speaking for the court

in ***Eccles v. Bourque***, quoted *supra*. For convenience, I repeat the opening sentences of that paragraph:

> Except in exigent circumstances, the police officers must make an announcement prior to entry. There are compelling considerations for this. An unexpected intrusion of a man's property can give rise to violent incidents. It is in the interests of the personal safety of the householder and the police as well as respect for the privacy of the individual that the law requires, prior to entrance for search or arrest, that a police officer identify himself and request admittance.

[48] Having regard to those matters, it is difficult to avoid the conclusion that the assertions of apprehension of risk of violence or destruction of evidence were based on considerations other than a genuine belief that the no knock/no notice policy was based on sound practice. What the true motivation was, and at what level The Policy was authorized, does not appear from the evidence before us. Wong J., in para. 89 of his reasons in ***McAllister*** (quoted *supra* ¶24), said there was "no evidence of bad faith." That may be so with respect to the individual officers who took part in the raid. But, at some level, there may have been some absence of good faith in establishing a policy which seems to run contrary to common sense as well as the clear letter of the law.

[49] It appears that, in some substantial number of cases in Provincial Court and in the Supreme Court in which the search and seizure was based on The Policy, it was either held not to be in breach of s. 8 of the ***Charter*** or, if in breach, not serious enough to justify exclusion of the evidence. Yet, it was surely a breach, a very serious one, and was such for reasons which are readily understood. After puzzling over that seeming conundrum, I have concluded that the likely answer is that the jurisprudence under s. 24(2) of the ***Charter*** has become so complex and has taken so many different and sometimes contradictory turns that there is great uncertainty amongst all those who must consider these matters, including judges, as to

what the outcome will or should be on any given set of facts.

[50] To explain the basis for that conclusion, I will outline the history, as I recall it, of judicial treatment since 1982 of s. 24(2) of the ***Charter*** which created the general power to exclude relevant and reliable evidence tendered by the Crown.

[51] Until the ***Charter*** came into force, the governing authority remained the decision of the Supreme Court of Canada in ***R. v. Wray*** (1970), [1971] S.C.R. 272, 11 C.R.N.S. 235, which had been affirmed in ***R. v. Rothman***, [1981] 1 S.C.R. 640, 20 C.R. (3d) 97. The law, to somewhat oversimplify, was that all relevant evidence was admissible but subject to the recognized exception that confessions had to be proved to have been given voluntarily. There was increasing support for recognizing a broader discretion to exclude evidence. The most comprehensive treatment of that point of view was that of Lamer J. (as he then was) in his reasons in ***Rothman***, *supra*. Such a discretion, as he put it at p. 688 (S.C.R.), allowed the court to sanction:

> . . . seriously unfair, oppressive, or undesirable conduct on the part of persons in authority by excluding even reliable statements through a liberal interpretation of the voluntariness rule or of the reliability test, . . .
>
> [emphasis of Lamer J.]

[52] In ***Rothman***, *supra*, the issue was whether a confession made by an inmate to an undercover officer posing as a fellow inmate should have been excluded on the ground the officer was a person in authority. The majority judgment is that of Martland J. for himself and five others holding the confession admissible. Estey J., Laskin C.J.C. concurring, dissented and would have excluded the evidence. The most significant reasons from the point of view of development of the ***Charter***, which came into effect about a year later, were those of Lamer J. who concurred with the majority in the result but reached that result by defining the test for exclusion applicable not only to confessions but to Crown evidence generally in the terms adopted

in s. 24(2). At pp. 696-697 (S.C.R.) he stated that the proper approach to confessions should be first to decide whether any statement to a person in authority might have been unreliable because it was not voluntary and, once that was satisfied, that it should nevertheless be excluded:

> ... if its use in the proceedings would, as a result of what was said or done by any person in authority in eliciting the statement, bring the administration of justice into disrepute.
>
> * * *
>
> The judge, in determining whether under the circumstances the use of the statement in the proceedings would bring the administration of justice into disrepute, should consider all of the circumstances of the proceedings, the manner in which the statement was obtained, the degree to which there was a breach of social values, the seriousness of the charge and the effect the exclu-sion would have on the result of the proceedings. It must also be borne in mind that the investigation of crime and the detection of criminals is not a game to be governed by the Marquess of Queensbury rules. The authorities, in dealing with shrewd and often sophisticated criminals, must sometimes of necessity resort to tricks or other forms of deceit, and should not through the rule be hampered in their work. What should be repressed vigorously is conduct on their part that shocks the community. That a police officer pretend to be a lock-up chaplain and hear a suspect's confession is conduct that shocks the community; so is pretending to be the duty legal-aid lawyer, eliciting in that way incriminating statements from suspects or accused; injecting Pentothal into a diabetic suspect pretending it is his daily shot of insulin and using his statement in evidence would also shock the community; but generally speaking, pretending to be a hard drug addict to break a drug ring would not shock the community; nor would, as in this case, pretending to be a truck driver to secure the conviction of a trafficker;

> in fact, what would shock the community would be preventing the police from resorting to such a trick.

[53] Those passages, being a definition of the phrase “bringing the administration of justice into disrepute”, were relied upon by many judges in deciding the issue of exclusion under s. 24 (2). Generally, they were seen as supporting exclusion only in cases where the authorities had been guilty of rather extreme misconduct of the kind described in the examples given by Lamer J. in ***Rothman***, *supra*, i.e., conduct which would shock the community.

[54] In the first few years after April 1982, during which the first wave of ***Charter*** cases was working its way to the Supreme Court of Canada, there were some sharply divergent views in provincial appeal courts as to the effect to be given to s. 24 (2). The majority of judges in some courts were inclined to the view that Canada, before April 1982, had as fair and efficient a criminal legal system as any, and that the purpose of the ***Charter*** was to prevent an erosion of established rights and, through s. 24(2), to provide a modest expansion of the power to exclude evidence. That was the approach of those at what might be called the cautious end of the spectrum. At the more activist or enlightened end of the spectrum were those who believed that to fail to expand the scope of individual rights would be to demean the new Constitution. This Court, it is safe to say, was consistently at the cautious end of that spectrum. We were inclined to agree with the view expressed by the Ontario Court of Appeal in one of the earliest appellate decisions dealing with s. 24(2): ***R. v. Altseimer*** (1982), 142 D.L.R. (3d) 246, 29 C.R. (3d) 276 (Ont. C.A.). In reversing a decision excluding breathalyzer evidence on a charge of “over .08”, Zuber J.A., speaking for himself, Martin and Blair JJ.A., said at p. 282 (C.R.):

> In view of the number of cases in Ontario trial courts in which Charter provisions are being argued, and especially in view of some of the bizarre and colourful arguments being advanced, it may be appropriate to

> observe that the Charter does not intend a transformation of our legal system or the paralysis of law enforcement. Extravagant interpretations can only trivialize and diminish respect for the Charter, which is a part of the supreme law of this country.

[55] The most significant early decision of this Court on s.24 (2) was ***R. v. Collins*** (1983), 148 D.L.R. (3d) 40, 33 C.R. (3d) 130 (B.C.C.A.), in which the issue arose from the use by a police officer of a throat hold to prevent a suspected heroin trafficker from swallowing the evidence. The trial judge, Wong Co.Ct.J. (as he then was) held that the admission of the evidence would not bring the administration of justice into disrepute: (1982), 3 C.R.R. 79. In so concluding, he relied in large part on the language of Lamer J. in ***Rothman***, *supra*, to which I have referred. After quoting from that decision, Wong Co.Ct.J. went on to say at pp.83-84:

> . . . I venture to say that, with the historical Anglo-Canadian tradition of high standard conduct of the vast majority of our police officers, cases where the admissibility of evidence would be calculated to bring the administration of justice into disrepute will be rare, but the rule to exclude will be available should the occasion warrant its use.
>
> Turning now to the case at bar, would any ordinary, right-thinking person think that seizing and searching a suspected hard drug trafficker for possession of illicit drugs be shocking to the community? The answer is self-evident. Even though the search and seizure of both accused would be regarded at law as an unreasonable infringement of a right provided by s. 8 of the Charter, I have concluded that, having regard to all the circumstances of this case, police conduct here was not shocking such that the admission of the evidence derived from these seizures would necessarily cast the administration of justice into disrepute. Accordingly, the evidence will be admitted. [See 33 C.R. (3d) 130 (B.

C.C.A.) at 142-43.]

[56] Nemetz C.J.B.C., Seaton and Craig JJ.A. each gave reasons for dismissing the appeal. Those of Seaton J.A. were the most influential. They included a lengthy analysis of the American experience to demonstrate why the broad exclusionary rules developed in that country should not be followed here. The specific approach advocated by Seaton J.A. was expressed in this passage at pp. 144-45 (C.R.):

> . . . The onus is on the person who wishes the evidence excluded to establish the further ingredient: that the admission of the evidence would bring the administration of justice into disrepute.
>
> Disrepute in whose eyes? That which would bring the administration of justice into disrepute in the eyes of a policeman might be the precise action that would be highly regarded in the eyes of a law teacher. I do not think that we are to look at this matter through the eyes of a policeman or a law teacher, or a judge for that matter. I think that it is the community at large, including the policeman and the law teacher and the judge, through whose eyes we are to see this question. It follows, and I do not think this is a disadvantage of the suggestion, that there will be a gradual shifting. I expect that there will be a trend away from admission of improperly obtained evidence.
>
> I do not suggest that the courts should respond to public clamour or opinion polls. I do suggest that the views of the community at large, developed by concerned and thinking citizens, ought to guide the courts when they are questioning whether or not the admission of evidence would bring the administration of justice into disrepute.

[57] Three weeks later, the Saskatchewan Court of Appeal, in upholding a trial judge’s decision to exclude breathalyzer

evidence, adopted a different approach in ***R. v. Therens*** (1983), 148 D.L.R. (3d) 672, 33 C.R. (3d) 204, aff'd. [1985] 1 S.C.R. 613, 45 C.R. (3d) 97. The principal reasons are those of Tallis J.A. who expressed at p. 221 (C.R.) the rationale of the decision:

> Our nation's constitutional ideals have been enshrined in the Charter and it will not be a "living" charter unless it is interpreted in a meaningful way from the standpoint of an average citizen who seldom has a brush with the law. . .

[58] That decision was upheld by the Supreme Court of Canada in a decision which, being the first to define the effect of the ***Charter*** on criminal law, was seen at the time as having great significance. Eight members of the court took part in the decision. The fullest reasons were those of Le Dain J. who dealt at length with the question as to the scope of "detention" in s. 10 of the ***Charter***. His conclusion that it should be given a broad meaning, which included the factual situation in ***Therens***, was concurred in by all members of the court. However, his conclusion that the admission of the evidence would not in that case bring the administration of justice into disrepute was agreed with only by McIntyre J. and so they were the dissenting judges in the result. The reasons of Estey J. upholding the exclusion of the evidence on the ground that [C.R. p. 107] "Here the police authority has flagrantly violated a ***Charter*** right without any statutory authority for so doing" were concurred in by three members of the court (Beetz, Chouinard and Wilson JJ.). Dickson C.J.C. and Lamer J. delivered separate concurring reasons.

[59] For a time, that decision was taken as imposing upon Canada the American rule of automatic exclusion. If the understandable and innocuous violation of the ***Charter*** in ***Therens*** required exclusion, it seemed to follow that there could be no circumstances in which exclusion could be refused. However, the brevity and absence of analysis in the reasons of the majority left some scope for restrictive distinguishing.

[60] That approach was taken by this Court in ***R. v. Strachan*** (1986), 25 D.L.R. (4th) 567, 49 C.R. (3d) 289 (B.C.C.A.), in holding that the rule in ***Therens*** was applicable only to cases in which, as in ***Therens***, the person detained was required to produce evidence which might be incriminating and where the refusal to comply without reasonable excuse is a criminal offence. ***R. v. Strachan***, like ***Therens***, involved a breach of s. 10(b) but in relation to a charge of possession of marijuana for the purpose of trafficking. The issue was whether the drugs and associated paraphernalia obtained on a search and seizure should, as the trial judge had held, be excluded.

[61] Our decision attracted adverse comment from those who favoured a less restrictive approach to exclusion of evidence. Then, as now, it was the practice of the editor of the *Criminal Reports* to append to reports of some decisions his useful and often scholarly "*Annotations*" in which he often expressed his view as to the soundness or otherwise of the decision. His view of the proper approach to exclusion was expressed thus in the *Annotation* to the Saskatchewan Court of Appeal's decision in ***R. v. Therens***, ¶58 *supra*, (33 C.R. (3d) 204 at 205) which began with this paragraph:

> The judgment of Tallis J.A. ... should become a classic authority on the proper approach to the [Charter] ... It speaks eloquently of the need to ensure that Charter rights and freedoms are meaningful and not given unduly restrictive interpretations.

[62] In the *Annotation* to ***Strachan***, the editor elevated the somewhat pontifical huffing by which he customarily warned readers to be wary of decisions of this Court on ***Charter*** issues to something like a decree of excommunication from the ***Charter*** Church. I quote, in part, from pp. 290-291 (C.R.):

> Some members of the British Columbia Court of Appeal appear to be determined to narrowly interpret the

> ruling of the Supreme Court of Canada in *R. v. Therens*, ...
>
> The rejection by the clear majority of the Supreme Court of Canada of this special type of good faith claim is a powerful blow against the strongly-held views of some judges – notably Seaton J.A. in *R. v. Collins*..., Esson J.A. in *R. v. Hamill*, 41 C.R. (3d) 123, [1984] 6 W.W.R. 530 . . ., and Zuber J.A., dissenting, in *R. v. Duguay* (1985), 50 O.R. (2d) 375... – who have striven hard to avoid a tilt in the direction of the exclusionary rule and to achieve the result that the exclusion of evidence under s. 24(2) will be rare.
>
> . . .
>
> Prior to *Strachan* a majority of the British Columbia Court of Appeal in *R. v. Gladstone*, 47 C.R. (3d) 289, [1985] 6 W.W.R. 504, . . . relied on the good faith of the investigating customs officers as entirely decisive in the decision not to exclude evidence despite a violation of the accused's right to counsel. This seems an unduly narrow and untenable view of *Therens*: see the C.R. annotation at p. 290. *Strachan* is far more restrictive. . . . [Esson J.A.] responds by confining *Therens* to impaired driving offences where potentially incriminating evidence is required by law. He admits the evidence, excoriating at length about the evils of the exclusionary rule for Canada and reasserting that exclusion should be rare and only in shocking cases.
>
> . . .
>
> This approach was and is no longer open to a Court of Appeal....

[63] Two years later, the Supreme Court of Canada dismissed the appeal in ***Strachan***, [1988] 2 S.C.R. 980, 67 C.R. (3d) 87. In giving reasons for the court, Dickson C.J.C. agreed in substance

with all aspects of our decision. In concluding his reasons, he said at pp. 1008-1009 (S.C.R.):

> The final group of factors relate to the effects of exclusion on the administration of justice. Routine exclusion of evidence necessary to substantiate charges may itself bring the administration of justice into disrepute. Any denial of a *Charter* right is serious, but s. 24(2) is not an automatic exclusionary rule. Not every breach of the right to counsel will result in the exclusion of evidence. In this case where the breach of the right to counsel was inadvertent and where there was no mistreatment of the accused, exclusion of the evidence rather than its admission would tend to bring the administration of justice into disrepute. I am therefore of the view that the evidence of the marijuana ought not to have been excluded at trial.

[64] Read as a whole, that decision clearly supports the view that courts, in applying s. 24(2), should do so in a balanced way which gives appropriate weight to the public interest in effective law enforcement. ***Strachan***, *supra*, continues to be generally regarded as a significant decision, but its importance is largely confined to the treatment of breaches of s. 10(b). In relation to the entire field of exclusion of evidence, the decision of the Supreme Court of Canada in ***Collins***, *supra*, pronounced a year earlier, is of overriding importance.

[65] The principal reasons are those of Lamer J., with whom Dickson C.J.C., Wilson, Le Dain and La Forest JJ. concurred. In the result, a new trial was ordered to allow the Crown the opportunity to establish, if it could, that the police officer, when he took a flying tackle at the accused and seized her by the throat, had reasonable and probable grounds, as distinct from a mere suspicion, to believe that she was either dangerous or a handler of drugs. The ratio of the decision was, as stated by Lamer J. for the majority at p. 288 (S.C.R.):

> . . . However, the administration of justice would be brought into greater disrepute, at least in my

> respectful view, if this Court did not exclude the evidence and dissociate itself from the conduct of the police in this case which, always on the assumption that the officer merely had suspicions, was a flagrant and serious violation of the rights of an individual. Indeed, we cannot accept that police officers take flying tackles at people and seize them by the throat when they do not have reasonable and probable grounds to believe that those people are either dangerous or handlers of drugs. . . .

That ground of decision was not fundamentally inconsistent with the "community values" or "reasonable man" approach advocated by Seaton J.A., which approach was not significantly different from the "community shock" test applied by the trial judge in ***Collins***, *supra*.

[66] However, it is the overall approach enunciated by Lamer J. in *obiter* which has shaped the law on s. 24(2), albeit with many modifications and shifts in emphasis. That overall approach was fundamentally different from that which had been advocated by Seaton J.A.

[67] The starting point of the analysis is the grouping of factors "according to the way they affect the repute of the administration of justice". Lamer J. went on to say, at p. 284 (S.C.R.):

> . . . The trial is a key part of the administration of justice, and the fairness of Canadian trials is a major source of the repute of the system and is now a right guaranteed by s. 11(d) of the *Charter*. If the admission of the evidence in some way affects the fairness of the trial, then the admission of the evidence would tend to bring the administration of justice into disrepute and, subject to a consideration of the other factors, the evidence generally should be excluded.
>
> [emphasis of Lamer J.]

> It is clear to me that the factors relevant to this determination will include the nature of the evidence obtained as a result of the violation and the nature of the right violated and not so much the manner in which the right was violated. Real evidence that was obtained in a manner that violated the *Charter* will rarely operate unfairly for that reason alone. The real evidence existed irrespective of the violation of the *Charter* and its use does not render the trial unfair. However, the situation is very different with respect to cases where, after a violation of the *Charter*, the accused is conscripted against himself through a confession or other evidence emanating from him. The use of such evidence would render the trial unfair, for it did not exist prior to the violation and it strikes at one of the fundamental tenets of a fair trial, the right against self-incrimination. . .
>
> [emphasis added]

[68] The only dissenting judge was McIntyre J. who said, at pp. 289-90 (S.C.R.):

> With the exception of his conclusion, there is little, if anything, inconsistent in the judgment of Seaton J.A. with what my colleague, Lamer J., has said up to the point where he discusses his approach to the question of how a court should determine, in accordance with s. 24(2) of the *Charter*, whether the admission of evidence would bring the administration of justice into disrepute. It is with respect to that aspect of my colleague's judgment that a divergence in our views appears. With the very greatest deference to my colleague, I would not approve of a test so formulated. I would prefer the less formulated approach of Seaton J. A., who said at p. 151:
>
> [Then follows the passage beginning "Disrepute in whose eyes?" reproduced, *supra* at ¶56.]

[69] In contending for that "less formulated" approach, one consistent with the historic approach of the common law, McIntyre J. may, I venture to suggest, have been prescient, as was Le Dain J. who, although he joined the majority in allowing the appeal, expressed reservations about the importance given in the analysis of Lamer J. to the factor referred to as “the effect of the admission of the evidence on the fairness of the trial.” That factor did not arise on the facts of ***R. v. Collins***, *supra*, but has since become the dominant one in s. 24 (2) analysis in a way which, in my respectful view, has led to much difficulty and uncertainty in the application of the section.

[70] In the 16 years since the decision in ***Collins***, *supra*, there have been countless decisions, dozens of them in the Supreme Court of Canada, which have sought to apply the ***Collins*** formula, but with many variations. As a result, it may be that the danger warned against by one of Canada’s pre-eminent authorities on criminal law has materialized. In ***R. v. Rao*** (1984), 46 O.R. (2d) 80, 40 C.R. (3d) 1, leave to appeal to S.C.C. refused 40 C. R. (3d) xxvi, a case dealing with a warrantless search, Martin J. A. engaged in an extensive examination of American authorities, and noted at p. 29 (C.R.) that the Fourth Amendment, the American equivalent to our s. 8, has produced a body of case law of “almost overwhelming” volume and complexity. He went on to comment that the American case law is “replete with refined distinctions which, in my view, ought to be avoided in developing our jurisprudence under s. 8 of the Charter.” Martin J.A. also noted, at p. 30, that the Law Reform Commission of Canada had commented on the “bewildering” distinctions drawn by American courts between various fact situations and stressed the importance of avoiding such “entanglements.” In my respectful view, those hazards have not been avoided. The complexity of the ***Collins*** formula has been made more complex by later decisions to the point where it often seems to be the largely subjective impression of the judge or judges in a given case that determines the outcome.

[71] These matters have, of course, been the subject of intense debate in the Supreme Court of Canada. That is apparent from the judgments in ***R. v. Stillman***, [1997] 1 S.C.R. 607, 5 C.R. (5th) 1, in which the concept of "unlawful conscription of the accused" was developed by the majority in a judgment of great complexity and refinement of concepts. One point emerges very clearly. The concept of "trial fairness" put forward by Lamer J. in the second paragraph of the passages from ***Collins***, quoted *supra*, ¶67, has come to mean something very different than a "fair trial" as previously understood. That applied to the conduct of the trial and to the right of the accused to the benefit of all of the rules of evidence and procedure including the confessions rule, but not to "other evidence emanating from him." The distinction was made in the reasons of McLachlin J. (as she then was), in dissent. Paragraph 257 reads:

> I come finally to the assumption underlying the approach that anything that affects trial unfairness automatically renders the trial unfair. Under the proposed rule of automatic exclusion for unfairness, any evidence which comes "within the trial fairness rationale" or which would have "affected the trial's fairness", to use the language of *Burlingham*, [[1995] 2 S.C.R. 206] at paras. 29 and 31, suffices to render the trial unfair. With respect, this confuses two different things: unfair aspects of a trial and a fundamentally unfair trial. As I wrote in *R. v. Terry*, [1996] 2 S.C. R. 207, the accused is entitled to a fundamentally fair trial. That does not mean that it must be perfect. Even the best-run trials may have aspects of unfairness. On the other hand, the unfairness may be so great that it leaves doubt as to whether the verdict is safe. When this occurs, the trial may be said to be fundamentally unfair. Throughout the fabric of our rules of evidence and trial conduct runs a golden thread: an innocent person must not be convicted. If a reasonable person viewing the trial proceedings as a whole would conclude that there is a danger that an innocent person may have been convicted, then the trial may be said to be fundamentally unfair. The ultimate

> unfairness is to be wrongly convicted on unsafe evidence.

[72] The modern concept of trial fairness is not directed at the danger of an innocent person being convicted but rather at preventing the Crown from introducing evidence obtained by investigatory tactics which, primarily in the eyes of the accused, are unfair. It seems to reject the balanced approach endorsed by Dickson C.J.C. in ***Strachan***, *supra*, in favour of the "meaningful" approach endorsed in ***Therens***, *supra*, ¶¶57-58. Because the circumstances of each case are different, it is a difficult rule to apply with consistency, all the more so because changes in the law which in the pre-***Charter*** era came about because of occasional statutory amendments and even more occasional modifications of the common law, generally after years of discussion, now occur with great frequency and unpredictability based as they are on the judicial view that "***Charter*** values" now require a change.

[73] Those tendencies were most dramatically illustrated in ***R. v. Feeney***, [1997] 2 S.C.R. 13, 7 C.R. (5th) 101, which was decided very shortly after ***Stillman***, *supra*. The majority reasons were those of Sopinka J.A. with La Forest, Cory, Iacobucci and Major JJ. concurring. As in ***Stillman***, L'Heureux-Dubé, Gonthier and McLachlin JJ. dissenting, Lamer C.J.C., who had joined with the five members of the ***Feeney*** majority to form the six/three majority in ***Stillman***, also dissented.

[74] The principal issue was whether a blood spattered shirt and other incriminating physical evidence, found after the police made a warrantless entry into the trailer in which Feeney was sleeping, should be excluded. In dismissing Feeney's appeal against his conviction for murder, this Court upheld the decision of the trial judge. It did so for the reasons of Lambert J.A. for the court: (1995), 54 B.C.A.C. 228, [1995] B.C. J. No. 208 (Q.L.) (C.A.). The essence of the reasons of this Court is to be found in this passage, at paras. 34-36:

> [34] I do not think that it is necessary to consider

> each of the alleged ***Charter*** breaches in this case. Each of them attracts a good deal of jurisprudence and some nice analytical concepts. For the reason that it is not necessary to do so, it is not desirable to do so.
>
> [35] The fundamental point in relation to the police conduct in this case was that there had been a savage attack on an elderly man in a small community which suggested a killer who was out of control in the community and that the police had a duty to protect the community. They also had a duty to try to locate and neutralize the killer and if possible to gather evidence that would satisfy them then and there that the killer had been apprehended, and that would later tend to establish that the correct person had been apprehended and made to stand trial.
>
> [36] In those circumstances it is my opinion that the police were facing a situation which could be classified as an emergency, or as exigent circum-stances which would require immediate action, and that in addition they were facing circumstances where the possibility of the destruction of evidence, particularly evidence in relation to bloodstains, was a real one and had to be addressed....

Chief Justice Lamer would have dismissed the appeal for the reasons of Lambert J.A. The reasons of the three other dissenting judges were those of L'Heureux-Dubé J.

[75] In finding that the entry into the trailer by the officer in charge was a "very serious intrusion of [Mr. Feeney's] privacy rights", the majority held that the officers should have stayed outside the property on which the trailer was situate until Feeney came out voluntarily or until they had obtained both a search warrant and an arrest warrant. Obtaining the search warrant would, having regard to the remoteness of the location, probably have required several hours. The law as it stood made no provision for an arrest warrant in the

circumstances of the case. The entry, except perhaps for the sparse announcement which consisted of the single word "police", would seem to have met the test for warrantless entry of a dwelling house laid down in ***R. v. Landry***, [1986] 1 S.C.R. 145. But that decision was held to no longer state the law because, as was said in ***Feeney***, *supra*, at p. 45 (S.C.R.), the decision of Chief Justice Dickson in ***Landry***, *supra*, "was largely based on a balance between privacy and the effectiveness of police protection" as a result of which it was necessary that the test "be adjusted to comport with ***Charter*** values."

[76] The entry also, as the trial judge, three members of this Court and four of the Supreme Court held, was justified by "exigent circumstances", as understood to that time. Professor Stuart entitled his Annotation (7 C.R. 5th 175), *Feeney*: *New Charter Standards for Arrest and Undesirable Uncertainty*. At p. 177, he said:

> The problem with the majority judgment lies in its refusal to recognize a general exigent circumstances exception.

because, as he said at p. 178:

> In the absence of the recognition of a general exigent circumstances exception, the police have been placed in an unenviable position.

He was inclined to agree that there were no exigent circumstances on the facts of the case. That view was based on the assumption that the only relevant circumstance was the need to prevent destruction of evidence, but there was another circumstance: the officers had grounds for thinking that Feeney was in the trailer but could not be certain of that and, therefore, had to consider the possibility that a dangerously violent man was at large. As the officer said in a passage from his evidence quoted by L'Heureux-Dubé J. at p. 116 (S.C.R.):

> I had grounds to suspect he could have been involved, sir, and I would be negligent in my duty if I did not

check that out.

[77] That brings me back to the point I made in ¶49, *supra*, at the beginning of this long digression. It is a truism that the police have a duty to know the law and to follow it. But it is difficult to do that if the law itself is uncertain and frequently changes. One relatively reliable factor is that the law as it has developed seems rarely to result in exclusion where:

(a) the police relied upon a valid warrant;

(b) the object of the search was “real evidence” and not “conscripted”;

(c) the search was for drugs and drug paraphernalia.

Also relevant is the view expressed by Lamer C.J.C. in ***Collins***, *supra*, that the manner of the search will rarely justify exclusion. The ***Charter*** breach in this case, of course, related to the manner of the search. It may be that those who created The Policy had regard to such matters as, I have no doubt, did many of the judges who found The Policy not to be a breach, or if a breach, a trivial one.

[78] Although it is less clear to me now than it was at the time of hearing this appeal that The Policy is clearly unacceptable, I remain of the view, for the reasons stated at ¶¶37-48 hereof, that the manner of entry employed in this case was a serious breach which requires the evidence thereby obtained to be excluded.

[79] For the sake of completeness, I will note a decision of this court differently constituted which was pronounced on June 5, 2003 in which substantially the same issue was decided in substantially the same way: ***R. v. Lau***, 2003 BCCA 337. That appeal was heard before this one and therefore was under reserve when we heard and decided this case, a fact which did not come to our attention until very recently. I mention that only by

way of explaining how it came about that two divisions of the court decided the same issue without reference to the other case.

"The Honourable Mr. Justice Esson"

I Agree:

"The Honourable Mr. Justice Hollinrake"

**Reasons for Judgment of the Honourable Madam Justice Southin:**

[80] I have had the privilege of reading in draft the reasons for judgment of my colleague, Mr. Justice Esson, who has set out the essential facts of this case in paragraphs 3 to 7 of his reasons for judgment.

[81] I agree with his proposed disposition of this appeal and with the reasons he gives therefor.

[82] I add words of my own only because these marihuana cases give rise over and over again to a consideration of s. 24(2) of the ***Charter*** and one of the elements under that provision is the seriousness of the crime.

[83] While at one time I accepted the received wisdom that marihuana offences were serious crimes, I now am of a different opinion, having been persuaded to the contrary by, among other writings, the judgment of my colleague, Prowse J.A., in ***R. v. Malmo-Levine*** (2000), 145 C.C.C. (3d) 225, 34 C.R. (5th) 91, 2000 BCCA 335.

[84] By that, I do not mean that I would have come to the same conclusion in that case as did she. I have not yet abandoned my conviction that Parliament has a constitutional right to be hoodwinked, as it was in the 1920's and 1930's by the propaganda against marihuana, and to remain hoodwinked.

[85] The growing, trafficking in, and possession of marihuana

("Cannabis" in Schedule II to the ***Controlled Drugs and Substances Act***, R.S.C. 1996, c. 19) is the source of much work, not only for peace officers but also for lawyers and judges. Whether that work contributes to peace, order and good government is another matter.

[86] One can speculate as to how the law on s. 8 of the ***Canadian Charter of Rights and Freedoms*** would have developed if one of the first cases on it to reach the Supreme Court of Canada, ***R. v. Kokesch***, [1990] 3 S.C.R. 3, 61 C.C.C. (3d) 207, in which the court divided four/three, had not concerned peace officers trespassing at night to catch a marihuana grower but peace officers trespassing at night to listen in on a gather-ing of gangsters whom they believed, from a tip, to be making plans for a series of murders.

[87] In my years on the bench I have sat on over 40 cases which had something to do with this substance, which appears to be of no greater danger to society than alcohol.

[88] In his judgment in ***R. v. Malmo-Levine***, *supra*, my colleague, Braidwood J.A., at paras. 71-96, sets out some of the legislative and social history relating to cannabis and I shall not repeat what he said.

[89] I would add, however, two references.

[90] The first is a passage from R. Davenport-Hines, *The Pursuit of Oblivion, A Global History of Narcotics 1500-2000* (London: Weidenfeld & Nicolson, 2001), at pp. 274-77, concerning the "moral reformer", Harry Anslinger, Commissioner of the United States Federal Bureau of Narcotics from 1930 until 1962, whom the author calls "The First Drugs Czar":

> [He] was egotistical, authoritarian, energetic, brutal and unscrupulous. Wily rather than intelligent, he was suspicious of conspicuous intelligence in others. He was the first American to be dubbed a drug 'czar': the word is inapt, for it promises an absolutist's solution to a problem that is in fact chronic. ... Anslinger's

despotic influence was not only enduring but had global ramifications. Since 1909 American drug prohibition has impinged on underdeveloped countries as well as on the industrialised world. During the 1920s these strategies became integral to the anti-imperialist agenda of men like Congressman Porter. In the 1940s the drug prohibition crusade remained part of an increasingly interventionist US foreign policy, and after Anslinger's retirement, in the 1970s and 1980s, the internationalisation of presidential anti-drug wars became a neo-colonialist technique.

* * *

[In 1936] Anslinger escaped being fired for ineptitude by his deftness in office politics and his sudden, aggressive support for a cause that he found to restore his reputation: a federal initiative against marijuana.

As we have seen, the smoking of marijuana had spread into American industrial cities following the prohibition of alcohol in 1920, and by 1937 was outlawed in every state under laws that allowed no distinction between addictive narcotics such as heroin, stimulants such as cocaine and hallucinogens such as marijuana. 'Marijuana was something new and adventuresome,' Anslinger recalled of the mid-1930s. 'The angle-wise mobsters were aiming their pitch straight at the most impressionable age group - America's fresh, post-depression crop of teenagers.' He did not perceive that the success of the mobsters' pitch was largely attributable to the market conditions created by prohibitionist laws.

* * *

It was essential to the maintenance and expansion of his *imperium* to pursue all types of prohibited drugs and their users without distinction as to which substance was the most addictive, the most unhealthy or the most costly to society. This strategic need explains the

> Bureau's repeated references to marijuana as a narcotic, though it is nothing of the sort.
>
> [Endnotes omitted.]

[91] The second reference is to the foreword of a 1936 American film called "Reefer Madness":

> The motion picture you are about to witness may startle you. It would not have been possible, otherwise, to sufficiently emphasize the frightful toll of the new drug menace which is destroying the youth of America in alarmingly-increasing numbers. Marihuana is that drug - a violent narcotic - an unspeakable scourge - The Real Public Enemy Number One! Its first effect is sudden, violent, uncontrollable laughter; then come dangerous hallucinations - space expands - time slows down, almost stands still...fixed ideas come next, conjuring up monstrous extravagances - followed by emotional disturbances, the total inability to direct thoughts, the loss of all power to resist physical emotions... leading finally to acts of shocking violence...ending often in incurable insanity. In picturing its soul-destroying effects no attempt was made to equivocate. The scenes and incidents, while fictionalized for the purposes of this story, are based upon actual research into the results of Marihuana addiction. If their stark reality will make you *think*, will make you aware that something *must be done* to wipe out this ghastly menace, then the picture will not have failed in its purpose... Because the dreaded Marihuana may be reaching forth next for your son or daughter...or *yours*...or *YOURS*!
>
> [J. Walker, ed., *Halliwell's Film Guide* (HarperPerennial, 1996]

[92] I have been driven to the conclusion that, in the eyes of those who led not only their own country but also this country

into making criminals of those who are no better or worse, morally or physically, than people who like a martini, marihuana was the first weapon of mass destruction.

[93] This whole sorry history reflects the sorry history of prohibition in the United States. This Province also flirted with prohibition but, in practice, the ***British Columbia Prohibition Act***, S.B.C. 1916, c. 49, had sufficient holes in it that while the Province looked moral, liquor could be obtained by medical prescription. See R. A. Campbell, *Demon Rum or Easy Money: Government Control of Liquor in British Columbia from Prohibition to Privatization* (Ottawa: Carleton University Press, 1991) at pp. 24-25:

> In British Columbia a $2.00 prescription allowed one to buy liquor at a drugstore or government vendor. One doctor wrote 4000 in 30 days. During 1919 British Columbia doctors signed about 181,000 prescriptions, and in one month, January 1920, they wrote over 27,000 prescriptions for medicinal liquor. Part of this upsurge was due to the great flu epidemic, but for most people a note from the doctor was simply the easiest way to get a bottle. As a secretary to the premier observed:
>
> > Toward Christmas especially it looked as if an epidemic of colds and colics had struck the country like a plague. In Vancouver queues a quarter of a mile long could be seen waiting their turn to enter the liquor stores to get prescriptions filled. Hindus, Chinese, and Japanese varied the lines of the afflicted of many races. It was a kaleidoscopic procession waiting in the rain for a replenishment that would drive the chills away; and it was alleged that several doctors needed a little alcoholic liniment to soothe the writer’s cramp caused by inditing their signatures at two dollars per line.
>
> In 1920 the Vancouver Medical Association asked the government to relieve it “of the responsibility of dispensing liquor” as the practice had become “an

intolerable nuisance to the medical profession."

[Endnotes omitted.]

[94] I add to that that I have been informed on reliable authority that men returning from the horrors of the Western Front had no difficulty obtaining a prescription from a physician sympathetic to their need for surcease from recollection.

[95] History, unlike mathematics, is not essentially indisputable. I acknowledge that there may be scholars who see no relationship between the attempt to suppress the use of alcohol, rooted as I believe it to be in Proverbs 20:1, and the attempt to suppress the use of marihuana which, so far as I know, is not mentioned in either the Old or New Testament.

[96] Parliament tried to assist in the suppression of alcohol. See ***Russell v. The Queen*** (1882), 7 App. Cas. 829 (P.C.), but it is worth remembering that the Privy Council, in ***Toronto Electric Commissioners v. Snider***, [1925] A.C. 396 at 412, remarked:

> It appears to their Lordships that it is not now open to them to treat *Russell v. The Queen* as having established the general principle that the mere fact that Dominion legislation is for the general advantage of Canada, or is such that it will meet a mere want which is felt throughout the Dominion, renders it competent if it cannot be brought within the heads enumerated specifically in s. 91. Unless this is so, if the subject matter falls within any of the enumerated heads in s. 92, such legislation belongs exclusively to Provincial competency. No doubt there may be cases arising out of some extraordinary peril to the national life of Canada, as a whole, such as the cases arising out of a war, where legislation is required of an order that passes beyond the heads of exclusive Provincial competency. ... Their Lordships think that the decision in *Russell v. The Queen* can only be supported to-day, not on the footing of having laid down an

> interpretation, such as has sometimes been invoked of the general words at the beginning of s. 91, but on the assumption of the Board, apparently made at the time of deciding the case of *Russell v. The Queen*, that the evil of intemperance at that time amounted in Canada to one so great and so general that at least for the period it was a menace to the national life of Canada so serious and pressing that the National Parliament was called on to intervene to protect the nation from disaster. An epidemic of pestilence might conceivably have been regarded as analogous.

[97] It is thus curious that no attack has been made on the inclusion of "cannabis" in the ***Controlled Drugs and Substances Act***, *supra*, on the footing that the matter is beyond the reach of Parliament. Parliament having long since yielded to Provincial Legislatures the regulation of alcohol, perhaps it might consider yielding the regulation of marihuana.

[98] Lest this case be taken as criticism of individual peace officers who have carried out searches in accordance with the policy in issue, I consider criticism of that policy is properly directed to the Police Board.

[99] By the ***Police Act***, R.S.B.C. 1996, c. 367:

> **15** (1) Subject to subsection (2), a municipality with a population of more than 5,000 persons must provide, in accordance with this Act and the regulations,
>
> (a) policing and law enforcement in the municipality with a police force or police department of sufficient numbers
>
> (i) to adequately enforce municipal bylaws, the criminal law and the laws of British Columbia, and
>
> (ii) to maintain law and order in the municipality, and

(b) adequate accommodation, equipment and supplies for

(i) the operations of and use by the police force or police department required under paragraph (a), and

(ii) the detention of persons required to be held in police custody other than on behalf of the government.

(2) If, due to special circumstances or abnormal conditions in a municipality, the minister believes it is unreasonable to require a municipality to provide policing or law enforcement under subsection (1), the minister may provide policing or law enforcement in the municipality, subject to the terms the Lieutenant Governor in Council approves.

* * *

**23** (1) Subject to the minister's approval, the council of a municipality required to provide policing and law enforcement under section 15 may provide policing and law enforcement by means of a municipal police department governed by a municipal police board consisting of

(a) the mayor of the council,

(b) one person appointed by the council, and

(c) not more than 5 persons appointed, after consultation with the director, by the Lieutenant Governor in Council.

* * *

**26** (1) A municipal police board must establish a municipal police department and appoint a chief constable and other constables and employees the municipal police board considers necessary to provide policing and law enforcement in the municipality.

* * *

(4) In consultation with the chief constable, the municipal police board must determine the priorities, goals and objectives of the municipal police department.

(5) The chief constable must report to the municipal police board each year on the implementation of programs and strategies to achieve the priorities, goals and objectives.

* * *

**34** (1) The chief constable of a municipal police department has, under the direction of the municipal police board, general supervision and command over the municipal police department and must perform the other functions and duties assigned to the chief constable under the regulations or under any Act.

(2) The municipal police department, under the chief constable's direction, must perform the duties and functions respecting the preserva-tion of peace, the prevention of crime and offences against the law and the administration of justice assigned to it or generally to peace officers by the chief constable, under the regulations or under any Act.

[100] By virtue of these provisions, the responsibility for all policies of the City of Vancouver Police Force rests squarely on the Police Board of this City.

"The Honourable Madam Justice Southin"