

Chapter 4: The first leg of the admissibility analysis: determining trial fairness under section 35(5)

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A. Introduction

This chapter is divided into four main parts: Part A consists of this introduction, while part B explores the fair trial requirement under section 24(2) in Canada. Part C, in turn, contains a discussion of the fair trial prong contained in section 35(5) of the South African Constitution, and part D consists of a conclusion and recommendations.

In *R v Collins*,¹ Lamer J suggested that a court should consider three categories of factors when determining whether exclusion of disputed evidence could bring the administration of justice into disrepute. The three categories identified are: the first group of factors deal with the effect of admitting evidence on the fairness of the trial; the second, with a determination as to whether admission of unconstitutionally obtained evidence would be tantamount to judicial condonation of unconstitutional conduct (also known as the seriousness of the violation); and the third group of factors are concerned with the effect of exclusion or admission of the evidence on the integrity of the justice system. When courts consider the first group of factors, it is also referred to as the first leg or phase of the admissibility analysis, and when the second and third groups of factors are considered, it is referred to as the second leg or phase of the analysis.

This chapter explores the first group of factors, also known as the effect of admitting the disputed evidence on trial fairness.² The Canadian Supreme Court further held in *Collins*³ that the fair trial prong should be determined by assessing the following three factors: firstly, the nature of the evidence, or a conscription

¹ (1987) 33 CCC (3d) 1 (SCC); 38 DLR (4th) 508; (1987) 1 SCR 265; (1987) Can LII 84 (SCC), ("*Collins*").

² *Ibid* at 19-20.

³ *Loc cit*.

analysis,⁴ secondly a discoverability inquiry,⁵ and thirdly, the nature of the right breached.⁶ These three factors are analysed, having regard to the provisions of sections 24(2) and 35(5).

The Canadian position, both during the pre- and post-Charter era, is discussed in part B of this chapter. This discussion is undertaken, on the one hand, with the aim of establishing the scope and meaning of the conscription analysis under section 24(2) of the Charter. On the other hand, it serves the purpose of determining what impact the privilege against self-incrimination has on the right to a fair trial. The important question that needs to be explored here is: Does the common law privilege against self-incrimination adequately protect the fundamental right to a fair trial in a democratic society where courts must especially be concerned about the manner in which evidence had been obtained, regardless of its nature? Put differently, does the common law privilege against self-incrimination effectively protect constitutionally entrenched procedural rights designed to collectively enhance trial fairness values?

Following the *Collins* approach, a discoverability inquiry is discussed with the aim of establishing its function under the fair trial requirement. In addition to these

⁴ Loc cit. Lamer J formulated the conscription analysis as follows: "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 a trial unfair, for ... it strikes against one of the fundamental tenets of a fair trial, the right against self-incrimination". (The "first *Collins* fair trial factor").

⁵ Loc cit. The judge referred to the discoverability inquiry as follows: "It may also be relevant, in certain circumstances, that the evidence would have been obtained in any event without the violation of the Charter". ("The second *Collins* fair trial factor").

⁶ Loc cit. This requirement was identified by Lamer J as follows: "It is clear to me that the factors relevant to this determination will include ... the nature of the right violated and not so much the manner in which the right was violated". ("The third *Collins* fair trial factor").

two factors, the third *Collins* factor (the nature of the right infringed) is considered.

The *Collins* fair trial directive was reoriented during 1997 in *R v Stillman*⁷ and *R v Feeney*.⁸ The reasons for the adaptation of the *Collins* test, as well as the impact that the refined fair trial requirement has had on the *Collins* fair trial test, are explored. The following important issues emerge: Would it be more onerous or undemanding to admit 'real' evidence obtained after a violation in terms of the *Stillman* fair trial requirement, when compared to the *Collins* fair trial test? Also, has the 'refined' fair trial directive discarded a consideration of the third *Collins* fair trial factor (the nature of the right violated) as an independent element in the fair trial assessment? A second attempt at remodelling the *Collins* fair trial framework was made by the Ontario Court of Appeal in *R v Grant*.⁹ The Supreme Court of Canada heard argument in the appeal of *Grant* on 23 April 2008.¹⁰ Judgment has been reserved and will be delivered in due course. The implications of the *Grant* fair trial assessment is analysed under 4.4 below, with the aim of establishing whether it best serves the goals sought to be protected by the fair trial assessment.

⁷ (1997) 113 CCC (3d) 321, 144 DLR (4th) 193, 5 CR (5th) 1, [1997] 1 SCR 607, 209 NR 81, 85 NBR (2d) 1, 472 APR 1, 42 CRR (2d) 189, 1997 CarwellNB 107, 1997 NB 108 (SCC), ("*Stillman*"). The *Stillman* fair trial assessment is also referred to in this work as the "refined" or "new" fair trial assessment.

⁸ (1997) 115 CCC (3d) 129, 7 CR (5th) 101, [1997] 2 SCR 13, ("*Feeney*").

⁹ (2006) 209 CCC (3d) 250, 143 CRR (2d) 223, 38 CR (6th) 58, (2006) CarswellOnt 3352, 81 OR (3d) 1, 213 OAC 127 (Ont CA), ("*Grant*").

¹⁰ Stuart of the Faculty of Law, Queen's University, Ontario, represented the intervenor in this case, the Canadian Civil Liberties Association, in the Supreme Court of Canada. A copy of Stuart's Heads of Argument is annexed and marked "Annexure D".

The South African Supreme Court of Appeal, in *Pillay and Others v S*,¹¹ has embraced the *Collins* approach in its interpretation of section 35(5) of the South African Constitution. For this reason, the structure of the work followed in part C in the main mirrors that followed in the discussion of the Canadian position. The discussion commences with an analysis of the pre- and post-constitutional era, with the aim of assessing the values protected by the conscription analysis under section 35(5). The common law privilege against self-incrimination serves to protect important values in the South African criminal justice system, especially in the trial fairness assessment. Mindful hereof, the pre- and post-constitutional comparison is undertaken in order to determine whether the privilege against self-incrimination effectively protects the fair trial directive contained in section 35(5). Scott JA applied the *Stillman* fair trial framework in a dissenting minority opinion in *Pillay*. In *S v Tandwa*,¹² decided approximately four years after *Pillay*, the South African Supreme Court of Appeal did not follow the majority opinion in *Pillay*. Instead, the *Tandwa* court incorporated the exercise of a discretion into the fair trial assessment, which – though not identical to that applied in *Grant* – includes aspects of such fair trial framework. Two important questions arise: Should South African courts be guided by the *Collins*, *Stillman*, *Grant* or *Tandwa* fair trial analysis in section 35(5) challenges? If not, how should South African courts assess trial fairness in terms of section 35(5)?

Once more following the *Collins* approach, a discoverability or ‘but for’ inquiry is employed as a tool to determine trial fairness. Thereafter, the third *Collins* fair trial factor (the nature of the right infringed) is considered. The right to legal representation and the right to freedom and security of the person form part of this discussion, since infringements of these rights could frequently occur in section 35(5) challenges. While the infringement of other fundamental rights

¹¹ 2004 2 BCLR 158 (SCA) (“*Pillay*”).

¹² [2007] SCA 34 (RSA), (“*Tandwa*”).

may result more often than those discussed, it should be emphasised that this thesis is not aimed at a detailed discussion of the rights contained in section 35. Rather, the nature of the right infringed is discussed with the objective of demonstrating the characteristics of the fair trial assessment contained in section 35(5).

B. Determining trial unfairness under section 24(2) of the Canadian Charter

This part of the study begins with an overview of the common law privilege against self-incrimination in Canada as applied during the pre-Charter era, followed by the adaptation thereof during the post-Charter era. The issue of the admissibility of evidence in Canada and in South Africa display significant similarities, both before and after a justiciable Bill of Rights was introduced. To mention but a few: Both Canada and South Africa were at some stage under British rule; the law of England had a profound impact on the common law of both countries;¹³ both countries emerged from a system of parliamentary sovereignty to constitutional states where fundamental fairness informs the right to a fair trial;¹⁴ the Constitutions of both countries contain a general limitations

¹³ See *S v Zuma* 1995 4 BCLR 401, 2 SA 642 (CC), 1 SACR 568 (CC) at par 25 (“*Zuma*”), where Kentridge AJ stated, having regard to the common law presumption of innocence: “In both Canada and South Africa the presumption of innocence is derived from centuries old principle of English law, forcefully restated by Viscount Sankey in his celebrated speech in *Wolmington v Director of Public Prosecutions* (1836) AC 462 (HL) at 481 ... Accordingly I consider that we may appropriately apply the principles worked out by the Canadian Supreme Court ...”.

¹⁴ *Collins* (fn 1 above) at 20, where Lamer J held that: “The use of self-incriminating evidence obtained following a denial of the right counsel will generally go to the very fairness of the trial and should generally be excluded;” compare s 35(5) of the South African Constitution which

clause¹⁵ and, of importance for this study, an exclusionary provision, both of which are structured in a strikingly similar manner.¹⁶ In the light hereof, the historic development of case law preceding the introduction of section 24(2), as well as those cases decided in terms thereof, is considered as a basis to inform the future development of the South African fair trial assessment in terms of section 35(5).

It was pointed out above that after the advent of the Charter, the factors to be considered in order to assess the fair trial directive were identified in *R v Collins*.¹⁷ The South African Supreme Court of Appeal has endorsed the *Collins* approach.¹⁸ According to *Collins*, the first factor to be considered to determine whether the trial is fair, is the nature of the evidence (whether it is real evidence or testimonial evidence). It was held that the admission of testimonial evidence obtained in violation of the Charter would generally render the trial unfair – conversely, the admission of real evidence obtained in the same manner would not readily render the trial unfair. The *Collins* court also referred to the concepts of ‘self-incrimination’ and ‘conscriptio’ interchangeably. Do these two concepts have the same meaning? It is in the light hereof that the scope and function of the common law privilege against self-incrimination as well as the concept ‘conscriptio’, and the nature of the evidence protected by each, becomes one of the focal points in this chapter.

explicitly provides that “evidence ... must be excluded if its admission would render would render a trial unfair ...”

¹⁵ Section 1 of the Charter; see also section 36 of the South African Constitution.

¹⁶ See *S v Naidoo* 1998 1 SACR 479, 1 BCLR 46 (N), (“*Naidoo*”); and *Pillay* (fn 11 above); *S v Makwanyane* 1995 3 SA 391, 6 BCLR 665, where the Canadian approach to the interpretation of both sections 35(3) and 36 were embraced.

¹⁷ Fn 1 above.

¹⁸ *Pillay* (fn 11 above); see also *Ally* (2005) 1 *SACJ* 66.

The nature of the evidence obtained after a violation caused confusion both in Canada and in South Africa,¹⁹ leading to the recent 'refinement' of the fair trial requirement in *Stillman*²⁰ and *Feeney*.²¹ The *Stillman* and *Collins*²² approach is rooted in the principle of the 'absence of pre-trial obligation', as developed by Ratushny.²³ By contrast, the approach adopted in *Grant*²⁴ favours reliability concerns and the extent of the infringement as the focal points of the fair trial assessment. The High Court of South Africa has, on the one hand, associated itself with the *Collins* approach. On the other hand, a number of judgments may be construed as being more inclined towards an approach analogous to that advocated in *Grant*. These conflicting approaches give rise to the important question: What test should South African courts embrace, having regard to the interests sought to be protected by the fair trial requirement under section 35(5)? This issue can only be meaningfully settled by responding to the following question: What values do the fair trial requirement, contained in section 35(5) of the South African Constitution, seek to protect? The issue presented here is not whether South African courts should follow the Canadian precedent, but rather: Does the fair trial directive under section 35(5) serve the same purpose as its Canadian counterpart? If so, does any compelling reason exist as to why

¹⁹ See, in this regard, the discussion of *S v M* 2002 2 SACR 411 (SCA), ("*M* (SCA)"); and *S v M* 2000 2 SACR 474 (N), ("*M*") at C 1.2.3 below.

²⁰ Fn 7 above.

²¹ Fn 8 above.

²² As amplified by case law thereafter.

²³ See Ratushny (1973) 19 *McGill LJ* 1, ("1973"); Ratushny *Self-incrimination in the Canadian Criminal Process* (1979), ("1979"); Ratushny (1987) 20 *CLQ* 312; Ratushny "The Role of the Accused in the Criminal Process" in Beaudoin and Ratushny (eds) *The Canadian Charter of Rights and Freedoms* (2nd ed, 1989), ("Beaudoin & Ratushny"); compare Paciocco (1989) 35 *McGill LJ* 74, ("Paciocco 1989"); Paciocco (1989) 32 *CLQ* 326; Paciocco (2001) 80 *Can BR* 433, ("Paciocco 2001"); Penney (2004) 48 *CLQ* 249.

²⁴ Fn 9 above.

Canadian precedent should not be followed? In other words, a purposive interpretation should be applied to resolve this issue.

The second factor to be considered under the *Collins* fair trial requirement is a discoverability analysis: The courts should establish whether the disputed evidence could have been discovered without a constitutional violation. In the event that it would not have been discovered except by unconstitutional means, admission of the evidence would render the trial unfair. This would be the case because the violation was essential to procure the evidence. According to this view, when evidence cannot be obtained in a constitutional manner, any attempt at obtaining it in an unconstitutional manner should not be regarded as a valid excuse. This approach enhances the fundamental concern of a justiciable Bill of Rights: Governmental power should be exercised within the ambit of the law and should not be incompatible with constitutional guarantees. This interpretation further conveys the message that the prosecution should not build its case against the accused in an unconstitutional manner.

The third factor to be considered under the trial fairness inquiry, is the nature of the right violated. The reason why this factor was identified in *Collins* is because certain rights inherently serve to protect identifiable fundamental values: The right to legal representation, the right to remain silent and to be informed of the consequences of not remaining silent, the privilege against self-incrimination and the right not to be compelled to make confessions or admissions all have the common aim of protecting an accused against unlawful self-conscription.

1 The nature of the evidence obtained after a violation: 'conscriptive' evidence in Canada

Each of the *Collins* fair trial factors, employed to determine whether the trial of an accused complies with the trial fairness directive, is discussed. In this part of this chapter, the focal point of the discussion is centred round the nature of the evidence obtained after a Charter violation.

1.1 The pre-Charter era: the privilege against self-incrimination and its impact on the right to a fair trial in Canada

For the reason that our courts frequently refer to Canadian case law for guidance on the interpretation of section 35(5), this chapter commences with a consideration of the admissibility of unlawfully obtained evidence during the pre-Charter era in Canada. This is done with the aim of gaining an improved understanding of their interpretation of section 24(2) of the Charter. In the light hereof, this chapter draws a parallel between the historic developments in Canada and South Africa. Many of the pre-Charter principles have shaped the present-day section 24(2) jurisprudence. Some of these principles have survived constitutional scrutiny, whereas others had to be adapted so as to reflect the spirit and purposes that the Charter seeks to achieve. In this regard, the common law privilege against self-incrimination, as applied in Canada and South Africa, is especially important.

For this reason, it is apt to refer briefly to the application of the privilege against self-incrimination in Canada prior to the Charter, because this would put the post-Charter Canadian cases, often quoted by the courts in South Africa, in their proper perspective.

The Canadian common law differentiated between instances when an accused had been forced to participate in the procurement of physical evidence against her and the case where she had been compelled to provide answers to charges leveled against her. The privilege against self-incrimination was applicable to instances where the accused was compelled to provide testimonial evidence against herself, but not when the compelled conduct resulted in the discovery of real evidence. As an illustration, in *R v Honan*,²⁵ betting slips (real evidence) were obtained by means of an illegal search warrant. The objection to its admission in evidence was dismissed by the Ontario Court of Appeal in the following terms:²⁶ ‘... it is still quite permissible to “set a thief to catch a thief”.’ This decision conveyed the message to police officers in general that they were ‘empowered’ to make use of illegal means whenever they were in search of real evidence. Real evidence obtained in this manner would regularly be admitted: in other words, the end of a conviction justifies illegal means.

The Canadian Bill of Rights was enacted by the federal parliament of Canada in 1960. However, this statute did not contain a justiciable Bill of Rights and its legal status was the same as any other parliamentary legislation.²⁷ It was not applicable to the provinces and had little effect on federal law.²⁸ The fact that the Bill of Rights was not applicable to provinces meant that provincial violations of the Bill of Rights were not justiciable.²⁹ As a consequence, the enactment of the 1960 Bill of Rights did not have an impact on the common law admissibility requirement. In fact, the common law privilege against self-incrimination had been preserved. Hogg points out that the 1980 version of the draft Canadian Charter contained a provision to the effect that no provision contained therein,

²⁵ (1912) 6 DLR 276, (“*Honan*”).

²⁶ *Ibid* at 280-281.

²⁷ See Roach *Constitutional Remedies in Canada* (1994) at 2-27, par 2.560.

²⁸ Hogg *Constitutional Law of Canada* (3rd ed, 1992) at 794, par 33.1.

²⁹ *Ibid* at par 32.1

except the privilege against self-incrimination, shall have an impact on the law relating to admissibility of evidence.³⁰ Any changes to the common law privilege against self-incrimination had to be effected in clear terms by means of legislation. This was demonstrated in the case of *R v Hogan*.³¹ Ritchie J held that a violation of the right to legal representation cannot result in exclusion of real evidence 'on the American model which is in derogation of the common law rule long accepted in this country'.³²

In *R v Wray*³³ the Supreme Court was required to rule on the admissibility of a confession, as well as real evidence derived from the confession.³⁴ The accused, at that stage a suspect on a charge of murder, was asked to accompany the police to their headquarters. While there he was in the company of the police from 10h00 until 19h18, when he signed a confession. A few minutes thereafter, the accused directed the police to a watery wooden area where he pointed out the place where he had thrown the murder weapon (a rifle). The police searched for and found the rifle the next day. Expert evidence was led, showing that the

³⁰ Ibid at 932. He mentions that the October 1980 version of the draft Canadian Charter reiterated the existing law, and read as follows: "26. No provision of this Charter, other than section 13 [the privilege against self-incrimination], affects the laws respecting the admissibility of evidence in any proceedings or the authority of the Parliament or a legislature to make any laws in relation thereto".

³¹ (1974) 18 CCC (2d) 65, (1975) 48 DLR (3d) 427, ("*Hogan*").

³² Ibid at 434; however, compare the dissenting dictum of Laskin J at 443 where he reasoned as follows: "... the more pertinent consideration is whether those [constitutional] guarantees, as fundamentals of the particular society, should be at the mercy of law enforcement officers and a blind eye turned to their invasion because it is more important to secure a conviction. The contention that it is the duty of the Courts to get at the truth has in it too much of the philosophy of the end justifying the means ...".

³³ (1970) 4 CCC (3d) 1, ("*Wray*").

³⁴ The concept "derivative evidence" and its admissibility under the 'refined' fair trial directive was discussed in *Feeney* (fn 8 above) at par 70.

bullet located in the body of the deceased was fired from this rifle. Prior to the pointing-out being made, the attorney of the accused tried to telephonically get in touch with the police, left messages, but they deliberately chose not to return his calls. They conceded that they were aware of the possibility that after the accused had consulted with his attorney he would in all likelihood have refused to make a pointing-out.³⁵

Martland, Fauteux, Abbott, Ritchie and Judson JJ, writing for the majority in *Wray*,³⁶ held that the admissibility of evidence in England and in Canada is governed by the dictum of Lord Goddard, as expressed in *Kuruma v R*.³⁷ The majority accordingly held the confession to be inadmissible in evidence against the accused, because the prosecution could not show that the confession had been obtained voluntarily. However, the pointing-out and the discovery of the rifle³⁸ were held to be admissible. This decision highlights the impact that the common law privilege against self-incrimination had on the right to a fair trial. Testimonial evidence obtained after a violation would be excluded, but real evidence obtained in the same manner would 'not readily be excluded.'³⁹ Cartwright CJC, in a dissenting judgment, was alive to the fact that the admission of illegally obtained evidence could be viewed by the public at large as judicial contamination of the criminal justice system. He advocated a change to Canadian law when he emphasised that courts should not be seen to associate themselves with the unlawful conduct of the police, because to admit evidence

³⁵ Ibid at 4.

³⁶ Cartwright CJC, Hall and Spence JJ dissenting.

³⁷ [1955] AC 197 ("*Kuruma*"). Martland based his conclusion on the following dictum in *Kuruma*, at 13: "In their Lordships' opinion the test to be applied in considering whether evidence is admissible is whether it is relevant to matters in issue. If it is, it is admissible and the court is not concerned with how the evidence was obtained".

³⁸ Martland J categorised the said evidence as being "relevant" and "of probative value".

³⁹ Lamer J appears to confirm this approach in the post-Charter case of *Collins* (fn 1 above) at 19.

obtained in this manner would 'bring the administration of justice into disrepute in the minds of right-thinking men'.⁴⁰ This formulation of the analysis for the admissibility of unconstitutionally obtained evidence would be adopted by the drafters of the Charter during 1982.

It should be underscored that in terms of the Canadian common law, the privilege against self-incrimination was not applicable to situations where the accused was compelled to participate in an identity parade⁴¹ or forced to provide a breath sample.⁴² Evidence of this nature was classified as real evidence, which existed independently from the violation. Real evidence is classified as anything tangible that existed as an independent entity.⁴³ In a nutshell, the common law

⁴⁰ Fn 33 above at 11; see also the dissenting judgment of Lamer J, delivered before the advent of the Charter, in *R v Rothman* (1981) 121 DLR (3d) 578 ("*Rothman*"), to the effect that evidence obtained by oppressive police conduct that would "shock community", ought to be excluded.

⁴¹ *R v Marcoux* (2) (1972) 13 CCC (2d) 313, ("*Marcoux*"). The Saskatchewan Court of Appeal held, per Schroeder and Jessup JJA that: "The evidence in question is not inadmissible on the ground that it offends against the maxim *nemo tenetur se ipsum accusare*, by which no one is bound to incriminate himself. That privilege relates to the obtaining of oral confessions or statements from a prisoner. Here the evidence adduced to is conduct of the accused, not to something that he stated or did not state as to the charge against him".

⁴² Fn 41 above.

⁴³ *Feeney* (fn 8 above) at par 76. In the South African context, see *S v M* (SCA) (fn 20 above) at par 31, where the Supreme Court of Appeal echoed this view, even during the post-constitutional era. Based on Schmidt & Rademeyer *Schmidt Bewysreg* (4th ed, 2000) at 326 and Hoffmann & Zeffertt *The South African Law of Evidence* (4th ed, 1988) at 404 and *Cross & Tapper on Evidence* (8th ed, 1995) at 48, the court held as follows: "Real evidence is an object which, upon proper identification, becomes, of itself, evidence (such as the knife, photograph, voice recording, letter, or even the appearance of a witness in the witness-box)". Compare *Tandwa* (fn 12 above) at par 125.

privilege against self-incrimination was limited in its scope to the protection of testimonial compulsion.⁴⁴

Paciocco⁴⁵ is of the opinion that the distinction between the admissibility of real evidence and testimonial evidence lacks clear and convincing reasons.⁴⁶ However, he offers two reasons for the distinction between real evidence and testimonial evidence: Firstly, he is of the opinion that a reason for such a distinction could be traced back to the fact that real evidence is reliable (whereas the same cannot consistently be said about testimonial evidence). Secondly, he points out that testimonial evidence differs from real evidence, in that testimonial evidence does not exist before the witness communicates. In the case of testimonial compulsion, oppressive police conduct is a prerequisite for the incriminatory conduct.⁴⁷ Put differently: There exists a causal nexus between the compelling police conduct and the testimonial evidence. The witness would not have given the incriminating testimonial evidence 'but for' the force, duress or undue influence. However, real evidence has an independent existence. It does not exist 'but for' the duress or force, since it would 'inevitably' have been discovered in a lawful manner after diligent search by the police.

Some of these principles have found their way into section 24(2) Charter jurisprudence. For instance, it appears that the distinction between real evidence

⁴⁴ Per L' Heures-Dube J in *Stillman* (fn 7 above) at par 187, where she argued against the broadening of the scope of the privilege against self-incrimination to encompass real evidence. The judge reasoned as follows: "The question is this: what was the extent of the privilege against self-incrimination at common law? The privilege against self-incrimination at common law found expression in the confessions rule, the right to silence, and rules protecting witnesses from the use of their testimony against them in other proceedings. All these rules were concerned exclusively with testimonial evidence".

⁴⁵ Fn 23 above (1989) at 77, 86-87.

⁴⁶ Loc cit.

⁴⁷ Ibid at 87.

and testimonial compulsion was introduced into the fair trial assessment by *Collins*.⁴⁸ Correspondingly, a causation analysis between the compelling conduct and the discovery of the evidence was introduced into the section 24(2) fair trial assessment by *Collins*,⁴⁹ confirmed in *R v Black*,⁵⁰ and applied in a number of cases since.⁵¹

In summary, the common law privilege against self-incrimination, as developed in Canada, was limited in its scope to the protection of testimonial evidence. The dictum of Lord Goddard in *Kuruma*,⁵² had a profound effect, both in Canada and South Africa, in respect of the admissibility of evidence. For the reason that real evidence has reliable characteristics, it deserved differential treatment: if it is relevant, it should be admitted no matter how it had been obtained. It is for this reason that the privilege against self-incrimination is not concerned with the manner in which real evidence has been obtained. The flaw of the privilege against self-incrimination, when applied to a trial that has to comply with a notion of substantive fairness, thus becomes apparent: It would be ineffective for the protection of fundamental rights, where courts must be especially

⁴⁸ Fn 1 above at par 37, where Lamer J reasoned as follows: "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 However, the situation is very different ... where, after the 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 ...".

⁴⁹ Loc cit. Lamer J reasoned as follows: "It may also be relevant, in certain circumstances, that the evidence would have been obtained in any event without the violation of the Charter".

⁵⁰ (1989) 50 CCC (3d) 1, ("*Black*").

⁵¹ See, for example, *R v Wise* (1992) 70 CCC (3d) 193, ("*Wise*"); *R v Mellenthin* (1993) 76 CCC (3d) 481, ("*Mellenthin*"); *R v Dersch* (1994) 85 CCC (3d) 1, ("*Dersch*"); *R v Burlingham* (1995) 28 CRR (2d) 244, ("*Burlingham*").

⁵² Fn 37 above.

concerned about the manner in which evidence, regardless of its nature, had been obtained.

The dissenting opinion of Lamer J in *Rothman*⁵³ and the legal philosophy he supported in that case would ultimately have an impact in Canada, when it was incorporated into the provisions of section 24(2) of the Charter. The majority opinion in *Wray*⁵⁴ demonstrates that the disparity between the admissibility of the different kinds of evidence inescapably led to the regular admission of real evidence, without a consideration of the manner of its obtainment. This prompted the manifestly different line of reasoning by Cartwright CJC in *Wray* to the effect that, at times, the regular admission of evidence obtained by means of oppressive police conduct would 'bring the administration of justice into disrepute'.

1.2. The post-Charter era: self-incrimination or self-conscription during the pre-*Stillman* era

This part of the chapter starts off with an analysis of the *Collins* fair trial framework, within the context of *R v Therens*.⁵⁵ This is done in order to establish whether the common law privilege against self-incrimination or the concept of 'conscription' better serves the goals sought to be protected by the fair trial requirement. An important step is to determine the values sought to be protected by the fair trial requirement to determine its purpose, scope and meaning. The *Collins*, *Stillman* and *Grant* fair trial assessments are considered to determine the values sought to be protected by each approach.

⁵³ Fn 40 above.

⁵⁴ Fn 33 above.

⁵⁵ (1985) 18 CCC (3d) 481, 45 CR (3d) 97, 1 SCR 613, ("*Therens*").

In addition, the conscription analysis is explored, having regard to the following issues: Firstly, what differences, if any, exist between the concepts 'self-incrimination' and 'conscription'? This exercise is undertaken in order to determine which of the two concepts best serves the goals sought to be achieved by the fair trial directive. Secondly, this part of the work considers the application of the principle of the 'case to meet' or the 'absence of pre-trial obligation' as a means to achieve the object of the trial fairness requirement

1.2.1 *The Collins test*

In the hallmark case of *Collins*,⁵⁶ Lamer J wrote as follows, thereby seemingly incorporating the common law principle of the privilege against self-incrimination into article 24(2) Charter jurisprudence:⁵⁷

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***. Our decisions in *Therens supra*, and *Clarksen v Queen* [1986] 1 SCR 383, are illustrative of this.

⁵⁶ Fn 1 above.

⁵⁷ Ibid at par 37. Emphasis added.

At a first reading of this dictum, it might appear that Lamer J restated the common law position that the privilege against self-incrimination had nothing to do with the manner in which real evidence had been obtained. Real evidence obtained in a manner that violated any right contained in the Charter, would in general, not render the trial unfair. However, testimonial evidence, obtained as a result of a Charter violation, falls to be protected under the shadow of the self-incrimination umbrella. This distinction between the nature of the evidence, 'real' or testimonial, is referred to in this work as either as the 'real evidence divide' or the 'real evidence distinction'. The nature of the evidence obtained determines whether it is protected by the privilege against self-incrimination. However, the privilege against self-incrimination was not the only test for the fair trial requirement, because Lamer J supplemented his comment with the phrase 'or other evidence emanating from him',⁵⁸ and referred to *Therens*.⁵⁹ For this reason it is important to consider the dictum of Lamer J in *Collins* within the context of *Therens*.

In *Therens* the accused was 'detained' and compelled to provide a breath sample without being informed of his right to legal representation and without having been provided the opportunity to retain and instruct a legal representative. The majority of the court ruled that the real evidence thus obtained should be excluded.⁶⁰ Lamer J held in *Therens* that the disputed evidence constituted compulsory ***self-incrimination***, because refusal to provide such samples would have been tantamount to committing a criminal offence.⁶¹ Furthermore, the evidence (the breath sample) 'emanated' from the accused. In other words, the

⁵⁸ Did Lamer J have the unconstitutional taking of breath and blood samples, saliva, and fingerprints in mind when he used this phrase? See fn 61 below.

⁵⁹ Fn 55 above.

⁶⁰ Per Dickson CJC at par 4, Estey, Beetz, Chouinard and Wilson JJ concurring; Lamer J delivered a separate concurring judgment; McIntyre and Le Dain JJ delivered dissenting judgments.

⁶¹ Per Lamer J at par 21.

bodily samples had been obtained through a process whereby the accused had been conscripted against himself. When the often-quoted opinion of Lamer J in *Collins*, cited above, is read within the context of *Therens*, it becomes evident that the privilege against self-incrimination he referred to in *Collins* **does** serve the purpose of protecting real evidence obtained in a manner that violates a right contained in the Charter,⁶² since it 'emanated' from the accused.

In *Therens*, the manner in which the evidence had been obtained was at the heart of the section 24(2) assessment. The question that now emerges is the following: Was the privilege against self-incrimination adapted or was an exception created to cater for procedural fairness in the procurement of evidence? But before this is ascertained, it is imperative to ascertain the scope of the fair trial requirement. This, in turn, calls for a determination of the values that the right to a fair trial seeks to protect.

The *Collins* fair trial framework was applied and developed in a number of cases.⁶³

⁶² In *R v Ross* (1989) 46 CCC (3d) 129, ("*Ross*"), the accused was called upon to participate in an identity parade without having had the opportunity to appoint counsel. The real evidence (the identity parade) was excluded in terms of article 24(2). Lamer J wrote at 139: "In *Collins* we used the expression 'emanating from him' since we were concerned with a statement. But we did not limit the kind of evidence susceptible of rendering the trial process unfair to this kind of evidence. I am of the opinion that the use of **any** evidence that could not have been obtained but for the participation of the accused in the construction of the evidence for the purposes of the trial would render the trial unfair". (Emphasis in original); see also *Therens* (fn 55 above); *R v Pohoretsky* (1987) 1 SCR 945 at par 5, where a blood sample of the accused was taken without his consent. The court held that it constituted an unreasonable search and concluded that the effect of the police conduct was "to conscript the appellant against himself".

⁶³ See, for example, *R v Manninen* (1987) 1 SCR 1233, ("*Manniner*"); *R v Trask* (1987) 2 SCR 304, ("*Trask*"); *R v Strachan* (1988) 46 CCC (3d) 479, ("*Strachan*"); *R v Dymont* (1988) 45 CCC (3d) 244, ("*Dymont*"); *R v Jacoy* (1988) 45 CCC (3d) 46, ("*Jacoy*"); *R v Racette* (1988) CCC (3d)

1.2.2 *The values sought to be protected by the fair trial directive and the meaning of the concept 'conscriptio'*

Although the discussion is focused on the pre-*Stillman* era, it is apposite to explore the values sought to be protected in terms of the three seminal cases of *Collins*,⁶⁴ *Stillman*⁶⁵ and *Grant*.⁶⁶ In addition, the meaning of the concept 'conscriptio' is demonstrated by means a discussion of the principle of the 'case to meet' or the 'absence of pre-trial obligation'.

The scope of a right or remedy⁶⁷ is determined by the goal it seeks to achieve, while not losing sight of the general purposes and values enshrined in the

250, ('*Racette*'); *R v Legere* (1988) 43 CCC (3d) 161, ('*Legere*'); *R v Genest* (1989) 45 CCC (3d) 385, ('*Genest*'); *Thompson Newspapers Ltd v Canada* (1990) 54 CCC (3d) 417, ('*Thompson Newspapers*'); *R v Mellenthin* (fn 51 above); *R v Hebert* (1990) 57 CCC (3d) 97, ('*Herbert*'); *R v Kokesch* (1990) 61 CCC (3d) 207, ('*Kokesch*'); *R v Brydges* (1990) 1 SCR 190, ('*Brydges*'); *R v Elshaw* (1991) 67 CCC (3d) 97, ('*Elshaw*'); *R v Broyles* (1991) 68 CCC (3d) 308, ('*Broyles*'); *R v Dersch* (1994) 85 CCC (3d) 1, ('*Dersch*'); *R v Silveira* (1995) 97 CCC (3d) 450, ('*Silveira*'); *R v Black* (fn 50 above); *R v Law* (2002) 160 CCC (3d) 449, ('*Law*'); *R v Mooring* (2003) 174 CCC (3d) 54, ('*Mooring*'); *R v Buhay* (2003) 174 CCC (3d) 97, [2003] 1 SCR 63, ('*Buhay*'); *R v Buendia-Alas* (2004) 118 CRR 32, ('*Buendia-Alas*'); *R v Vu* (2004) 118 CRR (2d) 315, ('*Vu*'); *R v Symbalisy* (2004) 119 CRR (2D) 311, ('*Symbalisy*'), *R v Schedel* (2003) 175 CCC (3d) 196, ('*Schedel*'); *R v Manickavasagar* (2004) 119 CRR (2d) 1, ('*Manickavasagar*').

⁶⁴ Fn 1 above.

⁶⁵ Fn 7 above.

⁶⁶ Fn 9 above.

⁶⁷ In *Nelles v Ontario* (1989) 60 DLR (4th) 609, ('*Nelles*'), it was held that the scope of both rights and remedies should be determined in the same manner; see also Roach (fn 27 above) at 3-15.

Charter.⁶⁸ In the light hereof, it is important to determine what purpose the fair trial requirement under section 24(2) serves to protect. This issue leads to the important question: what values are to be protected by the fair trial directive?

In *Collins*, Lamer J intimated that the fair trial directive primarily serves the purpose of the prevention of unfair self-incrimination or conscription during the pre-trial phase.⁶⁹ What is the meaning of the concept 'conscription'?

The role played by the accused in the evidence-gathering process during the pre-trial phase would be central when she is, for example, forced to participate in an identity parade, to provide a blood or hair sample, to provide a statement, or when pressurised to make a pointing-out, admission or a confession. It is at this stage of the proceedings (but not limited thereto) when she would be at risk of

⁶⁸ *R v Mills* (1986) 29 DLR (4th) 161, per Lamer J (dissenting) at 240, ("*Mills*"); *R v Gamble* (1988) 44 DLR (4th) 385, per Wilson J at 237, ("*Gamble*"); see also *R v Big M Drug Mart Ltd* (1985) 18 DLR (4th) 385, at 395-396, ("*Big M Drug Mart*"), where the Supreme Court held as follows: "The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect. In my view, this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought, by reference to the character and larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historic origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the context of the Charter. The interpretation should be, as the judgment in *Southam* emphasised, a generous rather than a legalistic one, aimed at fulfilling the purpose of a guarantee and securing for individuals the full benefit of the Charter's protection".

⁶⁹ According to Cory J in *Stillman* (fn 7 above) at par 73, the judge commented on the dictum of Lamer J in *Collins*, cited at fn 57 above, as follows: "It is apparent from this passage that the primary aim and purpose of considering the trial fairness factor in the s 24(2) analysis is to prevent an accused person whose Charter rights have been infringed from being forced or conscripted to provide evidence in the form of statements or bodily samples for the benefit of the state".

performing the conscriptive conduct that the fair trial directive seeks to protect. The reason why these protections should be available to an accused during the pre-trial phase is summarised as follows by Ratushny:⁷⁰

One approach to this question is to examine the procedural protections which are available to an accused at trial. The accused is given (a) a public trial (b) after a specific accusation including particulars (c) according to specific rules of procedure and evidence and (d) represented by counsel to ensure that all of these protections are provided. Moreover, the accused is (c) entitled to know the evidentiary case to meet before deciding whether or not to respond. In other words the accused hears all the Crown witnesses under oath before deciding whether to respond and, if so, in what manner and to what extent.

All of these protections are present in the court room. They are absent during interrogation at the police station ... How is a criminal justice system to be described if it jealously guards such protections at the trial stage while 'turning a blind eye' to the pre-trial stage? Such a system certainly would be inconsistent. It might be described as lacking in integrity – and perhaps even as hypocritical!

This view of Ratushny has been labeled the 'case to meet' principle.⁷¹ This principle provides the rationale for the principle of the 'absence of pre-trial obligation'. In terms of the principle of the 'case to meet' or the 'absence of pre-trial obligation', the accused is under no obligation to respond to allegations made by the prosecuting authority until it has made out a *prima facie* case against her or established a 'case to meet'. The accused is, in other words, not compelled in a general sense (as opposed to the narrow testimonial sense in

⁷⁰ Beaudoin & Ratushny (fn 23 above) at 462.

⁷¹ Paciocco 1989 (fn 23 above) at 77.

court) to answer the allegations against her until the state established a 'case to meet'.⁷² In view hereof, the principle of a 'case to meet' asserts that the accused should not be required to co-operate with the police in the creation of incriminating evidence against herself. In other words, the principle of a 'case to meet' essentially serves to protect the negative impact any unwarranted governmental confrontation might have on the freedom, privacy and dignity of a suspect, on the one hand, and to prevent any harm caused by the impermissible persuasion of vulnerable individuals providing incriminating evidence against themselves, on the other.⁷³ The principle of the 'case to meet' in effect serves to protect an accused from unfair conscription during the pre-trial phase. The most forceful proponent of the principle of the 'case to meet' or the 'absence of pre-trial obligation' in the Supreme Court of Canada was Lamer CJ.⁷⁴

Ratushny concludes that the accused should therefore be treated fairly both in the 'gatehouses' of the criminal justice system (the interrogation phase) by protecting her from the effects of unwarranted conscription, as well as the 'mansions' (the court).⁷⁵ In a word, the right to a fair trial serves to guarantee that an accused is treated fairly during the pre-trial and trial phases, with the aim of ensuring that ill-repute does not befall the criminal justice system. If fairness

⁷² *R v P (MB)* (1994) 89 CCC (3d) 289 at 577, ("P").

⁷³ Penney (fn 23 above) at 255.

⁷⁴ Ibid at 264. Penney cites the following cases as examples of instances where Lamer CJ applied the principle: *R v Du Bois* (1985) 22 CCC (3d) 193, ("*Du Bois*"); *P* (fn 72 above). See, further for example, *Ross* (fn 62 above), a judgment written by Lamer J held that an identity parade (real evidence) held after a violation of the right to legal representation conscripted the accused against himself. The identity parade was for that reason excluded; see also *Paciocco* (2000) 5 *Can Crim L Rev* 63, confirming the view of Penney. Lamer J has since passed.

⁷⁵ Beaudoin & Ratushny (fn 23 above) at 462; see also Kamisar "Equal justice in the Gatehouses and Mansions of American Criminal Procedure" in Hall & Kamisar (eds) *Modern Criminal Procedure* (2nd ed, 1966), cited by Paizes (1981) *SACC* 122 at 131, where this metaphor was also employed.

related only to the treatment of the accused during the trial stage, then the elaborate provisions protecting an accused against unfairness during the trial would similarly be rendered ineffectual. In the premises, a failure to protect the accused from pre-trial conscription would be an affront to the integrity of the administration of justice.⁷⁶

The *Stillman* court held that the fair trial directive serves the purpose of preventing an accused whose rights have been violated from being 'forced or conscripted to provide evidence in the form of statements or bodily samples for the benefit of the state'.⁷⁷ Added to these interests, the Supreme Court reasoned in *Stillman* that the 'compelled use of the body of the accused', as well as the unwarranted and significant invasion of human dignity meet the criteria of values worthy of protection under the fair trial requirement.⁷⁸ This categorisation of the values sought to be protected by the fair trial assessment often led to a 'pigeon-hole' approach, since the focus of the courts is directed to the three sources (statements, bodily samples or use of the body) that produce conscriptive evidence, rather than the manner in which the evidence had been obtained.⁷⁹

The fair trial analysis proposed in *Grant* advocates that considerable weight should be attached to the truth-seeking function of the courts. The *Grant* approach suggests that, despite the fact that the accused had been conscripted against herself, the courts should inject into the equation factors like the reliability of the evidence and the extent of the infringement, to determine **to what degree** the trial would be rendered unfair.⁸⁰ A finding that trial fairness was not seriously compromised by the infringement would not result in the

⁷⁶ Beaudoin & Ratushny loc cit.

⁷⁷ Fn 7 above at par 73.

⁷⁸ Ibid at par 89 and 91.

⁷⁹ Maric (1999) 25 *Queen's LJ* 95.

⁸⁰ *Grant* (fn 9 above) at paras 53 and 59.

'automatic' exclusion of the disputed evidence.⁸¹ On this view, the *Grant* approach appears to be a reactionary response to the 'automatic' or 'near automatic' exclusion of reliable real evidence caused by the *Stillman* fair trial framework.⁸²

To summarise, in *Collins* Lamer J gave as an example of the violation of the right to a fair trial, the obtainment of self-conscriptive evidence after the violation of the right to counsel, leaving the impression that the fair trial directive serves to protect only testimonial compulsion during the pre-trial phase.⁸³ It soon became clear that, unlike the common law privilege against self-incrimination, the fair trial directive equally serves to protect real evidence discovered after the accused had been conscripted against herself.⁸⁴ In actual fact, the fair trial directive primarily seeks to protect fundamental fairness towards the accused as well as the prevention of disrepute befalling the criminal justice system.⁸⁵

The concepts 'compelled' or 'forced' is used to typify the unwarranted police conduct which causes an accused to 'conscript' herself. In other words, a person is 'compelled' to provide evidence (whether 'real' or testimonial) when she

⁸¹ Ibid at par 59.

⁸² Ibid at par 50; see Stuart (2006) CR (6th) 58 (publication page references are not available for this document); Stuart (fn 10 above) at 3, where he argues that "[t]he problem here is of the *Stillman* majority's making in their over-inflated use of the phrase 'fairness of the trial'."

⁸³ Cory J referred to this example in *Stillman* (fn 7 above) at par 80 and added another frequently occurring example to it, as follows: "The traditional and most frequently encountered example of this type of evidence is a self-incriminating statement made by the accused following a violation of his right to counsel as guaranteed by s 10(b) of the Charter. The other example is the compelled taking and use of the body or bodily substances of the accused, such as blood, which lead to self-incrimination. It is the compelled statements or the conscripted use of bodily substances obtained in violation of Charter rights which may render a trial unfair".

⁸⁴ *Ross* (fn 62 above) at 139.

⁸⁵ *Beaudoin & Ratushny* (fn 23 above) at 462.

provides or creates evidence for use by the prosecution against herself, after a Charter violation.⁸⁶ The crucial difference between this concept and the common law privilege against self-incrimination, is that in the case of conscriptive evidence the nature of the evidence created or discovered – real or otherwise, is insignificant. Rather, the manner of its obtainment is of paramount importance.

A review of Canadian case law has revealed that the value protected by the fair trial requirement is a guarantee that an accused, while in a position of vulnerability, should not be forced or compelled to provide evidence against herself. The concepts 'conscripting' and 'compulsion' in this context, means the obtainment of evidence without constitutional compliance⁸⁷ or statutory authority

⁸⁶ *Mellenthin* (fn 51 above). The accused was stopped at a roadblock and the police officer asked him what was contained in a bag on the seat of his car. (The accused was this stage "detained"). The accused pulled the bag open, whereupon the officer saw a small bag in the bag situated on the seat. The officer, without reasonable grounds for the search (and in violation of s 9 of the Charter) proceeded to search the bag. The evidence was excluded on the basis that admission would render the trial unfair, because the accused had been compelled to participate in the discovery of the evidence. See also *Ross* (fn 62 above), where Lamer J said the following: "Any evidence obtained after a violation of the Charter, by conscripting the accused against himself through a confession or other evidence emanating from him would tend to render the trial unfair". See also *Black* (fn 50 above) discussed under the discoverability requirement. The right to legal representation was violated, as a result whereof the accused made certain inculpatory statements and pointed out the murder weapon (a knife) to the police. The incriminating statements were excluded on the grounds that she had been conscripted against herself because her right to legal representation had been violated: admission would render the trial unfair. However, with regard to the knife, Wilson J reasoned as follows at 21: "... the knife would undoubtedly have been uncovered by the police in the absence of the Charter breach and the conscription of the appellant against herself ...".

⁸⁷ *R v Prosper* (1994) 92 CCC (3d) 353, ("*Prosper*"); *R v Pozniak* (1994) CCC (3d) 353, ("*Pozniak*"); *R v Bartle* (1994) CCC (3d) 289 ("*Bartle*"); *R v Cobham* (1995) 92 CCC (3d) 333, ("*Cobham*"); *Stillman* (fn 7 above); see also Hogg (fn 28 above), at 45-47, dealing more particularly with the unauthorised monitoring of telephone conversations, notes the following:

(should the legislation survive constitutional muster),⁸⁸ or the informed consent of an accused person.⁸⁹ In *Mellenthin* the trial court held that the impugned conduct of a police officer (the search of the suspect's bag took place without statutory authority) could be equated with the procurement of compelled **testimony**,⁹⁰ which led to the discovery of the real evidence.⁹¹ A similar approach was followed by the Natal Provincial Division of the South African High Court in *S v Naidoo and Another*.⁹²

"When the Criminal Code's regime of judicial authorization is complied with, the wiretap, although obviously still a search and seizure, is not only lawful but is not unreasonable under section 8".

⁸⁸ *Racette* (fn 63 above); *Mellenthin* (fn 51 above) where it was held that random roadblocks constitutes a violation of s 9 of the Charter, unless justified under s 1 (the limitations clause). Cory J reasoned as follows: "It would surely affect the fairness of the trial should check stops be accepted as a basis for warrantless searches and the evidence derived from them was to be automatically admitted. To admit evidence obtained in an unreasonable and unjustifiable search carried out while a motorist was detained in a check stop would adversely and unfairly affect the trial process ..."; Roach (fn 27 above) at 10-56, is of the opinion that the evidence in *Mellenthin* had been obtained "while the accused was forced to participate in a spot check ..." or that the abuse of the roadblock procedure caused the "accused to participate in the search by opening the bag ..."; *Pohoretsky* (fn 62 above).

⁸⁹ See, for instance, *Dymont* (fn 63 above); *Racette* (fn 63 above).

⁹⁰ Per Cory J in *Mellenthin* (fn 51 above) at 489-490, where he discussed the approach of the trial judge as follows: The trial judge held that the evidence " ... would not have been discovered without the compelled testimony (the search) of the appellant".

⁹¹ It was pointed out earlier that Roach (fn 27 above) at 10-57, reasons that the unlawful search was deemed to be compelled testimony because of the abuse of the roadblock procedure.

⁹² Fn 16 above at 91A-C, where McCall J reasoned as follows: "To admit evidence provided by an accused against himself without his knowledge as a result of the unlawful monitoring of his conversation with someone else would offend against the notions of basic fairness in no less a measure than the admission of evidence of a confession or admission made by an accused person without having been informed of his right to legal representation, which has been held to result in an unfair trial ...". A confession and admission is, more often than not, in the form of testimonial evidence. In the event, it was held that admission of the real evidence obtained after a violation of the right to privacy, would tend to render the trial unfair.

Admission of evidence obtained in a conscriptive manner would inevitably render a trial unfair. However, the protection granted by the principle of a 'case to meet' is broader in scope when compared to that identified in *Stillman*. While the *Stillman* analysis appears to limit the scope of protection in terms of certain identified categories, (for example testimonial evidence, the use of the body or bodily samples, including significant infringements to human dignity), the principle of the 'case to meet' is much broader since it is focused on the *manner* in which *any* evidence has been obtained.⁹³

The *Grant* approach, with its focus on the reliability of the evidence, could lead to the regular admission of reliable real evidence, despite the fact that the accused had been conscripted against herself. This, in turn, could lead to patterns of infringements when the police are aware that real evidence was involved in the commission of crimes. Unlike the common law privilege against self-incrimination, the *Grant* fair trial assessment does consider the manner in which the evidence had been obtained, but it fails to attach adequate weight to the value of the prevention of conscription. Can it ever be said that such an approach adequately appreciates the values sought to be protected by the fair trial prong under section 24(2) and the general purposes and values enshrined in the Charter?

The fact that the evidence had been obtained in a conscriptive manner does not put an end to the *Collins* fair trial assessment, because the case against the accused is not necessarily unfairly strengthened in that way. The underlying principle of the fair trial test is that the accused should not be forced to confront

⁹³ Compare the dictum of Lamer J in *Ross* (fn 63 above) at 139, when he wrote the following: "I am of the opinion that the use of *any* evidence that could not have been obtained but for the participation of the accused in the construction of the evidence for purposes of the trial would render the trial unfair". (Emphasis in original). See also Maric (fn 79 above).

evidence at trial that she would not have had to face if her Charter rights had been respected. This is the fundamental evil that the trial fairness prong of section 24(2) seeks to avert. A discoverability analysis is employed to achieve this aim. Does the *Grant* fair trial analysis seek to prevent the accused from having to face unconstitutionally obtained evidence she would not have had to face if her rights had not been infringed? Moreover, does the *Grant* approach encourage police officers to defer to the Charter rights of an accused when the procurement of real evidence is essential to their investigation of a crime?

The discoverability analysis is discussed below.

2. Discoverability or causation analysis as a means to determine trial fairness

Lamer J acknowledged the importance of this *Collins* factor in the fair trial assessment when he proclaimed that it would also be a relevant consideration to determine whether 'the evidence would have been obtained in any event without a violation',⁹⁴ thus intimating that in such events admission would not render the trial unfair. The rationale for this approach is the following: The accused is not in a worse position he would have been in had a violation not occurred.⁹⁵ Put

⁹⁴ *Collins* (fn 1 above) at par 37.

⁹⁵ *Thompson Newspapers* (fn 63 above) at 553, where the court reasoned as follows: "In contrast, where the effect of the breach is merely to locate or identify already existing evidence, the case of the ultimate strength of the Crown's case is not necessarily strengthened in this way. The fact that the evidence already existed means that it could have been discovered anyway. Where this is the case, the accused is not forced to confront any evidence at trial that he would not have been forced to confront if his Charter rights had been respected"; see also Fenton (1997) 39 *CLQ* 279, at 304, where he confirms the view held in *Thompson Newspapers* as follows: "The central proposition underlying the liberal view of the doctrine is that trial fairness is

differently: When the prosecution can show that the evidence would have been discovered in any event by lawful means, admission of the impugned evidence would not render the trial unfair.⁹⁶ For the reason that the evidence would have been discovered in any event, the admission thereof would, in the eyes of a reasonable man, not adversely affect the outcome of the trial. This approach is closely aligned to the value of rights protection, which section 24(2) seeks to promote.

The doctrine of discoverability was introduced into the section 24(2) analysis in order to prevent the result caused by the application of the common law privilege against self-incrimination when *real evidence* was discovered after a Charter violation. In the event, the discoverability analysis under the *Collins* regime is limited to the discovery of real evidence.⁹⁷ In terms of this doctrine, the

compromised, not only through self-incrimination, but rather any time it can be shown that 'but for' the Charter breach the evidence would not be discovered".

⁹⁶ *Black* (fn 50 above) at 20, where Wilson J reasoned as follows: "I have little doubt that the police would have conducted a search of the appellant's apartment with or without her assistance and that such search would have uncovered the knife"; and she continued at 21 as follows: "... the knife would undoubtedly have been uncovered by the police *in the absence of the Charter breach* and the conscription of the appellant against herself ...". (Emphasis added). For criticism leveled against the doctrine of discoverability, see B 4.4 below.

⁹⁷ See *Mellenthin* (fn 51 above), where real evidence (narcotics) were excluded because it was held to be virtually undiscoverable without a Charter violation; *Black* (fn 50 above) a knife was excluded); see also Roach (fn 27 above) at 10-61, where he argues as follows: "Courts have only been willing to create an 'inevitable discovery' exception, when what is discovered is real evidence as opposed to statements or other self-emanating evidence". However, compare the *Stillman* fair trial directive, in terms whereof both testimonial and real evidence must be subjected to a discoverability analysis. For comment on the *Mellenthin* approach, see Mitchell (1996) 38 *CLQ* 26; Davison 35 (1993) *CLQ* 493; Delisle (1993) 16 CR (4th); Delisle (1987) 56 CR (3d); see further Paciocco (1996) 38 *CLQ* 26; Young (1997) 39 *CLQ* 406 at 411, where he argues as follows: "Finally, the discoverability doctrine in *Mellenthin* has been narrowed so as to apply only to real evidence which is discovered through the coerced participation of the accused".

court considers whether the police had any other constitutional means to procure the disputed real evidence, other than that used to obtain it. When the real evidence could have been discovered in the normal course of the police investigation and without the violation of any fundamental rights, its admission would not have a negative effect on trial fairness. By contrast, should it appear that the only means to obtain the disputed evidence would have been by unconstitutional means, the trial would be rendered unfair, should the evidence be admitted. The rationale behind this doctrine is that the government gained an unfair advantage it would not otherwise have had, had the rights of the accused not been violated.⁹⁸ This approach is aligned to the corrective justice theory. Hence, by excluding the disputed evidence, a form of *restitutio in integrum* is attained and the courts are simultaneously expressing their commitment not to be associated with the unconstitutional police conduct. In this manner, the courts are restoring the integrity of the administration of justice.

The leading Canadian case where the doctrine of discoverability was applied by the Supreme Court is *Black*.⁹⁹ The accused was informed that she faced a charge

⁹⁸ *Wise* (fn 51 above; *Mellenthin* (fn 51 above). See also Davison (fn 97 above) at 503-504), who is of the opinion that the discoverability doctrine was applied in *Mellenthin*, but not mentioned. Ackermann J, in *Ferreira v Levin NO* 1996 1 SA 984 (CC) at par 112, ("*Ferreira*") quoted the dictum of La Forest J in *Thompson Newspapers* with approval, where the latter applied the same reasoning. La Forest J reasoned as follows: "A breach of the Charter that forces the eventual accused to create evidence necessarily has the effect of providing the Crown with evidence it would not otherwise have had. It follows that the strength of its case against the accused is necessarily enhanced as a result of the breach. This is the very kind of prejudice that the right against self-incrimination, as well as his rights such as that to counsel, are intended to prevent"; see also Ally (fn 18 above) at 69.

⁹⁹ Fn 50 above; see also *Silveira* (fn 63 above), where the police went to the residence of the accused without a search warrant. They "froze" the premises while waiting for a search warrant to be issued. The breach was serious, but self-conscriptio was not at issue. Applying the doctrine of discoverability, it was held that the police would have found the drugs in any event.

of murder, but was not given a reasonable opportunity to appoint a legal representative. After a failed attempt to get hold of her legal representative, the police started a conversation with the accused during which she made certain incriminating statements.¹⁰⁰ She was later escorted by two police officers, first to hospital where she was treated for her injuries (presumably inflicted by the deceased), and thereafter to her residence. Upon their arrival the accused went to the kitchen drawer, pulled out a knife and gave it to the officers, indicating it to be the murder weapon.¹⁰¹ Considering the fair trial requirement, the court held that the accused's statements and her 'conduct and words in relation to the discovery of the knife' is inadmissible, because admission thereof would violate the accused's right against self-incrimination. The court added that under the prevailing circumstances this right 'could have been protected' had the accused been given the opportunity to consult her legal representative.¹⁰² Admission of the inculpatory statement would render the trial unfair.¹⁰³ However, the court held that admission of the knife would not render the trial unfair – not because it is real evidence – but because it would have been discovered in any event.¹⁰⁴ The police would in all likelihood have obtained a search warrant to conduct a lawful search of her residence (the crime scene) and would have discovered the murder weapon in a lawful manner, without her co-operation.

The evidence was accordingly admitted. Fenton correctly concludes (fn 95 above) at 307 that excluding the evidence would have placed the state in a worse position it would have been in had the breach not occurred.

¹⁰⁰ Ibid at 6.

¹⁰¹ Ibid at 7.

¹⁰² Ibid at 17.

¹⁰³ Loc cit.

¹⁰⁴ Ibid per Wilson J at 21, where she notes: "... the knife would undoubtedly have been uncovered by the police in the absence of the Charter breach and the conscription of the appellant against herself".

The discoverability test makes clear that the admission of evidence that would not have been discovered in a ***constitutional*** manner would render a trial unfair. Admission of evidence thus obtained would indirectly encourage the police to violate constitutional rights. This clearly is not an aim that the Charter seeks to achieve; quite the opposite, section 24(2) seeks to protect fundamental rights.

In terms of the *Collins* fair trial directive, the court must, in addition to 'conscriptio' and discoverability inquiries, consider the nature of the right violated. This factor is explored hereunder.

3. The nature of the right violated as a factor determining trial fairness

Lamer J reasoned in *Collins* that the nature of the constitutional right violated is an important factor when determining the fair trial prong. The reason why this factor is considered is because certain rights have been designed to serve as a barrier against conscription. Rights that aim to achieve this purpose are, for example, the right to legal representation, the right to remain silent and to be informed of the consequences of not remaining silent, the privilege against self-incrimination and the right not to be compelled to make admissions or confessions. Lamer J said the following in *Collins*¹⁰⁵ with regard to this requirement:¹⁰⁶

It is clear to me that the factors relevant to this determination will include the nature of the evidence obtained as a result violation and

¹⁰⁵ Fn 1 above at 19.

¹⁰⁶ Emphasis added.

the nature of the right violated and not so much the manner in which the right was violated.

Fundamental rights frequently infringed in the procurement of disputed evidence in Canada are the rights to legal representation and freedom and security of the person. Added to this, the Supreme Court often applied the principle of the 'absence of pre-trial obligation' when these rights were infringed. For these reasons, the mentioned rights are considered.¹⁰⁷

3.1 The right to legal representation

As a general rule, a violation of the right to legal representation would tend to render a trial unfair.¹⁰⁸ This approach serves as an illustration of the application of the principle of the 'absence of pre-trial obligation', because the right to legal representation principally aims to protect the accused against unconstitutional conscription. Based on this premise, evidence obtained in the shadow of a violation of the right to legal representation would, more often than not, result in the accused being conscripted against herself.¹⁰⁹ Roach¹¹⁰ is of the opinion that

¹⁰⁷ See Roach (fn 27 above) at 10-60 to 10-65, for a discussion of other Charter rights under this group of factors.

¹⁰⁸ See *Collins* (fn 1 above) at 19, where Lamer J reasoned as follows: "... self-incriminating evidence obtained following a denial of the right to counsel will, generally, go to the very fairness of the trial ..."; see also *Ross* (fn 62 above); *Prosper* (fn 87 above); *Manninen* (fn 63 above); *Elshaw* (fn 63 above); *Burlingham* (fn 51 above); *Feeney* (fn 8 above); *Stillman* (fn 7 above).

¹⁰⁹ *Collins* (fn 1 above) at 19; see also *Black* (fn 50 above) at 17, where Wilson J reasoned as follows, premised on *Collins*: "In my view, the admission of the appellant's inculpatory statement would adversely affect the fairness of the trial ... since the admission of the statement would infringe on the appellant's right against self-incrimination ...".

¹¹⁰ Roach (fn 27 above) at 10-61. He bases his opinion on *Therens* (fn 55 above) and *Trask* (fn 63 above). In these cases the Supreme Court rejected the conclusion that the obtainment of legal advice would not have prevented the accused from being conscripted to provide

the courts of Canada would not apply the doctrine of discoverability when the right to legal representation had been violated. To be fair, this opinion of Roach was written before *Stillman* and *Feeney*.¹¹¹ The doctrine of discoverability was applied in these cases in instances where the right to legal representation had been violated. The issue would therefore be whether the evidence could have been discovered without a violation of the right to legal representation.¹¹² A saving mechanism has been included in favour of the prosecuting authority to show that the evidence could have been discovered in the absence of a violation of the right to legal representation or any other Charter right.¹¹³

In *Brydges*¹¹⁴ it was held that an accused should be informed about the availability of duty counsel and applicable legal aid systems in the jurisdiction of the court where he or she has been arrested.¹¹⁵ When applicable, the accused should further be informed about the availability of legal advice on a toll-free telephone number.¹¹⁶ In addition, the police should also give the accused a

conscriptive evidence. In *Trask*, the accused's right to legal representation had been violated and he was compelled to participate in the production of the evidence (a breathalyser test). The Appeal Court held that, under those circumstances, counsel would have advised the accused to submit to the test and also about the consequences of not complying. This reasoning was rejected by the Supreme Court.

¹¹¹ Roach appeared on behalf of the intervenor in *Stillman*.

¹¹² See *Feeney* (fn 8 above) at par 65, where Sopinka J expressed the view that the statements obtained from the accused in the trailer constituted conscriptive evidence, because it had been obtained in violation of the right to legal representation. He continued as follows: "Having found the statements conscriptive, the next question set out in *Stillman* is whether alternative legal means to obtain the conscriptive evidence existed". *In casu* it was held that the conscriptive statements were not "discoverable" without breaching the provisions of the Charter.

¹¹³ *Loc cit*.

¹¹⁴ Fn 63 above.

¹¹⁵ See also *Pozniak* (fn 87 above).

¹¹⁶ *Bartle* (fn 87 above).

reasonable opportunity to exercise her right to legal representation.¹¹⁷ The purpose of the right to legal representation is determined by its scope and nature – it serves to allow an accused to obtain advice as to how she could effectively exercise the rights guaranteed by the Charter.¹¹⁸ In a word, the right to legal representation protects an accused from being unconstitutionally forced to participate in the creation or discovery of incriminating evidence against herself. A violation of the right to legal representation would in effect result in a violation of at least the right to remain silent and any evidence thus obtained would result in the accused having been ‘conscripted’ against herself.¹¹⁹

3.2 The right to freedom and security of the person: freedom from unreasonable search and seizure

In *R v Greffe*,¹²⁰ the Supreme Court of Canada adhered to the overall structure of the admissibility assessment as introduced by *Collins* test. The accused in *Greffe* was charged with importing and possession of heroin. Customs officers searched him without informing him of his right to legal representation. After the search, he was handed over to the custody of the drug squad, who turned him over to a medical doctor for a rectal search. The rectal search was done under the pretence that the accused had been arrested for traffic offences. This search led to the discovery of heroin. The central issues in this case were, firstly, whether the evidence had been obtained in a manner that infringed his right to be secure from unreasonable search and seizure; and secondly, whether the evidence obtained in this manner ought to be admitted or excluded pursuant to section 24(2).

¹¹⁷ *Manninen* (fn 63 above); *Feeney* (fn 8 above); *Stillman* (fn 7 above).

¹¹⁸ *Ibid.*

¹¹⁹ See *Stillman* (fn 7 above); and *Feeney* (fn 8 above).

¹²⁰ 1 SCR 755, (“*Greffe*”).

Despite the fact that the violation was labeled a 'serious' and 'flagrant'¹²¹ intrusion of 'human dignity and bodily integrity', the court, following the *Collins* admissibility framework, declined to hold that its admission would tend to render the trial unfair. The evidence was excluded on the ground that its admission would be detrimental to the administration of justice.¹²² This approach was modified in *Stillman*,¹²³ because the court incorporated the seriousness of the infringement as a factor in the fair trial assessment. It could, perhaps, be argued that the *Grant* court took its cue from this approach: In *Stillman*, the seriousness of the infringement was considered as an important factor that justified exclusion on the grounds of trial unfairness; conversely, the fact that the infringement in *Grant* was regarded by that court as non-serious, was considered under the trial fairness prong to demonstrate that the fairness of the trial was not seriously impaired. However, the *Grant* judgment did not refer to this approach in *Stillman*.

The nature of the right to bodily sanctity and integrity, contained in section 7 of the Charter was considered by the *Stillman* court¹²⁴ and interpreted to mean that everyone has the right not to be deprived of security of the person except in accordance with the principles of fundamental justice. That, in turn, means that any intrusion of the human body may only be allowed when valid statutory

¹²¹ Ibid at 191, where the judge summarised the seriousness of the violation as follows: "Indeed it is the intrusive nature of the rectal search and considerations of human dignity and bodily integrity that demands a high standard of justification before such a search will be reasonable".

¹²² Loc cit. Lamer J stated the following to highlight the seriousness of the infringement to bodily integrity: "It is imperative that the court, having regard to the long-term consequences of admitting evidence obtained in these circumstances, dissociate itself from the conduct of the police in this case, which, always on the assumption that they merely had suspicions, was a flagrant and serious violation of rights of the appellant".

¹²³ Fn 7 above.

¹²⁴ See also *Racette* (fn 63 above); and *Legere* (fn 63 above).

authority permits such conduct or when the individual gives her informed consent for the particular intrusion or police interference. Cory J, writing on behalf of the majority opinion, reasoned as follows:¹²⁵

In my view, police actions taken without consent or authority which intrude upon an individual's body in more than a minimal fashion violate s7 of the Charter in a manner that would as a general rule tend to affect the fairness of the trial.

The fair trial directive contained in section 24(2) was, according to Cory J, designed with the aim to prevent unlawful interference with a person's dignity. Admission of any evidence obtained as a result of a significant interference with a person's dignity would tend to render the trial unfair. In the event, it was held that admission of the evidence, crucial for a successful prosecution, would render the trial unfair. Declining to follow the approach followed in *Grefe*, by considering the admissibility of the disputed evidence under the second and third group of *Collins* factors,¹²⁶ the Supreme Court in *Stillman* deemed it necessary to convey the message to law enforcement officers that a significant infringement of an individual's body that significantly impinges on a person's dignity, is worthy of earnest protection by the courts. The fact that the approach followed in *Stillman* implies that the prosecution would have to justify legislation that allows bodily intrusion, did not convince Cory J to adhere to the *Collins* structure.¹²⁷

To summarise: The rationale for the inclusion of the 'nature of the right' as a factor in the fair trial assessment, as formulated in *Collins*, is not without merit.

¹²⁵ Fn 7 above at par 91.

¹²⁶ The second and third groups of factors were considered obiter, because it was held that admission of the evidence would render the trial unfair.

¹²⁷ *Stillman* (fn 7 above) at paras 91-92. Cory J held that he did not find such governmental justification "an unduly onerous requirement when dealing with bodily intrusions".

It serves as one of the indicators to both the prosecution and legal representatives as to whether police conduct impacted negatively on the trial fairness directive: In the event that the purpose that the right seeks to protect is the prevention of self-conscriptio, the more susceptible the evidence would be for exclusion. A serious violation of the right to bodily integrity or human dignity has been held as worthy of protection under the first group of *Collins* factors,¹²⁸ thus emphasising the importance of these values in a modern and civilized society. Admission of evidence obtained in such a manner would tend to render the trial unfair.

It was mentioned above that the fair trial directive was 'refined' by the Supreme Court of Canada in *Stillman*. The 'refined' fair trial was modified in *Grant*. The position in Canada, during this era, is considered next.

4. The post-*Collins* era: the *Stillman* and *Grant* fair trial directives in Canada

The dictum of Lamer J in *Collins*, to the effect that the admission of real evidence would rarely render a trial unfair occasionally caused confusion.¹²⁹ Besides, the judge acknowledged when he wrote that celebrated opinion in *Collins* that a test for section 24(2) would be developed in future.¹³⁰

¹²⁸ Unlike the approach in *Collins* (fn 1 above) and *Grefe* (fn 120 above), where it was considered under the second group of factors (the seriousness of the violation).

¹²⁹ Roach (1993) *Israel LR* 607; Roach (1999) 42 *CLQ* 397, ("Roach 1").

¹³⁰ *Collins* (fn 1 above) at par 41, Lamer J wrote as follows: "I would agree with Howland CJO in *Simmons, supra*, that we should not attempt to substitute any other test for s 24(2) or attempt to substitute any other test for s 24(2). At least at this early stage of the Charter's development, the guidelines set out are sufficient and the actual decision to admit or exclude is as important as the statement of any test. Indeed, the test will only take on concrete meaning through our disposition of cases".

This part of the work begins with a discussion of the reasons for the adoption of the 'refined' approach, followed by a consideration of whether the 'real evidence' distinction had been discarded in *Stillman*. Thereafter, the case of *Grant*, which suggests that evidence should be admitted despite the fact that trial unfairness has – to an extent – been impaired, is discussed. This is followed by a critical analysis of the *Stillman* and *Grant* fair trial frameworks.

One of the issues explored in this part of the chapter is whether the *Stillman* fair trial assessment constitutes an 'automatic' or 'near automatic' exclusionary rule. Commentators have raised the objection that the *Stillman* fair trial framework fails to attach sufficient weight to the public interest in convicting the factually guilty. If so, should it for that reason be rejected? An issue intrinsically related to this, is whether the admission of unconstitutionally obtained 'real' evidence would 'not readily' render a trial unfair in terms of the *Stillman* fair trial test?¹³¹ Put differently, would it, compared to the *Collins* fair trial requirement, be more onerous or less onerous for 'real' evidence to be admitted under the fair trial prong?

What is the content of the 'refined' fair trial framework? The Canadian Supreme Court, in *Stillman*,¹³² reoriented the fair trial requirement by submitting that the following method should be applied when a fair trial assessment is undertaken:¹³³

1. The evidence should be classified as either conscriptive or non-conscriptive, based on the manner in which it had been obtained. If the evidence was obtained in a conscriptive manner and the prosecution **cannot** show, on a

¹³¹ See the dictum of Lamer J, quoted at fn 57 above.

¹³² Fn 7 above.

¹³³ Ibid at par 119.

balance of probabilities, that it would have been discovered by constitutional means, its admission would render a trial unfair. The court would not have to consider the seriousness of the violation and the effect of exclusion on the justice system, because an unfair trial would *per se* be detrimental to the criminal justice system.¹³⁴

2. However, if the prosecution **can** show that the evidence would have been discoverable by lawful means, admission of the evidence would not render the trial unfair. The court would proceed to consider the seriousness of the violation or the effect of exclusion on the repute of the criminal justice system.

3. If the evidence is classified as non-conscriptive, its admission would not tend to render the trial unfair. The court must proceed to consider the second phase of the analysis, being the seriousness of the violation and the effect of exclusion on the repute of the criminal justice system.

This 'refined' fair trial test, introduced by *Stillman*, was further 'refined' in *Feeney*, where the derivative evidence inquiry was added to the section 24(2) analysis.¹³⁵

¹³⁴ Compare the writer's recommendation in this regard in Chapter 6, par B below.

¹³⁵ In *Feeney* (fn 8 above) at par 67, it is explained that derivative evidence is a subdivision of conscriptive evidence. Derivative evidence involves the violation of a Charter right where the accused is conscripted against herself (generally by means of an inculpatory statement) that leads to the discovery of real evidence. The real evidence is derived from the inculpatory statement. Evidence qualifies as derivative evidence when it "would not have been obtained but for the conscriptive evidence". Sopinka J, in *Feeney* (ibid) at par 70, distinguished between "conscriptive derivative" and "not conscriptive derivative" evidence by posing the following questions: Firstly, was the violation the **necessary** cause for the discovery of the evidence? Secondly, has the evidence been obtained as a product of the accused's mind or body? If the answer to the questions is in the negative, the evidence should be classified as "not conscriptive derivative". The admission of "not conscriptive derivative" evidence would not render the trial unfair. Conversely, admission of "conscriptive derivative" evidence would render the trial unfair.

The 'refined' approach set the stage for the renewed dialogue between the Supreme Court of Canada and Canadian scholarly writers. Most scholars are forcefully opposed to the philosophy underlying the 'refined' fair trial framework.¹³⁶ The validity of these critiques are scrutinised under 4.4 below.

4.1 The reasons for the adoption of the new approach

During 1987, Lamer J indicated in *Collins* that the test applicable to section 24(2) proceedings should not be substituted at that early stage of the Charter's existence, because the guidelines that existed at that stage were adequate to resolve section 24(2) disputes. However, the judge hastened to add that such formulation should not be regarded as the ultimate formulation of the section 24(2) assessment, but that the relevant section 24(2) test would gradually 'take on concrete meaning'.¹³⁷ The modification of the fair trial assessment was left to Cory J in *Stillman*,¹³⁸ Lamer CJC concurring.¹³⁹

Cory J reasoned in *Stillman* that the *raison d'être* for this 'new' approach¹⁴⁰ is twofold:

a) Firstly, the confusion caused by the differential treatment of different kinds of evidence:¹⁴¹ There remained a 'misconception' that the concept 'real

¹³⁶ For example, see Stuart (1996) 48 CR (4th) 351; Fenton (fn 95 above); Delaney (1997) 76 CBR 521; Brewer (1997) *Can Crim LR* 329; Paciocco (1997) 2 *Can Crim LR* 163; Moreau (1997) 40 CLQ 148; Pringle (1999) 43 CLQ 86; Mahoney (1999) 42 CLQ 443; Davies (2002) 46 CLQ 21. However, compare Pottow (2001) 44 CLQ 34; Tanovich (1999) 20 CR (5th) 233; Maric (fn 79 above).

¹³⁷ Fn 1 above at 21.

¹³⁸ Fn 7 above.

¹³⁹ *Ibid* at par 1.

¹⁴⁰ *Ibid* at par 119.

evidence', within the context of section 24(2), referred to anything tangible that existed as an independent entity, the admission of which would not ordinarily render the trial unfair.¹⁴² Cory J continued by implementing the Ratushny principle as follows:¹⁴³

It is for this reason that blood, hair samples or the identity of the accused are often readily, yet incorrectly, classified as 'real evidence existing independently of the Charter breach'. Yet, it is key to their classification that they do not necessarily exist ***in a usable form***. For example, in the absence of a valid statutory authority or the accused's consent to take bodily samples, the independent existence of the bodily samples is of no use to the prosecution since there is no lawful means of obtaining it.

Put differently: In any instance when 'real' or testimonial evidence is obtained, the limitation or 'infringement' of any pre-trial right of the accused in the evidence-gathering process would not render the trial unfair when such limitation is authorised by a law of general application,¹⁴⁴ provided that the limitation satisfies the criteria contained in the limitations clause;¹⁴⁵ conversely, a limitation

¹⁴¹ Ibid at par 76; see also Roach (fn 129 above).

¹⁴² Loc cit.

¹⁴³ Loc cit. Emphasis in original text.

¹⁴⁴ Section 1 of the Charter.

¹⁴⁵ Fn 7 above at paras 91-92, where Cory J argued as follows: "There must always be a reasonable control of police actions if a civilized and democratic society is to be maintained. In my view, police actions taken without consent or authority which intrude upon an individual's body in more than a minimal fashion violate s 7 of the Charter in a manner that would as a general rule tend to affect the fairness of the trial. Those opposed to this position may argue that it leads to the requirement that the state will have to justify legislation permitting bodily intrusion. Yet, I do not find that to be an unduly onerous requirement when dealing with bodily intrusions. ... The security of the body should be recognized as being worthy of protection from state intrusion aimed at self-incrimination as are statements".

to the pre-trial rights of an accused would not render the trial unfair in instances when the accused gives her informed consent or waives the protection guaranteed by the pre-trial constitutional right. In respect of the latter, in most cases where the accused is uneducated, the assurance that such waiver is informed, would be best ensured by the protection guaranteed by the right to legal representation;

b) Secondly, that the police may use other forms of compulsion, involving a Charter violation, which forms of compulsion are not adequately protected by the common law privilege against self-incrimination.¹⁴⁶ Cory J poses the following rhetorical question, while at the same time highlighting the inadequacy of the protection granted by the common law privilege against self-incrimination with regard to modern practices in the evidence-gathering process:¹⁴⁷

For example, can there be any respect demonstrated for an individual if against their will women and men accused of a crime can be compelled to provide samples of their pubic hair to the police?

On this view, any reliance on the common law privilege against self-incrimination would be futile in those instances where the constitutional rights of the accused have been violated and real evidence (in this case pubic hair) is discovered as a result. Compelling an accused to provide samples of pubic hair intrudes upon a person's rights to privacy and human dignity. A failure to recognise the sanctity of the human body as worthy of protection from governmental intrusion – on the same basis as testimonial compulsion – would, as a general rule, impact negatively on trial fairness. Policy considerations underlying the common law privilege against self-incrimination dictate that the accused, relying on the trial fairness directive, would not be in a position to successfully attack the

¹⁴⁶ Ibid at paras 81-89.

¹⁴⁷ Ibid at par 88.

admissibility of real evidence obtained in an unconstitutional and extremely intrusive manner.

4.2 The 'refined' approach: discarding the 'real evidence' classification?

During 1997 the Supreme Court adopted a new approach to the classification of evidence, the admission whereof would render a trial unfair. In *Collins* the court categorised heroine as 'real evidence', whereas in *Stillman*, and shortly thereafter in *Feeney*, the same class of evidence¹⁴⁸ was typified as 'non-conscriptive evidence'. The difference between 'conscriptive' and 'non-conscriptive' evidence, and the inappropriateness of the 'real' evidence classification, was explained as follows by Cory J¹⁴⁹ in *Stillman*:¹⁵⁰

The crucial element which distinguishes non-conscriptive evidence from conscriptive evidence is not whether the evidence may be characterised as 'real' or not. Rather, it is whether the accused was compelled to make a statement or provide a bodily substance in violation of the Charter. Where the accused, as a result of a breach of the Charter, is compelled or conscripted to provide a bodily substance to the state, this evidence will be of a conscriptive nature, despite the fact that it may be 'real evidence.' Therefore, it may be more accurate to describe evidence found without any participation of the accused, such as the murder weapon found at the scene of the crime, or drugs found in a dwelling-house, simply

¹⁴⁸ A bloody shirt, the shoes, the cigarettes and money were regarded as non-conscriptive evidence, as opposed to "real evidence".

¹⁴⁹ Lamer CJC, La Forest, Sopinka and Iacobucci JJ concurring. L'Heureux-Dube, McLachlin and Gonthier JJ dissenting.

¹⁵⁰ Fn 7 above at 352. Emphasis in the original text.

as ***non-conscriptive*** evidence; its status as 'real' evidence *simpliciter*, is irrelevant to the s 24(2) inquiry.

A plain reading of this dictum indicates that the 'real' evidence distinction has been discarded as an irrelevant factor in the trial fairness assessment. However, when Cory J referred to the concept 'derivative' evidence', he termed it 'conscriptive real' evidence or 'conscriptive derivative' evidence.¹⁵¹ It therefore clearly transpires that the ***distinction*** between real evidence and testimonial compulsion has been discarded. In terms of the 'refined' fair trial test, real evidence, whether classified as 'conscriptive', 'not-conscriptive' or 'conscriptive derivative', remains a factor to be considered under the fair trial directive.¹⁵² The following important question therefore arises: Would real evidence or 'conscriptive derivative' evidence be more readily admitted in terms of the 'refined' fair trial directive? More importantly, what criterion has to be relied upon to govern the admissibility of this category of evidence? What is the impact of this 'refined' test on the admissibility assessment? These issues are explored under 4.4 below.

This dictum of Cory J further makes clear that the principle of the 'absence of pre-trial obligation' was embraced by the Supreme Court of Canada. The common law ***distinction*** between 'real' evidence and testimonial evidence is irrelevant, because it caused confusion.¹⁵³ The fact that either 'real' evidence or

¹⁵¹ Ibid at par 99.

¹⁵² However, compare Hession (1998) 41 *CLQ* 93 at 94.

¹⁵³ See Roach (fn 27 above) at 10-49; see also *Stillman* (fn 7 above) at 350, where Cory J explains as follows: "For example, confusion has arisen as to what constitutes 'real' evidence and in what circumstances its exclusion or admission would render the trial unfair"; and further, at par 76 (352), where he states: "There is on occasion a misconception that 'real' evidence, referring to anything tangible and exists as an independent entity, is always admissible. It is for this reason that blood, hair samples or identity of the accused are readily, yet incorrectly, classified as 'real evidence existing independently of the Charter breach'. Yet, it is key to their

testimonial evidence is produced as a result of the Charter violation should not be the cause of different outcomes in the section 24(2) determination. What is important is the *manner* in which the disputed evidence had been obtained, and not its nature and common law reliability.¹⁵⁴

4.3 Admission despite trial unfairness: the *Grant* fair trial test

In *Grant*,¹⁵⁵ two police officers dressed in plain clothes saw the accused, an eighteen year-old Black male, walk past them in a manner they considered 'suspicious'. They asked an officer dressed in police uniform to 'have a chat' with the accused. (None of the three officers knew the accused from previous encounters).¹⁵⁶ The uniformed officer stood in the accused's path, instructed him to hold his hands in front of him and began questioning the accused. In response, the accused admitted that he had a small quantity of marijuana and a loaded revolver in his possession. The evidence was seized and the accused was promptly arrested. It was common cause that the gun would not have been discovered if the accused did not admit that it was in his possession. The accused challenged the admissibility of the gun in a *voir dire*.

classification that they do not necessarily exist *in a usable form*. For example, in the absence of a valid statutory authority or the accused's consent to take the samples, the independent existence of the bodily evidence is of no use to the prosecution since there is no lawful means of obtaining it".

¹⁵⁴ In *Burlingham* (fn 51 above) at 408, Iacobucci J wrote as follows, referring to *Herbert*, at 36: "In any event, even if the improperly obtained evidence were reliable, considerations of reliability are no longer determinative, given that the Charter has made the rights of the individual and the fairness and integrity of the judicial system paramount."

¹⁵⁵ Fn 9 above.

¹⁵⁶ *Ibid* at par 18.

Laskin JA held that, despite the fact that the evidence constituted 'conscriptive, not discoverable' real evidence, such a finding did not call for the 'automatic' exclusion of the evidence.¹⁵⁷ Asserting that section 24(2) directs the courts of Canada to consider 'all the circumstances' that may have an impact on the repute of the criminal justice system, the judge reasoned that even though the admission of conscriptive evidence may compromise trial fairness, 'its admission will not always bring the administration of justice into disrepute'.¹⁵⁸ In the light hereof, Laskin J reasoned, that the decision whether to admit conscriptive evidence should depend on 'the degree of trial unfairness and on the strength of the other two *Collins* factors'.¹⁵⁹ Factors that have an impact on the degree of trial unfairness are: Firstly, the effect of the police misconduct on the reliability of the evidence; and secondly, whether the police conduct that led to the discovery of the evidence seriously infringed the particular Charter right.¹⁶⁰ The less serious the infringement, the less serious would be the effect on trial fairness.

¹⁵⁷ Ibid at par 49. Laskin JA based his finding on the dictum of Lebel J in *R v Orbanski* (2005) 196 CCC (3d) 481 (SCC) at 93, ("*Orbanski*"), where the following was said: "Our Court has remained mindful of the principle that the Charter did not establish a pure exclusionary rule. It attaches considerable importance to the nature of the evidence. It is constantly concerned about the potential impact on the fairness of a criminal trial of admission of conscriptive evidence obtained in breach of a Charter right. Nevertheless, while this part of the analysis is often determinative of the outcome, our Court has not suggested that the presence of conscriptive evidence that has been obtained illegally is always the end of the matter and that the other stages and factors of the process become irrelevant". See also *Buhay* (fn 63 above) at par 71, where Arbour J wrote on behalf of an unanimous Supreme Court, in respect of the third group of factors, as follows: "Section 24(2) is not an automatic exclusionary rule ... neither should it become an automatic inclusionary rule ..."; see further Stuart (2003) 10 CR (6th) 233, commenting on the implications of the *Buhay* judgment.

¹⁵⁸ *Grant* (ibid) at par 52.

¹⁵⁹ Loc cit.

¹⁶⁰ Ibid at par 53.

The court gave as an example, the case of *Burlingham* to demonstrate that conscriptive evidence obtained after an infringement of the right to legal representation would have a profound impact on trial fairness concerns, since the infringement in that case constituted a flagrant violation. By contrast, the infringement in the case at bar was described as 'not a flagrant case of police abuse'.¹⁶¹ Against this background, Laskin JA held that, having regard to the reliability of the evidence and the extent of the infringement, that admission of the evidence 'would have some impact on trial fairness', but held that the effect it had on trial fairness is located at the 'less serious end of the scale'.¹⁶² The judge explained that admission of the evidence would not have an impact 'so great that it precludes consideration of the other two *Collins* factors'.¹⁶³

The *Stillman* and *Grant* interpretations of the fair trial requirement is critically analysed below.

4.4 A critical evaluation of the *Stillman* and *Grant* fair trial tests: Do these tests seek to achieve the purpose sought to be protected by the right to a fair trial under section 24(2)?

Having considered *Stillman* and *Grant*, it is apposite to consider the following key issues: Do the *Stillman* and *Grant* fair trial directives accord with the values that the Charter seeks to protect? Has the *Stillman* fair trial requirement broadened or limited the scope of protection guaranteed by the fair trial assessment under section 24(2)? Has the *Stillman* fair trial framework rendered the 'nature of the right violated', to be considered as an independent factor redundant? Would real

¹⁶¹ Ibid at par 58. This finding is based on the fact that the line between police questioning that gives rise to a detention, and questioning that does not, is not clear – see (ibid) at par 62.

¹⁶² Ibid at par 59.

¹⁶³ Loc cit.

or derivative evidence be more readily admitted or excluded under the *Stillman* fair trial test, when compared to the *Collins* fair trial directive? Does the 'refined' fair trial requirement, introduced by *Stillman*, lean more favourably towards rights protection or crime control values? Is the derivative evidence inquiry, introduced by *Feeny*, unfairly geared towards the reception of unconstitutionally obtained real evidence? Should the doctrine of discoverability feature in a meaningful way in the fair trial assessment or should it be abandoned? Is there any merit in the criticism leveled by Canadian commentators that the 'refined' fair trial directive constitutes an automatic exclusionary rule? More importantly, should the approach favoured by the *Grant* judgment, suggesting that all three groups of *Collins* factors should be considered be adopted? In other words, should the presumption in favour of exclusion, when the evidence is labeled as 'conscriptive', be abandoned from the fair trial assessment?¹⁶⁴ Should a balancing exercise of the three groups of factors therefore be employed to determine the admissibility of disputed evidence?

It should be borne in mind that the *Grant* fair trial framework consists of two phases: The first phase consists of the *Stillman* fair trial framework, while the second phase proposes additional factors that should be included into the fair trial analysis.¹⁶⁵ In the light hereof, the criticism leveled against the *Stillman* fair trial framework (except that the *Stillman* fair trial requirement constitutes an 'automatic' exclusionary rule), is applicable with equal force to the first phase of the proposed *Grant* fair trial requirement.

¹⁶⁴ See Stuart (fn 10 above); the writer's recommendation in chapter 6.

¹⁶⁵ Fn 9 above at paras 47-52 contains the first phase, while the second phase of the trial fairness requirement was discussed at paras 53-59.

Some might argue that the 'refined' approach,¹⁶⁶ applied to assess the trial fairness requirement in *Stillman*, is challenging,¹⁶⁷ or that it may be arbitrarily applied.¹⁶⁸ However, it cannot be denied that it provides better protection to an accused when compared to the previous fair trial test.¹⁶⁹ The category of self-incriminating evidence under section 24(2) was indisputably broadened to include evidence other than testimonial evidence. Furthermore, the differences in the outcome in the trial courts, when compared to that in the Supreme Court in *Stillman* and *Feeney*, serves as practical illustrations of this submission: In *Stillman*, for instance, the trial judge held that the hair samples, teeth imprints and buccal swabs were admissible – by contrast, the Supreme Court held that admission of the self-same evidence would render the trial unfair and, on this basis, it had been excluded.¹⁷⁰

¹⁶⁶ Paciocco 2001 (fn 23 above) at 452 asserts that it is based on the reasoning in *Collins*, but in different contexts.

¹⁶⁷ See Hession (fn 152 above) at 119, where she makes the following comment: "The test for trial fairness cannot be said to be simple". See also Mahoney (fn 136 above) at 449, who expresses his view on the *Stillman* analysis as follows: "The bias against 'conscriptive' evidence steered the enquiry down a cul de sac from which we are still seeking an exit – as evidenced by the complexity of the *Stillman* analysis"; he continues as follows (ibid) at 450 by making the following comments: "The most obvious explanation for the Supreme Court's resort to complexity is that it was a reaction to the court's fear that, in the eyes of the majority of Canadians (or, more pertinently, the trial judges purporting to act as the public's amanuensis) the repute of the administration of justice will not suffer by the admission of tainted evidence".

¹⁶⁸ See the comments by Lamer CJC in *Feeney* (fn 8 above) at par 2, where he states that he does not have a principled objection to the use of the 'new' approach, but is in disagreement with the practical application thereof to the facts in the case. He intimates that he would have arrived at a different conclusion, despite applying the self-same principles employed by the majority and minority opinions; see also Stuart (fn 10 above) at 2, par 7.

¹⁶⁹ See Hession (fn 152 above) at 119.

¹⁷⁰ Compare, however, *Buhay* (fn 63 above), where the application of the *Collins* analysis and the approach suggested in *Stillman* produced the same result: The trial court had to decide whether a warrantless search and seizure of marijuana, stored in a locker, accessible by the public,

The approach advanced in *Stillman* proclaimed the temporary¹⁷¹ departure of the 'real evidence' ***distinction*** in the fair trial inquiry, including the associated confusion it created. It is also worth mentioning that the courts have discarded the concept 'self-incrimination' from their section 24(2) terminology, it having been replaced with 'conscriptive'.¹⁷² The latter concept is not limited to 'real'

violated the accused's right to privacy and, if so, whether the evidence discovered in this manner should be excluded in terms of section 24(2). The trial judge, (at par 13 and 51), held that the accused's right to privacy had been violated and proceeded to consider section 24(2), applied the 'real' evidence test as formulated in *Collins* and ruled that the admission of the 'real evidence' did not render the trial unfair. The Supreme Court, in a judgment written by Arbour J, (McLachlin CJC, Gonthier, Iacobucci, Major, Bastarache, Binnie, LeBel and Deschamps JJ concurring), at par 51, held that the marijuana was discoverable in the absence of a violation of any Charter rights and that the evidence constituted non-conscriptive, discoverable evidence, the admission whereof would not render the trial unfair.

¹⁷¹ It is submitted that the *Grant* fair trial test favours the re-introduction of the real evidence distinction.

¹⁷² See *Feeney* (fn 8 above) at for example par 62-72; *Stillman* (fn 7 above) at for example par 74-82, and 101; see also *Buhay* (fn 63 above) at 119, where Arbour J wrote as follows: "As Bastarache J noted, the leading case on this issue [of trial fairness] is *Stillman, supra*, which held that the admission of 'conscriptive' evidence, whether self-emanating or derivative would generally affect the fairness of the trial"; see also *Mooring* (fn 63 above) at 54; *Buendia-Alas* (fn 63 above) at 37, where the British Columbia Provincial Court, per Tweedale Prov Ct J held as follows: "Addressing the application under s 24(2) of the Charter, certainly this is not conscriptive evidence, so I look at the second and third *Collins* factors [*R v Collins* citation omitted], the seriousness of the violation and the impact of exclusion ..."; see further *Vu* (fn 63 above) at 336, a decision of the British Columbia Court of Appeal, where Braidwood JA applied the fair trial assessment as follows: "Turning to the three factors in the s 24(2) analysis, the evidence found inside the Honda is clearly classified as non-conscriptive; thus, its admission would not render the trial unfair"; see also *Symbalisy* (fn 63 above) at 311, where the police on a regular basis, entered the pawn shop of the accused without a warrant. This was deemed a serious violation. The statement made by the accused after the unlawful entry was held to be of a conscriptive nature, emanating from the accused during the unlawful search; it would further not have been discoverable in the absence of the unlawful search. Admission thereof, it was held, would render

evidence, as was the case with its common law counterpart. The concept 'conscriptive' refers to governmental conduct that unconstitutionally impinges upon the pre-trial rights of the accused, causing her to participate in the creation of the disputed evidence, intended to be used by the prosecution against her at her trial. This reading of the concept fair trial clearly alludes to the fact that the principle of the 'absence of pre-trial obligation' had been adopted by the Supreme Court.¹⁷³ In line with this principle, the central role played by the accused in the creation or discovery of the evidence forms the focus of the analysis.¹⁷⁴ It appeared as if the Supreme Court of Canada had settled the test for trial fairness: admission of 'conscriptive' evidence, it does not matter whether it is self-incriminating testimonial or real evidence, it would in general tend to render the trial of an accused unfair, if it could not have been discoverable by lawful means.¹⁷⁵ Can the *Stillman* and *Feeney* fair trial analysis be characterised as an automatic exclusionary rule? An issue related to this is, if so, should it for that reason be discarded?

Pottow is of the view that the *Stillman* fair trial framework can be construed as defying the dictates of section 24(2), in that the Supreme Court failed to consider 'all the circumstances' of the case, before arriving at its conclusion that the

the trial unfair; however, compare *Manickavasagar* (fn 63 above), where the Ontario Court of Appeal made no mention of the conscriptive/non-conscriptive analysis. In a short judgment, Rosenberg, Borins and Feldman JJA held that the evidence was correctly admitted, since admission of the evidence did not affect trial fairness and the breach was not serious, but the charges were of a serious nature and the evidence was necessary for a successful prosecution.

¹⁷³ Pottow (fn 136 above) at 49-58, supports this submission. However, he refers to the principle of the 'absence of pre-trial obligation' as 'de facto compelled incrimination'.

¹⁷⁴ Hession (fn 152 above) at 109.

¹⁷⁵ *Law* (fn 63 above) at par 34; *Buhay* (fn 63 above) at par 49. However, compare the approach in *Grant* (fn 9 above).

disputed evidence should be excluded.¹⁷⁶ This could be argued, according to Pottow, because it was held that after the classification of the disputed evidence as conscriptive, non-discoverable, the admissibility of the evidence requires no further scrutiny under the seriousness of the violation or the effect of exclusion on the repute of the criminal justice system. In other words, conscriptive non-discoverable evidence would always, as a matter of law, be automatically excluded. Pottow provides an answer to criticism on this issue by arguing that *Stillman* could be read not as ignoring all the circumstances, but as having weighed and rejected all the other circumstances 'as a pre-determined matter of law'.¹⁷⁷ The majority judgment in *Stillman* nevertheless proceeded to consider (obiter, it must be mentioned) the seriousness of the violation and the effect of exclusion on the repute of the criminal justice system, after having classified the evidence as conscriptive, non-discoverable.¹⁷⁸

The firm view held by Mahoney that the conscription analysis contained in *Stillman* should be abandoned,¹⁷⁹ is premised on the notion that the interpretation of section 24(2) of the Charter has to be fulfilled while having due

¹⁷⁶ Fn 136 above at 46. See also Mahoney (fn 136 above) at 476; Stuart (fn 10 above) at 1, par 3(2).

¹⁷⁷ Ibid at 45.

¹⁷⁸ Fn 7 above at par 122, the court wrote that "something should be said of the seriousness of the violation which occurred in this case".

¹⁷⁹ Fn 136 above at 476, he concludes as follows: "The *Stillman* analysis should be abandoned and the decision of admissibility of tainted evidence should be made by focusing directly on the test set forth in s 24(2) of the Charter". At 445 Mahoney is of the opinion that the "refined" fair trial test should be replaced with the *Collins* test. However, (ibid) at 447, he acknowledges that "much work remains in identifying and refining factors that will cause the admission of tainted evidence to bring the administration of justice into disrepute". The Ontario Court of Appeal made such an attempt in *Grant*. See also Stuart (fn 10 above) at 2, par 4.

regard to the 'intent of Parliament'.¹⁸⁰ Based on this incorrect premise, he comments that section 24(2) of the Charter makes no provision that evidence should be excluded if its admission would render a trial unfair. This view would have been correct if the provisions of the Charter were to be interpreted literally.¹⁸¹ However, he hastens to add that an unfair trial would have a negative effect on the repute of the criminal justice system.¹⁸² His key concerns about the *Stillman* analysis are twofold: first, the nature of the evidence obtained after a violation; and, second, the classification of the evidence as either 'conscriptive' or 'non-conscriptive'.¹⁸³ In respect of his first objection, he argues in favour of the retention of the common law privilege against self-incrimination, which distinguishes between real evidence and testimonial compulsion: the admission of unconstitutionally obtained real evidence would not readily render a trial unfair because of its reliable qualities.¹⁸⁴ Support for this argument of Mahoney can be found in the *Grant* fair trial assessment. An argument against the retention of the common law privilege against self-incrimination, within the context of section 24(2), has been presented above and is therefore not repeated here.¹⁸⁵

Turning to the second area of his concern, Mahoney attempts to demonstrate the weakness of typifying the evidence as either 'conscriptive or non-

¹⁸⁰ Ibid at 452, where he reasons as follows: "Section 24(2) must be applied with the integrity that comes from an adherence to the intent of Parliament as opposed to some hidden agenda based on a fear that Parliament drafted s 24(2) in error, or that the views [of the] Canadian public are an unworthy reference point".

¹⁸¹ Compare the approach to interpretation of a constitutional provision as dictated by the Supreme Court of Canada in *Big M Drug Mart* (fn 68 above).

¹⁸² Fn 136 above at 455.

¹⁸³ Ibid at 454-455, Mahoney responds to the conscriptive/non-conscriptive classification as follows: "I refuse to accept that a conclusion of unfairness flows merely from such an artificial labeling [conscriptive/non-conscriptive]".

¹⁸⁴ Ibid at 456; see also Stuart (fn 10 above) at 2.

¹⁸⁵ See the discussion under par B 1.2 above.

conscriptive', in terms of *Stillman*, as follows: A sample of the accused's hair is unlawfully taken from her brush in a search – the evidence would, according to him, be classified as non-conscriptive. Mahoney compares this scenario to that when a sample is unlawfully obtained by passing a gloved police hand through the hair of the accused – this evidence would, in his opinion be classified as conscriptive. Mahoney wished, by means of this comparison, to show that the *Stillman* analysis is inept. It is submitted that the demonstration of Mahoney is premised on an incorrect interpretation of *Stillman* and *Feeney*. The facts provided by Mahoney only serve to prevent one from meaningfully applying the *Stillman* analysis. It is, for example, not clear what results the discoverability analysis and derivative evidence inquiry would have engendered in the classification of the evidence, having regard to *all* the circumstances leading to the discovery of the evidence. The classification of the evidence as conscriptive or otherwise is but one factor of many to be considered during different phases of the admissibility analysis. A more meaningful example is presented by Pottow, calling for the application of the classification of the evidence, a discoverability analysis, as well as a derivative evidence inquiry.¹⁸⁶ He highlights the inconsistency that may be caused should different Charter rights of two accused be violated, the one in terms of section 7 and the other accused – in terms of section 8 of the Charter and where all other circumstances are virtually identical. However, he correctly notes that that inconsistency is caused by the approach of the *Feeney* court in ensuring the heightened protection of the right to human dignity that is not minimal in nature.¹⁸⁷

Paciocco attacks the 'conscriptive' evidence approach, arguing that if conscriptive evidence is so distasteful, why does Parliament and, by implication society at

¹⁸⁶ Fn 136 above at 56-57.

¹⁸⁷ Loc cit.

large, allow laws that permit conscription.¹⁸⁸ Section 254 of the Canadian Criminal Code,¹⁸⁹ for example, permits the taking of a breathalyser test – with, or without the consent of the suspect. This argument was countered by Cory J in *Stillman* when he reasoned as follows:¹⁹⁰

It is for this reason that blood, hair samples or the identity of the accused are often readily, yet incorrectly, classified as ‘real evidence existing independently of the Charter breach’. Yet, it is key to their classification that they do not necessarily exist ***in a usable form***. For example, in the absence of a valid statutory authority or the accused’s consent to take blood samples, the independent existence of the bodily samples is of no use to the prosecution since there is no lawful means of obtaining it.

In other words, a limitation of rights that complies with the limitations clause cannot be construed as a violation. Any such challenge would not survive even the threshold requirement contained in section 24(2) that evidence must have been ‘obtained in a manner’ that violates a right contained in the Charter.¹⁹¹

Unlike the approach before *Stillman* and *Feeney*, the key issue should not be whether the evidence has reliable qualities and existed prior to the violation,¹⁹²

¹⁸⁸ Fn 23 above (1989) at 77; see also *Paciocco* 2001 (fn 23 above) at 453.

¹⁸⁹ This section makes provision for the taking of blood or breath samples whenever a police officer has reasonable grounds to believe that a suspect has alcohol or a drug in her body while driving a motor vehicle.

¹⁹⁰ Fn 7 above at par 77. Emphasis in original.

¹⁹¹ This requirement is discussed in chapter 3.

¹⁹² In *Thompson Newspapers* (fn 63 above) at 256, La Forest J clarified the meaning of the requirement that the evidence “existed prior to the violation”, by indicating that it means that the evidence would have been discoverable without a violation. He said the following: “The fact that evidence already existed means that it could have been discovered anyway”; compare the

but whether the manner of its procurement could be classified as conscriptive. A purposive interpretation of the fair trial requirement mandates such an approach. Furthermore, the refined fair trial requirement does not constitute an absolute exclusionary rule,¹⁹³ because the assessment is not finalised when the evidence is labeled conscriptive. On the contrary, automatic exclusion is subdued by means of a causation analysis geared in favour of either admission or exclusion, depending on the facts of each case: If the evidence would have been discoverable in a lawful manner, admission thereof would not render the trial unfair.¹⁹⁴ Conversely, if it would not have been discovered by legal means, its admission would tend to render the trial unfair. On this view, the *Stillman* fair trial analysis could be described as favouring 'near automatic' exclusion.¹⁹⁵

However, the 'refined' fair trial directive, introduced by *Stillman*, cannot be described as exclusively promoting the deterrence rationale. Otherwise, why should the admission of conscriptive evidence that would inevitably have been discovered in an alternative ***constitutional manner***, not tend to render a trial unfair?

The discoverability analysis is of paramount importance throughout the *Stillman* and *Feeney* fair trial framework. It features during the fair trial assessment, the 'seriousness of the Charter violation' assessment, and even when the 'effect of

approach in *Grant*, suggesting a return of the reliability characteristics of the evidence in the fair trial assessment.

¹⁹³ However, compare Hession (fn 152 above) at 119, where she summarises the impact of the "refined" test as follows: "We have today an absolute rule of exclusion built within the trial-fairness test based on how one classifies the evidence"; see also Pottow (fn 136 above) at 46.

¹⁹⁴ Compare, however, the view of Paciocco (1989) (fn 23 above) at 77, where he argues as follows: "... where evidence is obtained in the shadow of a Charter violation, it will be excluded almost automatically, as a matter of principle, whenever the evidence is the product of a pre-trial obligation imposed upon the accused by the state".

¹⁹⁵ *Grant* (fn 9 above) at par 50.

excluding the disputed evidence upon the repute of the justice system' is considered.¹⁹⁶ A number of Canadian commentators do not call for the abandonment of the doctrine of discoverability within the *Stillman* and *Feeney* fair trial requirement.¹⁹⁷ Davies advocates the submission that it should be totally discarded.¹⁹⁸ Mahoney suggests that it should be retained,¹⁹⁹ while also signifying that it should have a 'minor role to play when compared to such factors as the seriousness of the violation and the seriousness of the offence proffered against the accused'.²⁰⁰ He correctly remarks that the discoverability analysis is founded on the corrective justice theory, to the extent that it is designed to ensure that the prosecuting authority is 'no better or no worse off' as a result of a Charter violation.²⁰¹ The thrust of his line of reasoning is located in the following passage, thus exposing his predilection in favour of crime control values:²⁰²

¹⁹⁶ Mahoney (fn 136 above) at 464-465; Stuart (fn 10 above) at 3, par 9 argues that it should be abandoned. He points out that the doctrine would have no place in the section 24(2) analysis if the conscriptive/non-conscriptive analysis is abandoned.

¹⁹⁷ Brewer (fn 136 above); Moreau (fn 136 above); Delaney (fn 136 above); and Davison (fn 97 above).

¹⁹⁸ Davies (fn 136 above) at 38, where he concludes as follows: "Discoverability is a highly complex, unprincipled and speculative doctrine. It ought to have no place the s 24(2) analysis"; see also Stuart (fn 10 above) at 3, par 9, where he raises his objection as follows: "This adds an obtuse inquiry and does not make sense ... Questions of legal remedy should turn on the evidence before the trier of fact, not on what might have been reality. Furthermore the fact that the police could have found the evidence without breaching the *Charter* makes the violation more serious and should therefore more likely result in exclusion".

¹⁹⁹ Fn 136 above at 471, where he states as follows: "I end up admitting that the discoverability principle itself may have a role to play, as will be obvious in some of the examples discussed shortly".

²⁰⁰ Loc cit.

²⁰¹ Ibid at 467 (fn 55 of his contribution).

²⁰² Ibid at 473.

Criminals must be detected and punished. If this result was about to occur in a particular case, the mere fact of a Charter breach should not be treated as a sufficient reason to interfere with that inevitability. But, in turn, the response to this argument is to ask, why then, ever bother to restore the parties to their respective 'advantage/disadvantage' positions as existed prior to the Charter breach? Why not make use of the evidence to convict, despite its tainted state?

Mahoney concedes that his argument could be viewed as a suggestive of the philosophy that the means justifies the end: a conviction justifies unconstitutional governmental conduct.²⁰³ However, he submits that such a result would be countenanced by the 'reasonable, dispassionate Canadian' who would not view the governmental conduct as having a negative impact on the repute of the

²⁰³ Ibid at 474 (fn 64), he contends that the *Stillman* fair trial framework likewise encourages unconstitutional police conduct, leaving the prosecuting in a **better** and no worse position. He argues that this would be the case when the police have sufficient grounds to obtain a warrant, but they consciously decide to conduct the search unlawfully, without a warrant. Drugs found on the premises, he contends, would be **admissible** because it would inevitably have been discovered by alternative, lawful means. It is submitted that this argument of Mahoney loses sight of the fact that the evidence would not be ruled **admissible**, but would at that stage of the assessment be ruled not to affect trial fairness. Its admissibility would have to be further assessed during the second phase or leg. In other words, it should be determined whether the infringement was serious: for instance, a violation that is deliberate is deemed to be more serious – a factor that swings the pendulum in favour of exclusion; and what effect exclusion would have on the repute of the justice system. These two factors are discussed in chapter 5. However, section 529.3 of the Canadian Criminal Code has subsequent to the *Feeney* judgment, virtually neutralised the notion that a warrantless entry unto a dwelling-house is *prima facie* unreasonable. This was achieved by the inclusion of a lowered threshold of a reasonable suspicion and justifications that police conduct was aimed at preventing the destruction of evidence or imminent harm or death to an occupant, thus effectively overturning the *prima facie* unreasonable criteria in *Feeney* - see also Pringle (fn 136 above) at 108.

criminal justice system.²⁰⁴ It is submitted that the difference between interpreting ordinary legislation – where the quest to determine the intent of the legislature²⁰⁵ is of paramount importance - and a constitution,²⁰⁶ provides an explanation why the opinion of Mahoney and the approach to this issue by the Supreme Court in *Collins*²⁰⁷ are fundamentally irreconcilable.

Maric holds the view that the *Stillman* fair trial framework has caused two possible approaches that could lead to different outcomes.²⁰⁸ It can be construed either broadly or narrowly. A broad interpretation would consider the full extent of the accused's participation in the creation or discovery of the evidence. By contrast, a narrow interpretation would focus solely on the nature of the evidence obtained, thereby confining courts to determine whether the evidence fits into one of the categories mentioned by Cory J in *Stillman*. In other words, the courts would be preoccupied with a determination as to whether the

²⁰⁴ Mahoney (ibid) at 473-475.

²⁰⁵ The argument of Mahoney is based on this approach. See Mahoney (ibid) at 452, where he reasons as follows: "Section 24(2) must be applied with the integrity that comes from an adherence to the intent of Parliament as opposed to some hidden agenda based on a fear that Parliament drafted s 24(2) in error, or that the views [of the] Canadian public are an unworthy reference point"; further (ibid) at 462, where Mahoney states: "Parliament, after all, did not frame s 24(2) in terms of assessing the effect of **exclusion** of tainted evidence on the repute of the administration of justice – quite the opposite" (emphasis in original text); see further (ibid) at 463, where Mahoney writes as follows: "Parliament may have had any one of a number of purposes in enacting s 24(2)".

²⁰⁶ See the approach to the interpretation of the Charter as applied in *Big M Drug Mart* (fn 68 above).

²⁰⁷ Lamer J stated in *Collins* at par 31-32, that "disrepute" cannot be measured by means of public opinion polls. He reasoned that public opinion would regularly lean towards admitting the disputed evidence. However, he continued by mentioning that it is the duty of the courts to protect the accused from the tyranny of the majority: one of the purposes the Charter was designed to achieve.

²⁰⁸ Fn 79 above at 97-101.

evidence constitutes a statement, a bodily substance or involves the use of the body as evidence or whether the violation constitutes a significant infringement of the right to human dignity: Only evidence that falls within this categorisation would be considered worthy of consideration for possible exclusion under the 'refined' fair trial requirement.²⁰⁹ He prefers a broad approach that gives effect to the principle of the 'absence of pre-trial obligation', by arguing that a court should consider the entire chain of events that led to the discovery of the evidence. This view is supported. The focus of attention should rather be on whether the evidence was obtained through a process of unfair conscription. In my view, such an approach gives effect to the phrase 'all the circumstances' contained in section 24(2), while also promoting a purposive and generous interpretation of the section.

In most cases a physical object (real evidence) is used to commit a crime. In most cases physical evidence, as for example, DNA evidence, fingerprints and blood samples would bear the most weight in establishing a link between the accused and the crime.²¹⁰ It would therefore be important for the prosecution to ensure that physical evidence that links the accused to the crime be admitted, provided that it does not 'strike at the heart of a fair trial'.²¹¹ Mindful hereof, the Supreme Court of Canada could not ignore the importance of 'real' evidence that would on many occasions secure a conviction. This category of evidence is considered under the fair trial directive and also when courts consider 'the effect of exclusion on the repute of the criminal justice system'. However, before the admission of 'real' or derivative evidence could be ruled not to unfairly impact on the trial fairness imperative, the discovery of the evidence should not be linked

²⁰⁹ Stuart (fn 10 above) at 2, par 6, submits that the courts of Canada apply the narrow categorisation test when the conscription analysis is undertaken.

²¹⁰ Davison (fn 97 above) at 495.

²¹¹ The words of Lamer J in *Collins*.

to the unconstitutional participation of the accused in its creation.²¹² The practical effect of this approach is important, especially for an accused: Unlike during the period when the *Collins* fair trial framework was misinterpreted,²¹³ the admissibility of 'real' evidence should not be assessed on the basis of its 'separate existence', but whether it could be linked to unconstitutional conduct. In other words, the issue should be whether the accused had been conscripted against herself.

Most importantly, the derivative evidence inquiry follows the conscription analysis. Put differently, the derivative evidence inquiry plays a secondary role in relation to the conscription analysis, since it may only be embarked upon *after* the conscription analysis. This approach has, no doubt, resulted in a noteworthy restructuring of the *Collins* test. On the one hand, the impact of this approach has rendered the statement of Lamer J in *Collins*, to the effect that 'real' evidence would 'rarely operate unfairly for that reason alone',²¹⁴ almost without any legal force. In a word, the admission of 'real' evidence obtained as a result of conscription would render a trial unfair. In this way the refined fair trial directive advances due process concerns by ensuring that the trial of an accused complies with notions of fundamental fairness. On the other hand, it favours crime control interests, because it makes it undemanding to admit 'real' evidence that was not obtained as a result of conscription. This is specifically the case when one considers the nature of the link that should exist between the unwarranted conduct and the discovery of derivative evidence.

The nature of the link between the unconstitutional participation of the accused and the discovery of derivative evidence noticeably serves crime control values:

²¹² *Feeney* (fn 8 above) at paras 64, 67 and 68.

²¹³ See Roach (fn 129 above).

²¹⁴ *Collins* (fn 1 above) at 19.

It is more difficult under the new fair trial directive to exclude derivative evidence than self-conscriptive evidence. The following two factors make it less onerous for the prosecution to seek the admission of real evidence: Firstly, in the case of derivative evidence, the accused must show that her unconstitutional participation was the **necessary** cause for the discovery of the evidence.²¹⁵ Secondly, it is not required of the prosecution to show that the evidence would have been discovered by **constitutional** means. It would be sufficient to demonstrate that the evidence would have been procured, even in an unconstitutional manner.²¹⁶ This approach, on the other hand, confirms the suggestion made by Lamer J in *Collins* that the admission of 'real' evidence would 'rarely operate unfairly for that reason alone'.²¹⁷ In this regard, the differential assessment of the nature of the link between 'conscriptive' and derivative evidence serves both due process and crime control values: a balance that was occasionally neglected by the courts when applying the *Collins* fair trial test. This approach also ensures that due consideration is accorded first of all to due process concerns, without a total disregard to the truth-seeking function of the courts.²¹⁸ By contrast, the *Grant* approach suggests that the admission of real evidence would rarely render a trial unfair, even if it was discovered through the compelled participation of the accused in creating the evidence. Moreover, this could be the case, regardless of the fact that the evidence would not have been discovered by lawful means. Against this background, the *Grant* approach encourages unconstitutional police conduct.

It should be emphasised that, unlike the position in common law jurisdictions, the fair trial assessment does not involve a weighing up of due process and

²¹⁵ *Feeney* (fn 8 above) at par 70.

²¹⁶ *Loc cit.*

²¹⁷ *Collins* (fn 1 above) at 19.

²¹⁸ However, compare Hession (fn 152 above) at 119 who argues that the new approach undermines the truth-seeking function of the courts.

crime control interests.²¹⁹ Rather, the *Stillman* fair trial framework is focused on three steps, firstly, a determination as to whether the accused had been conscripted against herself in the creation or discovery of the evidence; and secondly, whether the evidence would have been discoverable in a lawful manner; and thirdly, a derivative evidence inquiry.

The derivative evidence inquiry appears to be loaded in favour of the inclusion of 'real' evidence. In terms of the refined test, the admission of 'real' evidence would not render the trial unfair even when **unconstitutionally** obtained, provided that the accused had not been compelled to create it.²²⁰ However, in accordance with the values which the fair trial directive seeks to protect, the Supreme Court decision of *Stillman* has re-orientated the fair trial assessment by signifying that when evidence had **not** been obtained in a conscriptive manner, regardless of its nature, its admission would not render the trial unfair. Then again, the structure of the fair trial framework attenuates the effect of the derivative evidence inquiry, since the conscription analysis phase precedes the derivative evidence inquiry. Therefore, in the event that 'real' evidence had been obtained as a result of the accused having been conscripted against herself, admission thereof would render the trial unfair. A further finding that the evidence was non-discoverable would not require a derivative evidence inquiry.

Has the refined fair trial directive discarded the necessity for an independent assessment of the nature of the right violated? The Supreme Court has not clearly rejected this assessment. Mahoney²²¹ questions whether this factor could be meaningfully applied to the section 24(2) assessment.²²² His argument is

²¹⁹ This appears to be the approach advocated in *Grant*.

²²⁰ In such instances, the accused would be conscripted against herself.

²²¹ See also Delisle (1989) 67 CR (3d) 288 at 284.

²²² Fn 136 above at 458, formulating the rhetorical question as follows: "But is there any way to apply this factor in a meaningful way to the enquiry mandated by s 24(2)?"

properly founded on the fact that no hierarchy of rights has been established in the Charter.²²³ It is further submitted that, in terms of the *Stillman* and *Feeney* fair trial analysis, a determination as to whether evidence had been obtained in a conscriptive manner cannot be determined without also considering the nature of the constitutional right violated. *Stillman* and *Feeney* confirm the fact that the fair trial imperative seeks to protect the following values: freedom from compelled conscription by means of a statement, use of the body or bodily substances or any significant breach of the inherent dignity of an accused.²²⁴ Therefore, any Charter breach which involves a violation of any of these values is necessarily considered when the conscription analysis is undertaken.²²⁵

By and large, the 'refined' fair trial requirement has the important virtue of indirectly discouraging police officers from obtaining evidence in an unconstitutional manner. The same cannot be said of the *Grant* fair trial assessment.²²⁶ As an integral part of the test, the derivative evidence inquiry functions as an effective tool in the truth-seeking task of the courts.

It was pointed out above that the *Grant* fair trial assessment consists of two phases and that the second phase introduces additional factors for consideration in the fair trial assessment. This approach of the *Grant* court, by attaching considerable weight to the seriousness of the infringement and the reliability of

²²³ Loc cit. It is suggested that this argument should be applicable with equal effect to the South African s 35(5) provision.

²²⁴ Cory J defined conscriptive evidence in *Stillman* (fn 7 above) at par 80.

²²⁵ Rights triggered would be sections 7-10 of the Charter.

²²⁶ Stuart (fn 10 above) at 6, paras 17-18, highlights this effect of the *Grant* approach while discussing the second and third groups of *Collins* factors. He emphasises the general implications of the *Grant* approach to the interpretation of section 24(2) in a convincing manner when he argues as follows: "Where there are patterns of inclusion despite police breaches there will be less incentive for police to take the *Charter* seriously".

the evidence during the second phase, which in turn determines the degree of trial fairness, defies the principle of *stare decisis*. The case of *R v Ladouceur*²²⁷ was not mentioned in *Grant*. In *Ladouceur*, the Ontario Court of Appeal held that the trial fairness assessment is²²⁸

... **unrelated** to the **seriousness of the violation**, and the trial will be fair or unfair **to the same degree** with admission of conscripted evidence.

This dictum in *Ladouceur* affirms the view that the fair trial prong contained in section 24(2) was designed, unlike the goal sought to be achieved by the *Wray* principle, to protect an accused from providing evidence for the benefit of the prosecution through a process of self-conscription. By attaching considerable weight to the reliability of the disputed evidence during the second phase of the fair trial analysis, the *Grant* court conveys the message that the unwarranted conscription of persons accused of having allegedly committed an offence, is not worthy of Charter protection when real evidence is in dispute. Such an approach does not make sound constitutional policy.²²⁹ It is suggested that the focal point of the fair trial assessment should not be whether the evidence has reliable characteristics or whether the infringement is of a seriousness nature,²³⁰ but

²²⁷ (1990) 56 CCC (3d) 22, ("*Ladouceur*").

²²⁸ *Ibid* at 44.

²²⁹ Stuart (fn 10 above) at 5, par 15, makes a similar point, with regard to the *Grant* approach in relation to the second and third groups of *Collins* factors, when he argues as follows: "There cannot be a *de facto* two-tier system where one zone is *Charter*-free and the police ends always justify the means".

²³⁰ See in this regard, the approach in *Bunning v Cross* (1978) 141 CLR 54 at 78-79, ("*Bunning*"), where the seriousness of the infringement and the effect of the violation on the cogency of the evidence are important factors in the admissibility assessment. In other words, the reliability of the evidence is of paramount importance in the admissibility assessment.

whether it was 'obtained in a manner' that is offensive to the purposes sought to be protected by the fair trial requirement.

Conscription should have the same effect on trial fairness, because the purpose of the trial fairness assessment is to avoid conscription, not to determine to what degree trial fairness has been compromised. A purposive interpretation of the fair trial requirement should therefore be determinative of whether admission of the evidence would render the trial unfair. It is suggested that a purposive interpretation of the trial fairness requirement dictates that when trial fairness has been impaired, that the violation that caused such harm should be regarded as a serious infringement.²³¹ It is difficult to appreciate how an infringement that results in conscription can nevertheless be typified as non-serious, when a purposive interpretation is undertaken.²³² The admission of conscriptive evidence will, in general, have a serious effect on trial fairness. Furthermore, based on the sound constitutional policy that the good faith of the police cannot convert an unfair trial into a fair trial,²³³ the fact that the police officer did not 'grossly overstep the bounds of legitimate questioning',²³⁴ should accordingly not be considered as a factor that transforms an unfair trial into a fair trial.²³⁵

A purposive interpretation of the trial fairness requirement indicates that the unfairness relates to the fact that the accused would have to confront evidence

²³¹ *Mellenthin* (fn 51 above) at 491; *Roach* (fn 27 above) at 10-78. See also the recommended overall approach suggested in chapter 6 par B 2.1, where the appropriateness of such an approach is embraced.

²³² This is the upshot of the *Grant* analysis – see par 47, where the court held that the accused had been conscripted against himself; see further par 59, where the impact on trial fairness was deemed to be "at the less serious end".

²³³ *Hebert* (fn 63 above); *Elshaw* (fn 63 above); *Bartle* (fn 63 above).

²³⁴ *Grant* (fn 9 above) at par 58.

²³⁵ This is one of the implications of the *Grant* approach.

at her trial she would not otherwise have had to challenge if her Charter rights were respected. Moreover, the seriousness of the unfairness is contextualised when one bears in mind that the prejudice suffered by the accused would, in general, be caused by governmental agents overstepping the parameters of their authority, which is explicitly designed to safeguard trial fairness. The trial fairness prong cannot, it is suggested, be determined by means of a consideration of the extent of the infringement and the reliability of the evidence, when section 24(2) directs the courts of Canada to focus on the manner in which the evidence had been obtained.

This does not mean that the seriousness of the infringement and the reliability of the evidence should be totally ignored. It is suggested that these factors should be considered under the second and third groups of *Collins* factors.

Having considered the functions of the conscription analysis, and the doctrine of discoverability, together with the derivative evidence inquiry, some might argue that the *Stillman* fair trial directive serves both the public interests in truth-seeking, on the one hand, and rights protection, on the other. The *Grant* fair trial assessment was designed to achieve a similar purpose, but it fails to take into account the purposes sought to be protected by the fair trial directive. By attaching considerable weight to the reliability of the evidence, it defies sound constitutional policy enunciated in seminal cases like *Collins*, *Ross*, *Mellenthin* and *Black*. In the light hereof, one cannot but conclude that the *Stillman* fair trial test better enhances the values sought to be protected by the fair trial directive, when compared to *Grant*. However, both approaches have inherent strengths and weaknesses.

To summarise, the 'refined' fair trial directive could be viewed as a response by the Supreme Court resulting from Canadian scholarly writers raising the following concerns in respect of the *Collins* fair trial framework:

1. the *Collins* fair trial directive serves as an automatic exclusionary rule once it had been established that the accused had incriminated herself as a result of a Charter violation.²³⁶ In response, it was particularly emphasised in *Mellenthin* that more than 'conscriptio' is required to exclude evidence. *Stillman* confirmed the *Mellenthin* approach by confirming the appropriateness of a discoverability inquiry in order to determine trial fairness;
2. the *Collins* fair trial test leads to confusion and the incorrect admission of 'real' evidence solely because it is reliable²³⁷ – in reply, the differential treatment of different kinds of evidence had been discarded;
3. the *Collins* fair trial requirement, as developed in subsequent cases, applied differential criteria to determine the nature of the link between the violation and the discovery of the evidence²³⁸ – in reaction thereto, the nature of the link has been settled;

²³⁶ See Paciocco 1989 (fn 23 above) at 358; see also Sopinka, Lederman & Bryant (eds) in *The Law of Evidence in Canada* (1993) at 402-403.

²³⁷ See *Ross* (fn 62 above); also *Dersch* (fn 51 above) at 6, where L'Heureux-Dube responded to the issue as follows: "... regardless of the nature of the evidence, real or self-incriminatory, if the impugned evidence could not have been discovered had the Charter violation not occurred, the fairness of the trial is effected and the evidence ought to be excluded pursuant to s24(2)"; see also Davison (fn 97 above) at 495, the scholarly writer highlights the danger of the different approaches to the admissibility of different kinds of evidence as follows: "The mechanical approach to the issue of 'physical evidence' employed by most courts since *Collins* has ignored the negative impact upon the fairness of the trial which might be occasioned by allowing the Crown to introduce improperly obtained evidence of 'location' which might lead to a conviction if other essential elements have also been proven"; also Delisle (fn 97 above) at 288 who suggests that the test should rather be whether any evidence, real or otherwise, was discovered as a result of a Charter breach. Compare Paciocco 1989 (fn 23 above) at 358-359.

²³⁸ Roach (fn 27 above) at 10-52 to 10-53.

4. the discoverability analysis fails to distinguish between illegally obtained primary evidence and evidence derived from it, which would, more often than not, result in reliable real evidence being excluded.²³⁹ In response, *Feeney* introduced a derivative evidence inquiry that distinguishes between the admissibility of primary and derivative evidence. It is argued below that the *Feeney* derivative evidence inquiry is loaded in favour of the admission of real, derivative evidence; and
5. the discoverability analysis is limited to real evidence discovered after a violation.²⁴⁰ In response, the discoverability analysis was made applicable to any evidence discovered after a violation, including testimonial compulsion.

The criticism by Paciocco to the effect that the discoverability analysis is not based on legal principle and should therefore be discarded,²⁴¹ did not inspire the Supreme Court to abandon this concept. Rather, its function throughout the fair trial enquiry has been reinforced.²⁴²

The 'refined' fair trial requirement favours both the accused and the prosecution, because on the one hand, it does not limit the scope of its protection to the nature of the evidence discovered as a result of a violation. An additional effect

²³⁹ Wiseman (1997) 39 *CLQ* 435 at 466-469. He demonstrates (ibid at 462-463), by referring to *Mellenthin*, that the marijuana resin found in the car of the accused was not derived from something created by the accused. In fact, the marijuana was found as a result of the unconstitutional search of the car. Since the marijuana found was not created, nor discovered as a result of anything the accused had said or done, he argues that the marijuana was in fact primary evidence and not secondary real evidence.

²⁴⁰ Young (fn 97 above) at 411.

²⁴¹ Fn 23 above at 453; see also Stuart (fn 11 above) at par 9; compare Fenton (fn 95 above) at 307-308.

²⁴² The discoverability analysis is applicable during the three stages of the 'refined' fair trial assessment - see Mahoney, (fn136 above) at 464, fn 45 thereof.

of the 'refined' approach, is that it favours the accused when the evidence had been obtained in a conscriptive manner and would not have been discoverable – admission thereof would, in general tend to render the trial unfair. On the other hand, the 'refined' test favours the prosecution, because under the derivative inquiry, they do not have to demonstrate that the evidence would have been procured by constitutional means.

Stillman and *Feeney* discarded the real evidence **distinction** from the trial fairness inquiry, adopted due to a misinterpretation of *Collins*. The classification of the evidence (not as real or testimonial), but conscriptive and non-conscriptive is an important first step in the fair trial analysis. This classification ensures legal certainty, as it provides both the prosecution and legal practitioners with firm guidelines as to whether the disputed evidence constitutes either conscriptive, derivative or non-conscriptive evidence.²⁴³ Penney²⁴⁴ and Mahoney²⁴⁵ argue that the fair trial approach of the Supreme Court is tantamount to the almost automatic exclusion of non-discoverable self-conscriptive evidence. This objection can be countered by the meaningful concession made by Mahoney, submitting that it is proper to conclude that 'permitting an unfair trial to proceed is likely to meet the section's threshold and bring the administration of justice into disrepute,'²⁴⁶ but he hastens to add that such an 'elementary proposition'

²⁴³ Ibid at 470 Mahoney makes the following statement: "Lawyers respond to rules and appellate courts understandably seek to offer structured guidance for trial judges. In such climate, the intricate *Stillman* analysis and the 'no better/ no worse' rule are understandable".

²⁴⁴ Fn 23 above at 252 argues that: "... the court's 'trial fairness' approach – which results in near-automatic exclusion of non-discoverable, self-incriminating evidence – should be abandoned".

²⁴⁵ Fn 136 above at 451 he makes his point as follows: "The *Stillman* analysis, with its automatic exclusion of non-discoverable, conscriptive evidence, may be explicable as an attempt to ameliorate such result".

²⁴⁶ Ibid at 455. He prefers an interpretation that focuses "directly on the phraseology of s 24(2)". In other words, he prefers a literal interpretation.

offers little assistance in the practical application of section 24(2). The *Stillman* and *Feeney* judgments suggest that an unfair trial would, by its very nature, be detrimental to the administration of justice. However, does this mean that 'all the circumstances' should be ignored?²⁴⁷

A number of Canadian commentators concur that the courts should continue to apply the discoverability analysis,²⁴⁸ and it is submitted that it serves a significant purpose in the 'refined' fair trial analysis, since it enhances both the judicial integrity rationale and remedial imperative or corrective justice principle. It serves both rationales, because the discoverability analysis is undertaken to determine whether the evidence would have been obtained in a lawful manner: If not, the parties must be restored to the position they were in immediately before the violation (the remedial imperative), while by the same token, it conveys the message that the contaminated evidence is excluded because the courts do not want to be associated with the unconstitutional conduct (the judicial integrity rationale). Exclusion for this reason is informed by the purposes of these rationales. Moreover, discoverability analysis seeks the important constitutional value of rights protection: It conveys the idea that when evidence cannot be procured in a lawful manner, the accused should be left alone. On this view, the concept of discoverability augments two fundamental interests: First, it underscores the fundamental concern that a justiciable Bill of Rights serves the function of ensuring that governmental power should be exercised within the ambit of the law and within the parameters of constitutional guarantees; and second, it accentuates the notion that the prosecution should not build its case against the accused in an unconstitutional manner.

²⁴⁷ See, in this regard, the recommendation in this thesis in chapter 6 par B.

²⁴⁸ See the commentators listed in fn 197 above. However, compare Davies (fn 136 above) at 38; Stuart (fn 10 above) at 3, par 9. Stuart argues in favour of the abandonment of the conscriptive/non-conscriptive analysis. He points out that, with the abandonment of the conscriptive/non-conscriptive analysis, the doctrine of discoverability would be superfluous.

Mahoney is correct when he argues that a consideration of the nature of the right violated does not have a meaningful place in the trial fairness inquiry.²⁴⁹ An approach that highlights the nature of the right infringed is vulnerable to the criticism that the Charter does not make provision for a hierarchy of fundamental rights. The same criticism would bear equal weight for the interpretation of section 35(5). Does this mean that 'the nature of the right violated' should completely disappear from the radar of the fair trial assessment? No, a purposive approach to the interpretation of the Charter, including section 24(2), demands that courts should determine the purpose sought to be protected by the right violated, while having proper regard to the rationale of section 24(2). What is important is the fact that neither the *Stillman*, nor the *Feeney* majority opinions applied this factor as an independent feature in their assessment of the fair trial requirement. This approach, applied in *Stillman* and *Feeney*, could be ascribed to the fact that the conscription analysis incorporates this factor during the first phase of the analysis.

In addition, *Feeney* and *Stillman* demonstrates that the modern concept of a fair trial is evidently not limited to the conduct of the trial itself, requiring of the courts simply to ensure that all the rules of evidence and criminal procedure had been complied with,²⁵⁰ but in addition, it is also primarily aimed at preventing the prosecution from introducing evidence obtained by investigatory methods which, in the eyes of 'fair minded men and women' would be 'repugnant'.²⁵¹ It is submitted that the compelled incrimination of an accused in the shadow of a

²⁴⁹ Fn 136 above at 458-459, he argues as follows: "In a faithful application of the admissibility test set forth in s 24(2), the 'nature of the right' will only matter if it is possible to conclude that breach of certain rights in ss 7-10 will more readily bring the administration of justice into disrepute than will a breach of the remaining rights. Is this really a desirable line of enquiry?".

²⁵⁰ Per Esson JA in *Schedel* (fn 63 above) at par 72.

²⁵¹ *Feeney* (fn 8 above) at par 89.

Charter violation should, particularly in a democratic society based upon the supremacy of the constitution, be considered as just as 'abhorrently' and 'insidiously unfair'²⁵² as compelling an accused to incriminate herself by means of a confession. If that were not to be the case, the Charter would, merely theoretically, be the supreme law. Surely, if courts were to condone governmental conduct that shows a clear disregard for Charter rights, 'fair minded men and women' would agree that section 24(2) of the Charter fails to fulfil the purpose it is called upon to serve: the protection of fundamental rights, including the avoidance of disrepute befalling the criminal justice system?

Paciocco is correct when he asserts that the *Stillman* fair trial framework is the equivalent of the *Collins* fair trial test, but in other contexts.²⁵³ The *Grant* approach to the fair trial assessment can be regarded as a response by the Appeal Court of Ontario to the 'near automatic' exclusionary rule introduced by the *Stillman* fair trial requirement. To be sure, the proposed *Grant* fair trial structure proposes profound changes to the section 24(2) fair trial assessment. However, it is suggested that the Supreme Court of Canada should apply a purposive interpretation in section 24(2) challenges.

C. Determining trial unfairness under section 35(5) of the South African Constitution

This part of the thesis commences with a discussion of the 'nature of the evidence' in the admissibility assessment during the pre-constitutional era, covering the common law privilege against self-incrimination in South Africa and its bearing on the right to a fair trial. This is followed by a discussion of the

²⁵² Per Cory J in *Stillman* (fn 7 above) at par 81.

²⁵³ Fn 23 above (2001) at 452.

admissibility inquiry during the constitutional era, focusing on the impact the Constitution has on the common law privilege against self-incrimination. The adoption of the *Collins* fair trial directive, as well as its implications played an important part in the interpretation of section 35(5). This issue, together with the implicit adaptation of the common law privilege against self-incrimination, is in turn scrutinised.

In accordance with the *Collins* fair trial directive and the approach followed under part B, this part of the chapter proceeds to consider the discoverability analysis as a factor to determine trial fairness in South Africa. After that, the discussion considers the 'nature of the right' that was violated. Next, three recent Supreme Court of Appeal cases are considered where the admissibility of real evidence under section 35(5) was at issue. The different approaches adopted by the Supreme Court of Appeal in these cases are discussed.

Van der Merwe is of the opinion that the courts of South Africa have interpreted the fair trial prong in such a manner that police failure to comply with the informational warnings may – to a degree – impact negatively on trial fairness, but that admission of the evidence obtained in this manner would not render the trial unfair within the meaning of section 35(5).²⁵⁴ The validity of this argument is explored.²⁵⁵

Frequent reference is made here to judgments delivered in terms of the Interim Constitution. In my view, the approach followed in those judgements that is not inconsistent with the rationale of section 35(5) should be embraced when this provision is interpreted.

²⁵⁴ "Unconstitutionally obtained Evidence" in Schwikkard & Van der Merwe (eds) *Principles of Evidence* (2nd ed, 2002) at 215.

²⁵⁵ See C 4 below.

The admissibility of unconstitutionally obtained evidence has featured in the South African courts in a number of cases,²⁵⁶ and has frequently been subjected to scrutiny by South African scholarly writers.²⁵⁷

²⁵⁶ See, for example, *S v Motloutsi* 1996 1 SACR 78 (C), (“*Motloutsi*”); *S v Sebejan* 1997 1 SACR 626 (W), (“*Sebejan*”); *S v Nomwebu* 1996 2 SACR 396 (E), (“*Nomwebu*”); *S v Marx* 1996 2 SACR 140 (W), (“*Marx*”); *S v Mayekiso en Andere* 1996 2 SACR 298 (C), (“*Mayekiso*”); *S v Mathebula* 1997 1 BCLR 123 (W), (“*Mathebula*”); *S v Melani and Others* 1996 1 SACR 335 (E), (“*Melani*”); *Williams v S* [1997] 1 All SA 294 (NC), (“*Williams*”); *Khan v S* [1997] 4 All SA 435 (A), (“*Khan*”); *S v Shaba en Andere* 1998 1 SACR 16 (T), (“*Shaba*”); *S v Madiba* 1998 1 BCLR 38 (D), (“*Madiba*”); *S v Mphala and Another* 1998 1 SACR 388 (W), (“*Mphala*”); *S v Ngwenya and Others* 1998 2 SACR 503 (W), (“*Ngwenya*”); *S v Mokoena en Andere* 1998 2 SACR 642 (W), (“*Mokoena*”); *S v Aimes* 1998 1 SACR 343 (C), (“*Aimes*”); *S v Soci* 1998 3 BCLR 376 (E), (“*Soci*”); *S v Mfene* 1998 9 BCLR 115 (N), (“*Mfene*”); *Naidoo* (fn 16 above); *S v Gumede* 1998 5 BCLR 530 (D), (“*Gumede*”); *S v Malefo* 1998 1 SACR 127 (W), (“*Malefo*”); *S v Shongwe* 1998 9 BCLR 1170 (T), (“*Shongwe*”); *S v Mkhize* 1999 SACR 632 (W), (“*Mkhize*”); *S v Hoho* 1999 2 SACR 160, (“*Hoho*”); *S v Lottering* 1999 12 BCLR 1478 (N), (“*Lottering*”); *S v R* 2000 1 SACR 33 (W), (“*R*”); *M* (fn 19 above); *S v Mark and Another* 2001 1 SACR 572 (C), (“*Mark*”); *S v Monyane* 2001 1 SACR 115 (T), (“*Monyane*”); *M* (SCA) (fn 19 above); *Pillay* (fn 11 above); *S v Pitso* 2002 2 SACR 586 (O), (“*Pitso*”); *S v Mansoor* 2002 1 SACR 629 (W), (“*Mansoor*”); *S v Tsotetsi and Others* (3) 2003 2 SACR 648 at 651, (“*Tsotetsi*”); *S v Orrie and Another* 2005 1 SACR 63 (C), (“*Orrie*”); *Tandwa* (fn 12 above); *S v Mashumpa* 2008 1 SACR 126 (E), (“*Mashumpa*”); *Mthembu v S* (64/2007) [2008] ZASCA 51, (“*Mthembu*”). Although the judgments in, inter alia, *Motloutsi*, *Mayekiso*, *Marx*, *Mathebula*, and *Melani*, were not delivered in terms of section 35(5), but in terms of the Interim Constitution, it is submitted that those judgments do have significant persuasive value when section 35(5) is interpreted. See, in this regard, the discussion in chapter 2, under par E 2.

²⁵⁷ For a general discussion of the fair trial requirement contained in section 35(5), see Van der Merwe (1992) 2 *Stell LR* 173 (“Van der Merwe 1”); Viljoen “The Law of Criminal Procedure and the Bill of Rights” in Mokgorro & Tlakula (eds) *The Bill of Rights Compendium* (2008); Meintjies-Van der Walt (1996) 3 *SACJ* 389; Schwikkard (1997) 13 *SAJHR* 446, (“Schwikkard 1”); Naude (1998) XXX *CILSA* 315, (“Naude 1”); Van der Merwe (1998) 2 *Stell LR* 129 (“Van der Merwe 2”); Van der Merwe (1998) 11 *SACJ* 462 (“Van der Merwe 3”); Skeen (1998) 3 *SACJ* 389; Steytler *Constitutional Criminal Procedure* (1998) 33-40; Schutte (2000) 13 *SACJ* 57; Naude (2001) 14 *SACJ* 38 (“Naude 2”); Zeffertt et al *South African Law of Evidence* (2003) 625-645; Van der

1. The nature of the evidence obtained after a violation: 'conscriptive' evidence

The nature of the evidence obtained after a violation of a fundamental right is considered under this heading, both in terms of the common law and during the constitutional era.

1.1 The pre-constitutional era: the common law privilege against self-incrimination and its impact on the right to a fair trial

The similarities between the legal developments in Canada and South Africa were discussed under part B of this chapter. This section of the work commences with a discussion of the admissibility of evidence in terms of the common law, and its impact on the right to a fair trial. Given the central role played by the privilege against self-incrimination in the admissibility assessment, this part of the chapter is focused on the impact the privilege had on the determination of trial fairness. The reason for the adoption of this approach is the following: When the courts of South Africa interpreted the right to a fair trial, they embraced the concept 'self-incrimination' from the Canadian Supreme Court when that court interpreted section 24(2). This leads to the following fundamental issue: Should the courts of South Africa apply the common law privilege against self-incrimination when they assess the trial fairness requirement under section 35(5)? More importantly, should the reliability of the evidence be considered at

Merwe (fn 254 above); Schwikkard "Arrested, Detained and Accused persons" in Currie & De Waal (eds) *The Bill of Rights Handbook* (5th ed, 2005), ("Schwikkard 2"); De Jager et al *Commentary on the Criminal Procedure Act* (2005); Schwikkard "Evidence" in Woolman et al (eds) *Constitutional Law of South Africa* (Vol 1, 2nd ed, 2007), ("Schwikkard 3").

this stage of the admissibility assessment, since section 35(5) concerned with the manner in which unconstitutionally obtained evidence had been obtained?

The South African law of evidence, during the pre-constitutional era, was similar to that of England.²⁵⁸ The law of evidence applicable in England on 30 May 1960,²⁵⁹ governed the admissibility of evidence in South Africa.²⁶⁰ The golden rule applicable to the admissibility of evidence in England and South Africa, on 30 May 1960, was that all relevant evidence is admissible, regardless the manner of its obtainment.²⁶¹ English case law reported after 1960 is not binding on South African courts. However, this does not mean that South African courts had to strike a pen through all English case law reported after 1960. On the contrary, even before the advent of the 1996 Constitution,²⁶² those decisions were deemed to bear considerable persuasive significance in South African law.²⁶³ The Appellate Division²⁶⁴ of the Supreme Court of South Africa,²⁶⁵ for example, quoted with approval from the judgment written by Lord Hailsham in *Wong Kam*

²⁵⁸ For a discussion of the common law position in South Africa in general, see Kriegler *Hiemstra: Suid-Afrikaanse Strafproses* (5th ed, 1993) at 500; Van der Merwe "Sources of South African Law of Evidence and the Impact of Constitutional Provisions" in Schwikkard & Van der Merwe (eds) *Principles of Evidence* (2nd ed, 2002) at 24-31.

²⁵⁹ This was the date immediately before the advent of South African independence from Britain.

²⁶⁰ Van der Merwe 1 (fn 258 above) at 178-179.

²⁶¹ *R v Camane* 1925 AD 570, ("*Camane*"); *R v Matamba* 1941 AD 75, ("*Matamba*"); *Nkosi v Barlow NO en Andere* 1984 2 SA 148 (T), ("*Nkos*"); *S v Nel* 1987 4 SA 950 (W), ("*Nel*").

²⁶² Section 39(1)(c) explicitly provides that South African courts "may" consider foreign law when interpreting the Bill of Rights.

²⁶³ *S v Langa* 1963 4 SA 941 (N) at 944, ("*Langa N*"); see also *Van der Linde v Calitz* 1967 2 SA 239 (A) at 246, ("*Van der Linde*"); see further Kerr (1965) *SALJ* 169.

²⁶⁴ Now known as the Supreme Court of Appeal.

²⁶⁵ In *S v January; Prokureur-generaal, Natal v Khumalo* 1994 2 SACR 801 (A) at 807-808 ("*January*"); see also *Hoho* (fn 256 above).

*Ming v The Queen*²⁶⁶ when judgment was delivered on the issue of the admissibility of a confession or admission.

Comparable to the position in Canada during the pre-Charter era, the admissibility of evidence in South Africa during the pre-constitutional era was premised on the dictum of Lord Goddard in *Kuruma*.²⁶⁷ Relevant real evidence was, as a rule, admissible, no matter how it had been obtained. Admission thereof would not 'readily' render a trial unfair.

The benchmark South African common law case dealing with self-incrimination and the nature of the evidence it serves to protect, is *Camane*,²⁶⁸ where Innes CJ wrote that the privilege against self-incrimination is a fundamental principle of South African law. The judge explained that this principle is applicable both during the pre-trial and trial phases. He further explained that in terms of the privilege no person may be compelled to give incriminating evidence against himself or herself. Innes CJ accepted that the privilege against self-incrimination was introduced to South African law by the English law of evidence and had become firmly rooted in our law. The judge emphasised that, regardless of its importance, its impact should be restricted according to the purpose it had been designed to serve. The scope of the privilege is determined by the nature of the

²⁶⁶ [1980] AC (PC), ("*Wong Kam Ming*"), where Lord Hailsham reasoned as follows in his reasons for judgment regarding the admissibility of confessions and admissions: "This [the exclusion of improperly obtained confessions and admissions] is not only because of the potential unreliability of such statements, but also, and perhaps mainly, because in a civilised society it is vital that persons in custody or charged with offences should not be subjected to ill-treatment or improper pressure in order to extract confessions". See also *Melani* (fn 256 above), where, *Whiteman v Attorney-General of Trinidad and Tobago and Others* (1991) LRC (Cons) 563 (PC), ("*Whiteman*"), a decision of the Privy Counsel was quoted with approval.

²⁶⁷ Fn 37 above.

²⁶⁸ Fn 261 above at 575.

evidence it seeks to protect. Against this background, the judge reasoned as follows:²⁶⁹

What the rule forbids is compelling a man to give evidence which incriminates himself. 'It is not merely compulsion' says *Wigmore* (s2263) 'that is the kernel of the privilege, but ***testimonial compulsion***'. It is important to bear this in mind, because a man may be compelled when in Court, to do what he would rather not. His features may be of importance, and he may be made to show them, his complexion, his stature, mutilations or marks on his body, may be relevant points, and he may be compelled to show them to the Court. That is what *Wigmore* calls autoptic evidence (vol II, s1150) which is perceived by the Court itself, and which it has a right to see. In such cases the man is really passive. But he cannot be forced to go further and to give ***evidence against himself***.

This dictum was particularly influential in South African criminal procedural law. It also confirms that, like the pre-Charter position in Canada, the common law privilege is limited in its scope by the nature of the evidence it serves to protect. In effect, real evidence obtained as a result of compulsion fell outside the range of its protection.

Approximately two decades after *Camane*, Watermeyer JA further confined the privilege in *Matemba*,²⁷⁰ by excluding the taking of palm prints of the accused, the taking of photographs, or her participation in an identity parade, from the protection granted by the privilege. The judge concluded that any such evidence, even when the accused had been compelled to provide it, would be admissible. The rationale for its admission is the fact that the accused, when participating in

²⁶⁹ Loc cit. Emphasis added.

²⁷⁰ Fn 261 above; see also *Nkosi* (fn 261 above).

the creation of this kind of evidence, is not compelled to 'give evidence or to confess'.²⁷¹ It is therefore necessary to determine what impact the common law privilege against self-incrimination had on the right to a fair trial.

The impact of this interpretation of the privilege against self-incrimination on the right to a fair trial was demonstrated in *S v Desai*.²⁷² Chaskalson SC²⁷³ invited the court to embrace the notion of 'substantive fairness' into the scope of the right to a fair trial. Flemming DJP compared this suggestion to 'saddling an unruly horse'.²⁷⁴ The judge reasoned that the exclusion of evidence, even if unfairly obtained, and which implicates the accused in the commission of a crime, would in general, be detrimental to the administration of justice.²⁷⁵ He refused to develop the common law by expanding the scope of the right to a fair trial to

²⁷¹ *Matemba* (fn 261 above) at 83.

²⁷² 1977 1 All SA 298 (W), (*'Desai'*).

²⁷³ In the post-constitutional era Chaskalson SC became the first President of the South African Constitutional Court.

²⁷⁴ Fn 272 above at 30, when the judge stated: "During argument appellant's counsel changed tack. The submission was that a man may only be found guilty if the evidence which proves his guilt was obtained in a fair manner. This submission perhaps does not really suggest such a rule but states the impact of a somewhat different proposition: the court may exclude evidence which was unfairly obtained. As argument developed, it seemed that this was what counsel had in mind.

Again the improbability arises that responsible founding fathers of the new Constitution would prescribe a penal system which in part depends on such an unruly horse as 'impermissible unfairness' and in which those who willingly (even if reluctantly) and knowingly commit crime, go out as innocents. Such a state of affairs will certainly breed contempt for the law and for the legal system. Unless the discretion to exclude the truth is introduced by statute, these considerations should operate against developing the law in a way dissimilar to the position in English law as reflected in *Sang infra'*.

²⁷⁵ *Loc cit*.

include the concept of 'impermissible unfairness' into the assessment.²⁷⁶ Flemming DJP held that criminal courts should only adhere to the principles of procedure as prescribed by the common law and the provisions contained in Acts of Parliament, because Parliament reigned supreme.²⁷⁷

At common law, the courts of South Africa, premised on *Kuruma*,²⁷⁸ held that it had a discretion to exclude relevant evidence in two instances:

- a) in the event that the prejudicial effect of the evidence is outweighed by its probative value; and
- b) in cases where the evidence was improperly or unfairly obtained.²⁷⁹

The judge had to exercise her discretion as part of her duty to ensure that the accused is not deprived of a fair trial.²⁸⁰ Despite the existence of this narrow exclusionary discretion, the South African courts were reluctant to exclude unlawfully obtained evidence on this basis.²⁸¹ This consequence could by and large be ascribed to the key role played by the inclusionary rule, inherited from English law. This, in turn, resulted in the immunisation of unwarranted police conduct from judicial scrutiny.

To summarise: During the pre-constitutional era, the scales weighed heavily in favour of the admission of unfairly obtained 'real' evidence, for the following reasons: Firstly, in most cases it would be *relevant* to the determination of guilt and consequently admitted; secondly, real evidence fell outside the scope of protection guaranteed by the common law privilege against self-incrimination; thirdly, the discretionary powers of the courts to exclude unfairly obtained

²⁷⁶ Loc cit.

²⁷⁷ Loc cit.

²⁷⁸ Fn 37 above.

²⁷⁹ See *Nel* (fn 261 above).

²⁸⁰ *Ibid*.

²⁸¹ See *Desai* (fn 272 above).

evidence was sparingly exercised, because the frequent application thereof would have been construed as causing an affront to the 'golden rule' applicable to the admissibility of evidence – the relevance of evidence; fourthly, unlike the Constitutions of 1994 and 1996, the common law did not make provision for extensive procedural safeguards, collectively aimed at the protection of the right to a fair trial. It is assumed that the courts of South Africa were, for these reasons, reluctant to embrace the concept of the 'notions of basic fairness'²⁸² as a means of determining trial fairness. This development of South African law was left for the constitutional era, in a judgment delivered by the Constitutional Court in the high-ranking case of *Zuma*.²⁸³

1.2 The constitutional era

This part of the work starts off with a discussion of the adoption by the South African courts of the *Collins* fair trial framework, followed by a consideration of the scope and meaning of the concept 'fair trial' within the context section 35(5). The following critical issue is assessed: Does the concept 'fair trial' have the same meaning ascribed to it by our Canadian counterparts? More importantly, an issue intrinsically linked to this issue emerges: Should the principle of the 'absence of pre-trial obligation' be applied by our courts? It is argued that this principle has been adopted by the courts of South Africa, even in cases of identity parades, with the aim of preserving fundamental fairness in the entire criminal justice system – thus giving practical effect to the 'notions of basic fairness', rejected by South African courts during the pre-constitutional era.

The Constitutional Court has yet to interpret section 35(5). However, the Supreme Court of Appeal has, on four occasions, had the opportunity to

²⁸² *Desai* (ibid).

²⁸³ Fn 13 above.

determine the admissibility of unconstitutionally obtained evidence in terms of this provision.²⁸⁴ In three matters real evidence were excluded, but the same category of evidence was admitted in *M*. The *Collins* test was approved in a number of South African cases, including the Supreme Court of Appeal in the case of *Pillay*. However, in *Tandwa*, the Supreme Court of Appeal adopted a different fair trial framework.

1.2.1 The adoption of the Collins fair trial directive and the introduction of the 'real' evidence distinction into South African exclusionary jurisprudence

In *Melani*²⁸⁵ Justice Froneman made the comment, after having considered the applicable law in various jurisdictions, that the criteria applied in *Collins* is as 'practical and appropriate' an approach he could find.²⁸⁶ *Collins* has been referred to, either independently or in conjunction with *Jacoy*,²⁸⁷ with approval in a number of other South African reported cases.²⁸⁸

²⁸⁴ In *M* (SCA) (fn 19 above); *Pillay* (fn 11 above); *Tandwa* (fn 12 above); *Mthembu* (fn 256 above). In *M* (SCA), real evidence was admitted. In the three other cases, real evidence was excluded. In *Mthembu*, the Supreme Court of Appeal excluded real evidence (a motor vehicle and a metal box), not because its admission would render the trial unfair, but because admission would be "detrimental" to the administration of justice. For this reason, *Mthembu* is discussed in detail in chapter 5.

²⁸⁵ Fn 256 above. *Melani* was decided in terms of the Interim Constitution.

²⁸⁶ Ibid at 351; see also *Mansoor* (fn 256 above) at 631, where the judge made the following comments: "Dealing more pertinently with the test to be applied, it seems to me that the test expressed by the Canadian Supreme Court in *R v Collins* 1983 (5) CRR 122 at 136 is an appropriate one"; *Soci* (fn 256 above) at 298; see also *Shongwe* (fn 256 above).

²⁸⁷ Fn 63 above.

²⁸⁸ See for instance, *Mkhize* (fn 257 above); *Mansoor* (fn 256 above); *Tsotetsi* (fn 256 above) at 651; *Malefo* (fn 256 above) at 155; *R* (fn 256 above) at 41; *Orrie* (fn 256 above) at 75; *Naidoo* (fn 16 above) at 91F-J, 92A-E; *Soci* (fn 256 above); *Shongwe* (fn 256 above) at 342.

Most notably, the Supreme Court of Appeal confirmed the aptness of the *Collins* fair trial requirement in *Pillay*²⁸⁹ and *M.*²⁹⁰ Although the Supreme Court of Appeal, in the former case, mentioned that sections 24(2) and 35(5) are not indistinguishable in all respects,²⁹¹ both the majority and minority judgments proceeded to consider and apply the factors listed in *Collins*.²⁹²

However, a number of the South African High Courts, including the Supreme Court of Appeal, have (like their Canadian counterparts), erred by emphasising the importance to be attached to the nature of the evidence, in this manner misconstruing *Collins*.²⁹³ These South African decisions have introduced the

²⁸⁹ Fn 11 above at par 87, the majority judgment quoting Lamer J with approval, where he wrote as follows: "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 in the original text); see also par 91; see further par 92, where the majority opinion approved of the criteria as follows: "In *Collins* (supra) at 134, Lamer J says that the applicable test is 'whether the admission of the evidence would bring the administration of justice into disrepute'. ... At 35 of the *Collins* judgment involves some element of community views and concludes that 'the determination of disrepute thus requires the judge to refer to what he conceives to be the views of the community at large.'" See further the minority dissenting judgment in *Pillay* at par 123.

²⁹⁰ (SCA) fn 19 above at par 31 referred to *Jacoy* with approval.

²⁹¹ *Pillay* (fn 11 above) at par 87, where the majority judgment made the following comments: "Section 24(2) of the Charter, **though not in the same terms as section 35(5) of the Constitution**, provides that where evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by the Charter such evidence 'shall be excluded' if it is established that, having regard to all the circumstances, its admission would bring the administration of justice into disrepute". (Emphasis added).

²⁹² *Ibid* at paras 92-93; see also the minority judgment at par 122.

²⁹³ A contextual reading of *Collins* together with *Therens* and *Ross* clearly indicates that Lamer J did not incorporate the common law privilege against self-incrimination into section 24(2) jurisprudence. In *Ross* Lamer J explained that the "use of **any** evidence that could not have been

factor of 'the nature of the evidence' procured after a constitutional violation, as a central feature in the fair trial assessment. The Canadian experience of this approach was explored by Davison, who arrived at the conclusion that 'the courts appeared to brush quickly over the "fairness of trial" factors set out in *Collins* on the basis that the use of pre-existing real evidence "could not" affect the fairness of the trial negatively for the accused', with the result that such evidence was frequently admitted.²⁹⁴ In *Naidoo*,²⁹⁵ for instance, McCall J referred to the dictum in *Collins* where reference is made to the nature of the evidence and the need to distinguish between 'real' and testimonial evidence.²⁹⁶ Thereafter, the judge concluded that the unlawfully monitored telephone conversations could not be classified as 'real' evidence, but because it was obtained without consent, it constituted self-incrimination.²⁹⁷ It was held that the admission of such evidence would render the trial unfair. This aspect of the judgment suggests that the nature of the evidence, whether 'real' or testimonial, is the determinative factor under the trial fairness enquiry. In other words, the admission of unconstitutionally obtained 'real' evidence, as opposed to testimonial evidence, would not in general render a trial unfair. By contrast, the admission of testimonial evidence obtained in an unconstitutional manner would, in general,

obtained but for the accused in the construction of the evidence for the purposes of the trial would render the trial unfair". Emphasis in original text.

²⁹⁴ Fn 97 above at 495.

²⁹⁵ Fn 16 above at 90H; see also *R* (fn 256 above) at 43, where Willis J held, as a reason for the admission of DNA evidence: "The evidence is real evidence"; see further *S v Mkhize* (fn 256 above) at 637.

²⁹⁶ *Naidoo* (ibid) at 90D-E.

²⁹⁷ Ibid at 90H-J to 91A-B. The judge evidently applied the principle of the "absence of pre-trial obligation". The evidence was discovered after a violation of the right to privacy, which resulted in self-conscriptio. However, it is suggested that this should not have been the end of the fair trial assessment. A discoverability analysis would have revealed that the evidence was discoverable – see *Burlingham* (fn 63 above); see also *Pillay* (fn 11 above). Admission of the evidence would therefore not have rendered the trial unfair.

render a trial unfair. The reason why the trial would be rendered unfair is because evidence thus obtained would be classified as having been obtained as a result of self-incrimination.

The confusion caused by the distinction between 'real' evidence and testimonial evidence is demonstrated by a judgment in an appeal to the Natal Provincial Division of the High Court of South Africa in *S v M*.²⁹⁸ The accused was convicted in the court below of having raped his six-year old daughter over a period of several months during 1990. She watched a television programme during 1996 on child abuse and thereafter reported the matter to the police. The accused was convicted. The accused thereafter brought an application in the High Court to reopen his case in order to call two further witnesses. The one witness stated in his affidavit, annexed to the application, that he had sexual intercourse with the complainant. Before the evidence of one of these witnesses was led, application was made for a special entry to be made, recorded on the record in terms of section 317 of the Criminal Procedure Act.²⁹⁹ The special entry was recorded because the investigating officer unduly influenced the witness to change his statement before the trial was reopened. As a result of the undue influence, the witness made another statement to the effect that his previous statement was false.

²⁹⁸ Fn 19 above. This case preceded the Supreme Court of Appeal matter of *M* (SCA) (fn 19).

²⁹⁹ This section makes provision that an accused may, during the proceedings in a High Court or within a specified period after she had been convicted, make application that a special entry be made on the record, specifying in what respect the proceedings are alleged to be irregular or not according to law. Unless the presiding officer is of the opinion that such application is frivolous, she may enter such an application on the record of proceedings. On appeal, the court of appeal will consider the merits or demerits of the issues contained in the special entry. See Kriegler (fn 258 above) at 849-862.

During the reopened trial it emerged that the accused wrote a letter to the witness, asking him to commit perjury. The admissibility of this letter became the focal point of the dispute. Nicholson and Theron JJ held that, because 'the evidence of the contents of the two conversations' in *Naidoo* 'did not constitute real evidence', the court reasoned that 'if the spoken word is not real evidence then it is difficult to see how the written word can be'.³⁰⁰ The court was accordingly of the view that 'the letter, exh E2', found in the possession of the witness, 'does not constitute real evidence'. Premised on this finding, the court concluded that admission of the evidence would render the trial unfair.³⁰¹ This judgment suggests that the manner in which the letter was obtained constituted **testimonial** compulsion.

M³⁰² is an appeal to the Supreme Court of Appeal of the judgment delivered by the Natal Provincial Division of the High Court of South Africa. Referring to *Jacoy*, Heher AJA³⁰³ proceeded with the assertion that 'real evidence', unconstitutionally obtained 'is generally more readily admitted than evidence so obtained which depends on the say-so of a witness'.³⁰⁴ The reason for this general view is because real evidence 'does not "conscript the accused against himself" in the

³⁰⁰ Fn 19 above at 493.

³⁰¹ Ibid at 489. It must be pointed out that Nicholson and Theron JJ held in the alternative that in the event that the letter does not constitute real evidence, admission of the evidence would be detrimental to the administration of justice because of the seriousness of the violation.

³⁰² (SCA) fn 19 above.

³⁰³ Harms and Brand JJA concurring.

³⁰⁴ (SCA) fn 19 above at par 31; compare *Tandwa* (fn 12 above) at par 124, where Cameron JA highlighted the fact that "in later decisions, Canadian jurisprudence has rejected a strict distinction between real and testimonial evidence", and referred to *Burlingham*. At par 125 Cameron JA warned that "focussing, as the High Court did [in this matter], on the classification of the evidence (distinguishing between the nature of the evidence – testimonial or real) is misleading, since the question should be whether the accused was compelled to provide the evidence".

manner of a confessional statement'.³⁰⁵ One might ask: What then, is real evidence? The court defined real evidence with reference to its common law meaning, as being 'an object which, upon proper identification, becomes, of itself, evidence (such as a knife, photograph, voice recording, letter, or even the appearance of a witness in the witness-box)'.³⁰⁶ Based on this definition, the letter was classified as real evidence, the admission whereof would not have a negative impact on trial fairness.³⁰⁷

In *Mkhize*,³⁰⁸ Willis J was called upon to make a ruling on the admissibility of real evidence (a gun) found in the locker of the accused, without his consent and without a search warrant. The judge commenced his judgment by asserting that the evidence discovered after a violation of the right to privacy was relevant evidence, thus re-iterating the common law position.³⁰⁹ Referring to *Collins* and *Jacoy*, the judge reasoned that in both these matters it was stressed 'that the test for the admission of real evidence is less stringent than that for other evidence'. While relying on *Jacoy*, where it was said that 'the admission of real evidence "irrespective of the Charter violation" will "rarely render the trial unfair",' the basis for a ruling that favours the reception of the evidence had been established. The evidence was accordingly admitted, because admission thereof would not render the trial unfair.³¹⁰

The distinction between the admissibility of real evidence and testimonial evidence originates from an incorrect interpretation of *Collins*. It soon appeared that Lamer J did not suggest that unconstitutionally obtained real evidence

³⁰⁵ Loc cit.

³⁰⁶ Ibid at par 31. The court relied on the authorities referred to in fn 43 above.

³⁰⁷ Loc cit.

³⁰⁸ Fn 256 above.

³⁰⁹ Ibid at 636.

³¹⁰ Ibid at 638.

should, in general, be included.³¹¹ The opposite of what Lamer J meant is by implication suggested in *Naidoo*,³¹² *M*,³¹³ and *Mkize*.³¹⁴ The approach followed in *Naidoo*, *M* and *Mkhize* would be tantamount to the re-incarnation of the rule of automatic inclusion, on the same basis as the common law inclusionary rule. One effect such an approach would have, is that the courts would be completely debarred from even considering whether ***unconstitutionally obtained*** relevant evidence should be excluded. Surely, this is not a purpose that section 35(5) seeks to achieve? The values of rights protection would be conceived by the public at large as inferior to that of crime control interests.³¹⁵ In this regard, the South African courts should be alive to the criticism leveled by Davison to the effect that the real evidence distinction may lead to the prosecution introducing unconstitutionally 'obtained evidence of "location" which may lead to a conviction if other essential elements have also been proven'.³¹⁶

Another undesirable effect of such an approach would be the implied encouragement of police officers to deliberately infringe constitutional rights when they are aware that real evidence was used in the commission of the crime.³¹⁷ This message should not be conveyed to the police, especially by the

³¹¹ See *Ross* (fn 62 above); see also *Mellenthin* (fn 51 above); see also *Tandwa* (fn 12 above) at paras 124-125.

³¹² Fn 16 above.

³¹³ (SCA) fn 19 above.

³¹⁴ Fn 256 above.

³¹⁵ Godin (1995) *U T Fac Law Rev* 49 at 66.

³¹⁶ Fn 98 above.

³¹⁷ See in this regard Ally (fn 18 above) at 69, where it is argued as follows: "This situation, it is submitted, would more often than not, and for obvious reasons, result in a trial that is not substantively fair. ... If law enforcement agents knew that, for instance, a gun (real evidence) was used to execute a murder, they could consciously violate the constitutional rights of an accused, well knowing that the discovery of the weapon used would be admissible in court despite a deliberate violation of the Bill of Rights".

courts of South Africa. Ostensibly with the aim to eliminate the subsistence of any such message, the Supreme Court of Appeal in *Pillay*³¹⁸ declared that the admission of real evidence could compromise trial fairness if the accused had been compelled to participate in its creation or location and which would not have been discovered by lawful means.³¹⁹

1.2.2 The meaning and scope of the concept 'fair trial' and the factors to be considered to make the assessment

The scope and content of the right to a fair trial should be determined by the goal it seeks to achieve, while having due regard to the general purposes and values enshrined in the Bill of Rights.³²⁰ This approach to the interpretation of section 35(5) implies that presiding officers should correlate their findings with regard to the effect of unconstitutionally obtained evidence on trial fairness, to the broader purposes served by the Bill of Rights.³²¹ It is submitted that the primary purpose sought to be protected by the fair trial directive contained in

³¹⁸ Fn 11 above.

³¹⁹ *Ibid* at par 89. In casu, it was held that the real evidence would have been discovered without the infringement. Trial fairness was therefore not compromised. See also *Tandwa* (fn 12 above) at paras 124-125.

³²⁰ *Big M Drug Mart Ltd* (fn 68 above); see also *Makwanyane* (fn 16 above) at par 9; *Melani* (fn 256 above) at 347-348, where Froneman J reasoned as follows: "The purpose of the right to counsel and its corollary to be informed of that right (embodied in s25(1)(c) [of the Interim Constitution] is thus to protect the right to remain silent, the right not to incriminate oneself and the right to be presumed innocent until proven guilty". See also *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC), ("*Fose*") at par 195, where Kriegler J reasoned that the nature of a remedy is determined by the purpose it serves to protect. However, it must be mentioned that these South African cases were decided before the advent of section 35(5).

³²¹ *Makwanyane* (fn 16 above); *Mills* (fn 68 above); *Gamble* (fn 68 above); *Roach* (fn 27 above) at 3-15.

section 35(5), is the **prevention of self-conscription** and the need to ensure that an accused is treated fairly throughout the criminal justice process. Froneman J acknowledged this purpose in *Melani*,³²² when he reasoned that the rationale for the exclusion of evidence obtained as a result of an infringement of the right to legal representation is not to be found in its unreliability, but 'to ensure that the accused is treated fairly in the **entire** criminal process'.³²³ Determining whether admission of the evidence would tend to render the trial unfair, the judge added to his reasoning as follows:

In a very real sense these [the right to legal representation and to be informed thereof] are necessary procedural provisions to give effect and protection to the right to remain silent and the right to be protected against self-incrimination.

This passage explains, firstly, that **the nature of the right** violated is an important factor to be considered in the trial fairness assessment; and secondly, the reason why the failure to inform an accused of her right to legal representation impacts negatively on her right against self-incrimination and, inevitably the fairness of the trial. The gist of the judgment in *Melani* is that certain rights contained in the Bill of Rights inherently serve to protect an accused against self-conscription and are, for that reason, worthy of protection. In addition, the judgment points out that conscription inherently impacts negatively on trial fairness.

The admissibility of real evidence under section 35(5) was decided by the Supreme Court of Appeal in *Pillay*.³²⁴ The majority judgment quoted with

³²² Fn 256 above.

³²³ Ibid at at 348-349.

³²⁴ Fn 11 above.

approval from the decisions in *Thompson Newspapers*³²⁵ and *Burlingham*.³²⁶ The Canadian Supreme Court reasoned in these cases (the reasoning of which was endorsed in *Pillay*), that the issue of the impact of unconstitutionally obtained evidence on trial fairness depended not on the nature of the evidence,³²⁷ (real or testimonial) but whether the accused had been conscripted against herself.³²⁸ Thus, in South African context, the prevention of conscription is at the core of the right to a fair trial. Embracing the ***discoverability analysis*** as a further requirement in the fair trial assessment,³²⁹ the majority judgment in *Pillay* was of the opinion that the reasoning of the judges in the mentioned cases were 'apposite to the case at bar'.³³⁰ However, this judgment did not put an end to the quest for the values that the fair trial imperative under section 35(5) seeks to protect. In the recently decided case of *Tandwa*,³³¹ the Supreme Court of Appeal revisited this issue and preferred an approach that allows for the exercise of a

³²⁵ Fn 63 above.

³²⁶ Fn 63 above.

³²⁷ Fn 11 above at par 88, where the majority judgment quoted with approval from *Burlingham* as follows: "However, I find that in jurisprudence subsequent to *Collins*, this court has consistently shied away from the differential treatment of real evidence". The court also found confirmation for this approach in *Colarusso* (1994) 19 CRR (2d) 193 at 216, where La Forest J said the following: " ... where it was noted that the mere fact that impugned evidence is classified as either real or conscriptive should not in and of itself be determinative".

³²⁸ Loc cit. See also *Tandwa* (fn 12 above) at par 125.

³²⁹ Loc cit. The majority judgment quoted with approval from *Thompson Newspapers*, where La Forest J reasoned as follows, explaining what the discoverability analyses entail: "The fact that the evidence already existed means that it could have been discovered anyway. Where this is the case, the accused is not forced to confront any evidence at trial that he would not have been forced to confront if his Charter rights had been respected. In such circumstances, it would exclusion rather than admission of evidence that would bring the administration of justice into disrepute".

³³⁰ Loc cit.

³³¹ Fn 12 above. Judgment was delivered on 28 March 2007.

discretion, in terms whereof the competing societal concerns are to be weighed up to determine trial fairness.³³²

Cameron JA suggested that, based on *Key v Attorney-General, Cape Provincial Division*,³³³ the severity of the rights infringement and the degree of prejudice suffered by the accused should be 'weighed against the public policy interest in bringing criminals to book'.³³⁴ The judge explained that rights violations should be regarded as 'severe' when 'they stem' from police abuse. Conversely, rights infringements should not be regarded as severe, 'and the resulting trial not unfair, if police conduct was objectively reasonable and neither deliberate nor flagrant'.³³⁵ The judge in turn considered the role of the prejudice factor: The prejudice suffered by an accused would be high 'when there is a close causal connection' between the infringement and the 'subsequent self-incriminating acts of the accused'.³³⁶ By necessary implication, when the causal link between the infringement and the conscriptive conduct is remote, the degree of prejudice suffered by the accused would be trivial. Considering the public interest in crime control, Cameron JA pointed out that the admission of real evidence – 'however vital for ascertaining the truth' – obtained as a result of compulsion, or 'as a result of torture, violates the accused's fair trial right at its core'.³³⁷

The approach suggested by Cameron JA is analogous to the *Grant*,³³⁸ *Lawrie v Muir*,³³⁹ and *Bunning*³⁴⁰ analyses of the fair trial requirement. The courts in

³³² Ibid at par 117.

³³³ 1996 4 SA 187 (CC) at par 13, ("Key").

³³⁴ *Tandwa* (fn 12 above) at par 117.

³³⁵ Loc cit.

³³⁶ Loc cit.

³³⁷ Ibid at par 120.

³³⁸ Fn 9 above.

³³⁹ (1950) SC 19 (HCJ), ("Lawrie").

Scotland and Australia follow what is termed the 'intermediate' approach to improperly obtained evidence.³⁴¹ In terms of this approach, the countervailing public interest concerns are balanced in order to determine whether the trial of the accused would be fair. In both Scotland and Australia, exclusion of the disputed evidence hinges closely on the seriousness of the infringement.³⁴² In Scotland, the courts apply a presumption in favour of or against admission of the disputed evidence.³⁴³ The Australian courts determine admissibility without taking any presumptions into account.³⁴⁴ The judge exercises a broad discretion, guided by competing societal concerns. This is not the case in Canada and should likewise not be the case in South Africa. The criteria introduced by Lamer J in *Collins* serve to set out the scope, while it simultaneously functions as a guide to Canadian courts as to how their discretion should be exercised.³⁴⁵ It is

³⁴⁰ Fn 230 above.

³⁴¹ Skeen (fn 257 above) at 393; Zeffertt et al (fn 257 above) at 628

³⁴² In respect of the position in Scotland, see Skeen (*loc cit*), where he sums up the position as follows: "Whether an irregularity ought to be excused depends on the nature of the irregularity, the circumstances under which it was committed and whether it was deliberately committed to obtain the evidence"; for the Australian position, see *Bunning* (fn 230 above) at 78. Stephen and Aicken JJ considered the following factors in *Bunning* to decide the admissibility dispute: whether the infringement was committed deliberately or recklessly; the ease with which the law might have been complied with; the nature of the offence charged; and the interests that the legislature aimed to protect in imposing limits on policing authority.

³⁴³ *Lawrie* (fn 339 above); see also Zeffertt (fn 257 above) at 628.

³⁴⁴ *R v Ireland* (1970) 126 CLR 321 (Aust HC), ("*Ireland*"); *Bunning* (fn 230 above).

³⁴⁵ *Collins* (fn 1 above) at 137; see also *Therens* (fn 55 above) at 654, where Le Dain J described the nature of the section 24(2) discretion in the following terms: "Section 24(2) involves the application of a broad test or standard, which necessarily gives a court some latitude, but that is not, strictly speaking, a discretion. A discretion exists where there is a choice to do one thing or another, not merely because what is the application of a flexible standard. Under the terms of s. 24(2) where a judge concludes that the admission of the evidence would bring the administration of justice into disrepute, he or she has a duty, not a discretion, to exclude the evidence. This

submitted that this criteria should serve a similar function in the interpretation of section 35(5). For this reason and the reasons mentioned elsewhere,³⁴⁶ it is submitted that Cameron JA erred when he relied on *Key* to determine the fair trial prong under section 35(5). Most importantly, the approach adopted in *Collins* indicates that, in order to faithfully give effect to the terms of section 35(5), this provision should be interpreted in a purposive manner. It is further suggested that the approach applied by the *Pillay* court, unlike that employed in *Tandwa*, enhances the goals sought to be protected by the fair trial requirement.³⁴⁷

The *Tandwa* approach suggests that, despite a finding that an infringement compromised fundamental rights aimed the prevention of conscription (that is, the trial fairness test in terms of the *Pillay*), the evidence may nevertheless be admitted on the ground that the prejudice suffered by the accused was marginal and the infringement should therefore not be regarded as serious. This may be the case even in instances where the accused had been conscripted against herself, because the 'good faith' of the police is considered as a relevant factor, even at this stage of the analysis. Furthermore, a consideration of the

distinction is of some importance, of course, with reference to the scope of review of a determination under s. 24(2)".

³⁴⁶ See chapter 6 par A 3.1 and A 3.3 below. The admissibility assessment applied in common law jurisdictions was followed in *Motloutsi* (fn 256 above), *Madiba* (fn 256 above), and *Shongwe* (fn 256 above). In these matters the countervailing public interests were balanced to determine trial fairness. It was correctly held in *Naidoo* (fn 16 above), that since the date that section 35(5) came into effect, the "wide discretion" relied upon in *Motloutsi* should not be applied.

³⁴⁷ Compare *Schwikkard 2* (fn 257 above) at 794. *Schwikkard* suggests that the approach followed in *Lawrie* (fn 339 above) be applied when the courts of South Africa interpret section 35(5). Such an approach is comparable with the approach followed in *Tandwa*. However, compare *Steytler* (fn 257 above) at 36-37, who is of the view that trial fairness should be considered having regard to the listed and unlisted rights contained in section 35(3), as well as the prevention of conscription. This approach of *Steytler* is supported.

'current mood' of society³⁴⁸ at this stage of the analysis is suggestive of the notion that the normative value of fundamental rights aimed at protecting trial fairness concerns should be diluted in order to accommodate crime control interests. In other words, if an infringement did not taint the reliability of the evidence, such as a confession obtained as a result of torture, there would be a strong likelihood that admission of the evidence would not render the trial unfair within the meaning of section 35(5). In the case at bar, the fact that the evidence had been derived from incriminatory conduct arising from torture, saved it from admission. The obtainment of evidence by means of torture is not justifiable to any degree in a democratic society based on human dignity.³⁴⁹ The problem is that the *Tandwa* judgment suggests that, in principle, the infringement of any other fundamental right should be determined by considering the extent of the prejudice caused by the infringement in relation to factors associated with the public interest in crime control. This assessment would inevitably lead to findings that although trial fairness has been impaired – which is, per se, 'detrimental' to the justice system – that the reception of the evidence could nevertheless not be equated with trial unfairness within the meaning of section 35(5).³⁵⁰

The argument that an infringement may lead to a degree of trial unfairness was raised in the Canadian case of *R v Meddoui*,³⁵¹ but rejected. Pottow correctly argues that once it is understood that an infringement 'diminishes' or 'affects'

³⁴⁸ *Tandwa* (fn 12 above) at par 121.

³⁴⁹ See *Mthembu* (fn 256 above) at par 32, where Cachalia JA explained as follows, relying on Article 12 of the Convention Against Torture (ratified by South Africa on 10/12/1998): "The absolute prohibition on the use of torture in both our law and in international law therefore demands that 'any evidence' which is obtained as a result of torture must be excluded 'in any proceedings'."

³⁵⁰ See Van der Merwe (fn 254 above) at 215.

³⁵¹ (1990) 2 CR (4th) 316 at 319, ("*Meddoui*"). See Pottow (fn 136 above) at 43, fn 33.

trial fairness, it 'seems difficult to accept that a free and democratic society will countenance a "somewhat" unfair trial' when a person's freedom is at stake.³⁵² Would the fact that the courts are prepared to shut their eyes to a 'partly' unfair trial caused by constitutional infringements that conscripted an accused against herself, not be harmful to the reputation of the criminal justice system? More importantly, the danger of such an approach is that it may lead to the regular admission of real evidence, despite the fact that the accused had been conscripted against herself.

What factors should be considered within the context of the South African fair trial requirement under section 35(5)?³⁵³ The relevant factors can be summarised as follows: a) the fair trial requirement evidently seeks to protect an accused whose constitutional rights had been violated, from being compelled to participate in the creation of evidence against herself, at the behest of the state.³⁵⁴ In this regard, a conscription analysis must be applied; b) a discoverability analysis should be undertaken to determine whether the evidence could have been discovered in any event by constitutional means;³⁵⁵ c) the nature of the right violated should be taken into account,³⁵⁶ and d) a significant infringement of the right to human dignity could be considered as a factor to

³⁵² Loc cit.

³⁵³ The Supreme Court of Appeal has suggested two conflicting approaches to determine trial fairness. This work follows the approach applied in *Pillay*. See the recommended overall approach, discussed in chapter 6

³⁵⁴ See the minority judgment in *Pillay* (fn 11 above) at par 125. The minority and majority judgments were not in conflict in this regard. Scott JA correctly reasoned as follows: "But implicit in this reasoning is the requirement that the original infringement involves the creation of evidence that would otherwise not have existed, ie an infringement involving self-incrimination". This approach confirms the fact that the primary value that the fair trial requirement seeks to protect is the prevention of conscription. See the majority opinion at par 88.

³⁵⁵ Ibid at par 88.

³⁵⁶ *Melani* (fn 256 above) at 348-349.

determine trial fairness. A consideration of the last factor is based on the reasoning of Ackerman J in *S v Dzukuda; S v Thilo*.³⁵⁷ The judge made the heedful remark that the courts of South Africa should frequently remind themselves that the right to a fair trial should be understood while having due regard to the values sought to be enhanced by the Constitution.³⁵⁸ These values are **human dignity**, freedom and equality.³⁵⁹ In the light hereof, some might be enticed to reason that, similar to the present-day section 24(2) jurisprudence,³⁶⁰ the South African courts should be vigilant in protecting especially the value of human dignity when the trial fairness prong contained in section 35(5) is determined. However, it is **not** suggested that the courts of South Africa should follow Canadian precedent that dictates that in instances of the violation of the right to human dignity that – where the infringement cannot be classified as negligible – admission of the evidence thus obtained would render a trial unfair.³⁶¹

In the premises, the meaning and scope of the right to a fair trial, within the context of section 35(5), serves an analogous purpose as that of its Canadian counterpart.³⁶²

³⁵⁷ 2000 (2) SACR 443 (CC) (“*Dzukuda*”).

³⁵⁸ *Ibid* at par 9-11.

³⁵⁹ Section 1 of the South African Constitution; see also section 36, where these values are reiterated.

³⁶⁰ See *Stillman* (fn 7 above) and *Feeney* (fn 8 above).

³⁶¹ *Ibid*. See Van der Merwe (fn 254 above) at 225-226, who, in another context, holds the view that the courts of SA should not adopt the *Stillman* fair trial directive, because it would “disturb the well-settled distinction between self-incriminating testimonial communications and incriminating non-communicative real evidence” obtained from the body of the accused. He suggests that evidence obtained in this manner should be considered during the second phase of the section 35(5) assessment. See the writer’s recommendation in this regard in chapter 6.

³⁶² See the reasoning of both the majority and minority judgments in *Pillay*.

To summarise, the *Collins* fair trial directive has been embraced by a number of South African courts. It has also emerged that the scope and meaning of the concept 'fair trial', within the context of section 35(5), coincides with the meaning assigned to that concept by the Supreme Court of Canada. This conclusion is confirmed by the combined effect of the judgments of Ackerman J in *Dzukuda*, read with the judgment of Froneman J in *Melani*, as well as the majority and minority opinions in *Pillay*. In a word, the rationale of the *Collins* and *Stillman* fair trial requirements is premised on the protection of the presumption of innocence and the right to remain silent. Based on these key pillars of the right to a fair trial, the prosecution may only deprive the accused of her liberty by proving its case against her without compelling her to testify because she had been forced to create evidence against herself during the pre-trial phase.³⁶³ The *Tandwa* fair trial requirement is likewise concerned with the manner in which the evidence had been obtained. However, in determining trial fairness by balancing competing societal interests tend to lean towards crime control values and some might view this approach as verdict-centred. It would be regarded as verdict-centred because trial fairness is measured based upon whether the verdict is proper or unsafe. This explains why the 'good faith' of the police and the 'current mood' of society are included as factors in the assessment. Such an approach allows for exclusion only when the disputed evidence is unreliable or highly prejudicial.³⁶⁴ By contrast, the approach adopted in *Pillay* is process-centred, since it is focused on the treatment of the accused by government agents, rather than the soundness of the verdict.³⁶⁵

Against this background, the following issue is considered next: Does the common law privilege against self-incrimination enhance the spirit, purport and

³⁶³ Pottow (fn 136 above) at 50; Wiseman (fn 239 above) at 440; Fenton (fn 95 above) at 303.

³⁶⁴ Davies (2000) 29 CR (5th) 225 at 8.

³⁶⁵ Loc cit.

objects of the fair trial directive contained in section 35(5)? If not, should it or has it been adapted?

1.2.3 The conscription analysis: adoption of the principle of the 'absence of pre-trial obligation'

Collins has proclaimed a conscription analysis as one of the factors to be considered when courts have to determine whether admission of the disputed evidence would render a trial unfair. Of paramount importance to this determination is the issue as to whether an accused had been compelled to incriminate herself. *Collins* mentioned the conscription analysis, while also referring to a privilege against self-incrimination. In a number of subsequent decisions it would appear that Canadian courts were under the impression that Lamer J had the common law privilege against self-incrimination in mind when he wrote that real evidence should be treated differently when compared to testimonial evidence. This confusion was not limited to the courts of Canada. It is argued in this work that the South African Supreme Court of Appeal similarly erred in *S v M*.³⁶⁶ It is further contended that the common law privilege against self-incrimination has been developed or adapted by the courts of South Africa, in similar fashion as our Canadian counterparts. In addition, it is maintained that the approach adopted by the Supreme Court of Appeal in *M* is flawed and should for that reason be discarded.

Moseneke DP held in *Thebus and Another v S*³⁶⁷ that the need to develop the common law arises in at least two instances: Firstly, when a rule of the common law is 'inconsistent with a constitutional provision'; and, secondly, even when it is

³⁶⁶ (SCA) fn 19 above. See *Tandwa* (fn 12 above) at par 125, confirming this view.

³⁶⁷ 2003 10 BCLR 1100 (CC) at par 28, ("*Thebus*").

'not inconsistent with the Constitution, but may fall short of its spirit, purport or objects'.³⁶⁸ In such instances the common law must be adapted, with the aim of cultivating it to grow within the 'objective normative value system' established by the Constitution.³⁶⁹

This part of the work considers whether the common law privilege against self-incrimination, within the context of the fair trial requirement contained in section 35(5), has been adapted or developed, firstly by the South African High Court, and secondly the Supreme Court of Appeal.

(a) The Provincial Divisions of the High Court and the adaptation of the common law privilege against self-incrimination as a means to determine trial fairness

Under this heading, judgments delivered in terms of the Interim Constitution are often referred to. This approach is followed for two reasons: Firstly, to demonstrate that the High Courts of South Africa must have appreciated, at an early stage, the fact that the common law privilege is not capable of effectively protecting infringed fundamental rights whenever real evidence is in dispute; and, secondly, that the approach followed in these judgements which are not incompatible with the rationale of section 35(5), should be embraced when this section is construed. It was submitted under C 1.2.2 above that the primary rationale of the fair trial prong contained in section 35(5) is the prevention of

³⁶⁸ Loc cit.

³⁶⁹ Loc cit. However, see *Masiya v Director of Public Prosecutions, Pretoria and Another (Centre for Applied Legal Studies and Another Amici Curiae)* 2007 2 SACR 435 (CC); 2007 5 SA 30, ("*Masiya*"), where it was held that the development of the common law should not offend the principle of legality.

conscriptio. It is further submitted that these judgments seek to enhance comparable values.

S v Yawa and Another,³⁷⁰ a matter decided in terms of sections 73³⁷¹ and 217 of the Criminal Procedure Act, may be construed as an example of the application of the principle of the 'absence of pre-trial obligation', even though it had not been mentioned. Nepgen J developed the interpretation of section 217 so as to ensure that the trial of the accused was not rendered unfair. In so doing, the judge disregarded the doctrine of *stare decisis* when he overruled the authoritative Appellate Division precedent in *S v Mabaso and Another*.³⁷² In *Yawa*, the accused was not informed of his right to legal representation after his arrest. At a later stage the accused made certain pointings-out, the admissibility of which was disputed by the defence on the grounds that the accused was unduly influenced and not informed of his right to legal representation. Nepgen J considered the judgment of Hoexter JA in *Mabaso*,³⁷³ where the latter wrote:³⁷⁴

There is much to be said for the view that a person should be informed of this right [the right to legal representation] immediately upon arrest, and perhaps this is a matter which might enjoy the attention of the Legislature. But to the best of my knowledge it has never been suggested that a failure to so inform an accused may render inadmissible an admission made by an accused to the police; or a pointing-out by him; or a confession made by him to a magistrate.

³⁷⁰ 1994 2 SACR 709 (SE), ("*Yawa*").

³⁷¹ This section provides for the statutory right to legal representation.

³⁷² 1990 3 SA 185 (A), ("*Mabaso*").

³⁷³ *Ibid.*

³⁷⁴ *Ibid* at 209.

Nepgen J considered several subjective factors which probably had an effect on the accused before he made the pointings-out; this, together with the fact that he had not been informed about his statutory right to legal representation, led the judge to conclude that the accused was 'unduly influenced' to make the relevant pointing-out.³⁷⁵ Even though section 35(5) did not form the basis for the decision in this case, it could be read to signify that the compelled participation of the accused in the creation of evidence against herself after a violation of the right to legal representation, had an adverse impact on trial fairness. It is accordingly submitted that Nepgen J applied the principle of the 'absence of pre-trial obligation' (without mentioning it), because he focused on all the circumstances that led to the accused's participation in creating the evidence. Despite the fact that *Mabaso* directs that a failure to inform an accused of her right to legal representation does not authorise South African courts to exclude evidence, Nepgen held that evidence obtained in this manner warrants exclusion.

It is similarly suggested that Van Deventer J applied the principle of the 'absence of pre-trial obligation' in *S v Mhlakaza en Andere*,³⁷⁶ where the disputed evidence was in the form of an identity parade. In this case, the accused objected to the parade being held in the absence of their legal representatives. They were, despite their protestations, compelled to participate in the parade. It is patently evident from the judgment that the court preferred not to apply the common law privilege against self-incrimination, because the reliability of the identity parade was not in dispute.³⁷⁷ In fact, the privilege against self-incrimination was not

³⁷⁵ See the comment by Froneman J in *Melani* (fn 256 above), at 343 on the possible basis for this judgment being police impropriety. If this assumption of Froneman J is correct, then one would not be faulted in concluding that Nepgen J unwittingly applied the doctrine of the "absence of pre-trial obligation".

³⁷⁶ 1996 2 SACR 187 (C), ("*Mhlakaza*").

³⁷⁷ *Ibid* at 197: "Gevolgtlik was dit moontlik om as gevolg daarvan, soos aangevul deur die transkripsies en die getuienis van Luitenant Barkhuizen, enige potensieële geskille uit te skakel

mentioned. Under these circumstances, a strict application of the 'real evidence' distinction would have resulted in the reception of the evidence of the identity parade, because it constitutes real evidence and its flawless reliability characteristics would have outweighed its prejudicial effect.

Further, in terms of the common law privilege against self-incrimination, the participation of the accused in an identity parade would not have been regarded as 'testimonial evidence emanating from him'.³⁷⁸ Nonetheless, the court held that admission of the identity parade evidence would render the trial unfair. The right to a fair trial is ensured by legal representation during the pre-trial phase – in this case, the identity parade.³⁷⁹ It is suggested that a sound principled basis for

ten aansien van die feite-kompleks waarop die beskuldigde se advokate hul besware teen die uitkenningsgetuieenis gebaseer het." Loosely translated by the writer, this means: It was consequently possible to eliminate any factual disputes with regard to which counsel for the accused based their objections in respect of the the identity parade. A ruling on the admissibility of the identity parade could, in other words, be made by considering the court record and the evidence of Lieutenant Barkhuizen.

³⁷⁸ *S v Huma* (1995) 2 SACR 411 (W), ("*Huma*"); *S v Maphumulo* 1996 2 SACR 84 (N), ("*Maphumulo*"), where Combrink J, like Claasen J in *Huma*, quoted *Schwerber v California* with approval. Combrink J held at 89, in respect of the compulsory taking of fingerprints, "... whether it be voluntary given by them, or taken under compulsion in terms of the empowerment thereto, provided in s 37(1), would not constitute evidence given by the accused in the form of testimony emanating from them, and as such would not violate their rights as contained in s 25(2)(c), or 25(3)(d) of the [Interim] Constitution".

³⁷⁹ *Ibid* at 199, where Van Deventer J reasoned as follows: "... aangesien die Hof van mening was dat 'n verdagte in Suid-Afrika tans konstitusioneel geregtig is om aan te dring op regsbystand tydens 'n uitkenningsparade soos voorgeskryf deur reël 5 (*supra*) tensy die Staat die Hof miskien tevrede kan stel dat daar goeie redes was waarom regsbystand nie bekombaar was nie en dat die beskuldigde se regte, meer in besonder sy reg op 'n regverdige verhoor, geensins benadeel kon wees het deur die afwesigheid van 'n regsverteenvoerder nie". Loosely translated, this reads as follows: Since the court is of the view that a suspect in South Africa is presently constitutionally entitled to a right to legal representation at an identity parade as dictated by rule 5 (above) unless the prosecution can possibly satisfy the court that good reasons exist as to why

the exclusion of the evidence of the identity parade would be that the accused has been compelled to participate in the creation of the evidence as a result of the constitutional breach. Therefore, admission of the evidence would tend to render the trial unfair. This principled approach was acknowledged by Van Rensburg J in *S v Hlalikaya and Others*,³⁸⁰ where the judge reasoned as follows:³⁸¹

As I see the situation it [the right to legal representation] only extends to pre-trial procedures where ... the State seeks the co-operation of the accused in order to protect the accused against an infringement of his rights.

The approach of Van Deventer J in *Mhlakaza* coincides with the rationale of the principle of the 'absence of pre-trial obligation' as well as the judicial integrity rationale: Reliable real evidence, obtained in violation of a pre-trial procedural constitutional guarantee, was excluded with the aim of ensuring that the accused is guaranteed a fair trial. It is suggested that the court also indicated that it would not be associated with the unconstitutional conduct of the police by admitting the disputed evidence. In this regard, the exposition of the principle of 'absence of pre-trial obligation', applied by Lamer J,³⁸² adds force to the reasoning of Van Deventer J in *Mhlakaza*, where Lamer J reasoned that an identity parade should not be regarded simply as pre-existing 'real evidence'. Instead, one should consider the purpose of an identity parade and how it could affect the fairness of the trial of an accused: He or she would be confronted with this evidence at the trial and probably has to respond to the evidence created as

a legal representative could not be secured and that the rights of the suspect, more particularly the right to a fair trial, has not been compromised by the absence of a legal representative.

³⁸⁰ 1997 1 SACR 613 (SE), ("*Hlalikaya*").

³⁸¹ *Ibid* at 615.

³⁸² In *Ross* (fn 62 above) at 139.

a result of his or her unconstitutional participation. Lamer J applied a purposive interpretation when he explained the implications of the participation of the accused under these circumstances as follows:³⁸³

But secondly, and most important to the discussion here, the procedure of a line-up is designed to reinforce the credibility of identification evidence. In this sense the object of the line-up is to construct evidence that the accused was picked out from among a similar group of people, by a witness who was not prompted in any way to make that choice, and to settle the memory of the witness for purposes of the trial. When participating in a line-up, the accused is participating in the construction of credible inculcating evidence.

Froneman J added to this articulation of the principle of the 'absence of pre-trial obligation' in *Melani*,³⁸⁴ where the court had to determine whether certain pointings-out made by the accused were admissible.³⁸⁵ In *Melani* three accused

³⁸³ Loc cit.

³⁸⁴ Fn 256 above.

³⁸⁵ It is submitted that Claasen J applied the principle of the 'absence of pre-trial obligation' in *Mathebula* (fn 256 above), holding that the accused's rights to legal representation and the right not to be compelled to make an admission or confession, had been violated. The judge held (ibid at 132) that whenever the State wishes to embark on any pre-trial procedure that seeks the co-operation of the accused, and which could result in an erosion of or encroachment upon her rights, any such procedure would have to be preceded by a repetition of the warning of all his constitutional rights. The judge based this reasoning on the dictum contained in *Melani*, where reference was made to *Ratushny*. See also *Soci* (fn 256 above) at 298, where reference is made to *Ratushny*, and the principle of the 'absence of pre-trial obligation' was applied. It is further suggested that the *Ratushny* principle was applied in *Motloutsi* (fn 256 above) although not explicitly mentioned, because real evidence was discovered as a result of conscription (the right to privacy was infringed). However, compare the reasoning in *Gumede* (fn 256 above), where a Full Bench, in an opinion written by Magid J, while following a literal interpretation of the

were charged with murder, robbery, theft and the unlawful possession of fire-arms and ammunition. The identity of the culprits who allegedly committed the offences, were in dispute. The pointings-out by the accused were essential evidence connecting them to the alleged offences. The admissibility of these pointings-out were contested by the accused on two grounds: firstly, based on the common law, the accused alleged that such pointings-out were involuntarily made; secondly, that a number of the constitutional rights of the accused were violated and that the evidence thus obtained should be excluded. Froneman J considered the admissibility issue firstly in terms of the common law position, unaffected by the Constitution, and ruled the pointings-out made by accused 3 to be inadmissible. The pointings-out made by accuseds 1 and 2 were held to have been freely and voluntarily made and could therefore not be ruled inadmissible on the same grounds. The court thereafter considered whether the pointings-out made by accuseds 1 and 2 constituted violations of any of their constitutional rights guaranteed by sections 25(1)(c), (2)(a), (c), and (3)(d) of the Interim Constitution.³⁸⁶

In the absence of a constitutional exclusionary rule, Froneman J developed an exclusionary *rationale* based primarily on section 24(2) of Canada, in this way embracing the principle of the 'absence of pre-trial obligation' into South African jurisprudence, when he wrote:

The original value served by the exclusion of involuntary admissions and confessions as evidence in a criminal trial was the removal of the potential unreliability of that evidence. Evidence obtained in breach of the fundamental rights embodied in the specific

provisions of the Constitution, held that an accused does not have to be informed of her right to legal representation at every stage of the investigative process. See also *Shaba* (fn 256 above); *Shongwe* (fn 256 above) at 338.

³⁸⁶ See Annexure "A", which contains selected sections of Chapter 3 of the Interim Constitution.

provisions of ss 25(1), 25(2) and 25(3) already referred to, may well lie in preserving the fairness of the criminal justice system as a whole and not only the fairness of the actual trial itself. Insofar as the common law may not have fully recognised this additional basis for the exclusion of improperly obtained evidence, the relevant provisions of s 25 of the Constitution in my view puts the matter beyond doubt (cf *S v Zuma and Others* (*supra* at 586c-588d) (SACR), 658-9 (SA)[paras 30-3]).

Citing³⁸⁷ Ratushny,³⁸⁸ the leading proponent of the principle of the 'absence of pre-trial obligation',³⁸⁹ Froneman J was of the opinion that the rationale for exclusion should be based on the preservation of the fairness of the entire criminal justice system – from the pre-trial phase, including the trial.³⁹⁰ The fairness of the entire criminal justice system is predicated upon recognition of the fact that the accused should be treated fairly. Fairness to the accused during the pre-trial phase, in turn, is ensured by the constitutional guarantee of the right to legal representation, because '[t]he right to consult with a legal practitioner during the pre-trial procedure and especially the right to be informed

³⁸⁷ Fn 256 above at 348-349.

³⁸⁸ Beaudoin and Ratushny (fn 23 above) at 462; see also the following cases where Ratushny was cited with approval: *Sebejan* (fn 256 above) at par 52; *Mathebula* (fn 256 above) at 131.

³⁸⁹ According to Paccioco 1989 (fn 23 above) at 75.

³⁹⁰ This argument is based on the view held by Beaudoin and Ratushny (fn 23 above) at 462. Froneman J elaborated as follows: "The purpose of the right to remain silent and its corollary to be informed of that right (embodied in s 25(1)(c)) is thus to protect the right to remain silent ... Sections 25(2) and 25(3) of the Constitution make it abundantly clear that this protection exists from the inception of the criminal process, that is on arrest, until its culmination up to and during the trial itself. This protection has nothing to do with a need to ensure the reliability of the evidence adduced at the trial. It has everything to do with the need to ensure that an accused is treated fairly in the *entire* criminal process: in the 'gatehouses' of the criminal justice system (that is the interrogation process), as well as in its 'mansions' (the trial court) (see Beaudoin and Ratushny at 462". (Emphasis in original).

of this right', is intimately linked to the 'presumption of innocence, the right of silence and the proscription of compelled confessions'.³⁹¹ Froneman J proceeded with his reasoning by emphasising that the purpose of the right to legal representation during the pre-trial phase has nothing to do with the 'need to ensure that the evidence adduced at trial is reliable', but serves to 'protect the right to remain silent, the right not to incriminate oneself and the right to be presumed innocent until proven guilty'.³⁹² To be concise: besides ensuring that the accused is not compelled to participate in the construction of evidence against herself, the right to legal representation furthermore serves to guarantee that she is treated fairly during the entire criminal process.

Put in a different way: The right to legal representation ensures that the constitutional rights of the accused are not violated during the pre-trial phase, thus preventing her to participate in the creation of any evidence against herself – the prosecution should prove the guilt of the accused without her unconstitutional participation in the creation or procurement of such evidence. For that reason, when the evidence is the product of a pre-trial obligation 'impose[d] upon the accused by the State',³⁹³ the evidence should be susceptible for exclusion.

In *Naidoo*,³⁹⁴ McCall J referred with approval to *Melani*, holding that the violation jeopardised the 'right against self-incrimination'.³⁹⁵ It has been noted above that the common law privilege against self-incrimination is limited in its scope to the exclusion of **testimonial** evidence obtained as a result of **compulsion**. However, the conversations in the relevant case were not the product of

³⁹¹ Ibid at 347.

³⁹² Ibid at 348.

³⁹³ Paccioco 1989 (fn 23 above) at 77.

³⁹⁴ Fn 16 above.

³⁹⁵ Ibid at 527.

compulsion, in the sense required by the common law. The telephone calls of the accused were intercepted by the police without the knowledge of the accused. By referring to 'the right against self-incrimination' McCall J could therefore not have purported to refer to the common law privilege against self-incrimination, because he held that³⁹⁶

To admit evidence provided by an accused person against himself without his knowledge as a result of the unlawful monitoring of his conversation with someone else would offend against the notions of basic fairness in no less a measure as than the admission of evidence of a confession or admission made by an accused person without having been informed of his right to legal representation, which has been held to result in an unfair trial in, for example, *S v Melani and Others* (*supra*) and *S v Marx and Another* 1996 2 SACR 140 (W).

It is submitted that the judge, by referring to *Melani* and the 'notions of basic fairness', as the basis for arriving at the conclusion that admission of the disputed evidence would render the trial unfair, is indicative of the fact that he had in mind the principle of the 'absence of pre-trial obligation'. The court in effect reasoned that the evidence had been obtained as a result of a serious pre-trial impropriety³⁹⁷ (the right to privacy was violated), perpetrated by the police in the evidence gathering process, which caused the accused to produce the disputed evidence. The evidence was excluded on the basis that admission would render the trial unfair.³⁹⁸ McCall J arrived at this conclusion by equating the unlawful monitoring of the telephone conversations with the reception of

³⁹⁶ Loc cit.

³⁹⁷ It is submitted that this factor is not applicable at this phase of the assessment, but during the next phase, discussed in Chapter 5 of this work.

³⁹⁸ Fn 16 above at 527.

confessions or admissions in the shadow of a violation of the right to legal representation. A similar approach was adopted by the trial judge (but not in the Supreme Court) in *Mellenthin*.³⁹⁹ It is suggested that the conclusion reached in *Naidoo* was incorrect. The evidence was indeed obtained after a violation of the constitutional right to privacy. The accused were therefore conscripted against themselves.⁴⁰⁰ However, the court failed to, in addition, apply a discoverability analysis.

(b) The Supreme Court of Appeal and the adaptation of the common law privilege against self-incrimination as a means to determine trial fairness

The facts in the decision of *M*⁴⁰¹ is discussed under C 1.2.1 above. Heher AJA⁴⁰² had to consider whether the trial of the appellant complied with the 'notions of basic fairness', contained in section 35 of the Constitution. The Natal Provincial Division of the High Court had held that a letter written by the accused to a potential defence witness cannot be classified as real evidence.⁴⁰³ The Supreme Court of Appeal disagreed, holding that the letter constitutes real evidence.⁴⁰⁴

Heher AJA held that the disputed evidence did not 'conscript the accused against himself', because the letter 'predated the threat and owed nothing to it'.⁴⁰⁵ The point was made earlier that this approach is an example of the misconceived interpretation of the dictum of Lamer CJ in *Collins*. Heher AJA determined the

³⁹⁹ Fn 51 above.

⁴⁰⁰ See Part B 1 above for a discussion of the conscription analysis.

⁴⁰¹ (SCA) fn 19 above.

⁴⁰² Harms and Brand JJA concurring.

⁴⁰³ *M* (SCA) fn 19 above.

⁴⁰⁴ *Ibid* at par 31.

⁴⁰⁵ *Loc cit*.

trial fairness requirement based on the real evidence divide – thus erring as did a number of Canadian courts⁴⁰⁶ by assessing the trial fairness directive without having due regard to the purpose the exclusionary rule was designed to serve: the exclusion of unconstitutionally obtained evidence if it ***had been obtained in a manner that violated a constitutional right***. The manner in which the evidence had been obtained should therefore be a key consideration. In the result, the nature of the evidence determined its admissibility, while disregarding ‘whether it was obtained through a process of unfair self-incrimination’.⁴⁰⁷ Concluding the trial fairness directive, the court held that despite the fact that the letter had been ‘improperly obtained’, its admission did not impact negatively on the trial of the appellant. The reason for this finding is that it had been unfairly obtained from a third party.⁴⁰⁸ The effect of such an interpretation unduly limits the scope of the protection of fundamental rights, and should be discarded. It was argued in chapter three that section 35(5) aims to prevent the ***admission*** of unconstitutionally obtained evidence, regardless whether the rights of an innocent third party or that of the accused had been violated. The impact that this narrow interpretation, proclaimed by the Supreme Court of Appeal in *M*, might have on the repute of the justice system was demonstrated in chapter three and merits brief repetition: By limiting the scope of the protection guaranteed by section 35(5) to instances when the rights of the accused had been violated, the courts of South Africa would indirectly encourage the police to infringe the rights of the innocent in order to convict the ‘guilty’. To

⁴⁰⁶ See Roach (fn 129 above) at 623; Roach 1 (fn 129 above). He notes that a number of Canadian appeal courts distinguished between real evidence and testimonial evidence (despite the dictum of Lamer J in *Ross*), holding that the admission of real evidence would not ‘readily’ render a trial unfair.

⁴⁰⁷ Roach (fn 27 above) at 10-47, par 10.1040.

⁴⁰⁸ (SCA) fn 19 above at par 31f-g; compare *S v Hena and Another* 2006 2 SACR 33 at 40, (“*Hena*”), where Plasket J, expounding section 12(1)(c) of the Constitution correctly held that it binds both the State and private persons.

allow the means to justify the end would inevitably be indicative of a judiciary that is amenable to condone unconstitutional police conduct. The correctness of this view held by the writer was confirmed by the Supreme Court of Appeal in the recently reported case of *Mthembu*.⁴⁰⁹

It was argued by the prosecution in *Pillay*, that the common law distinction between real evidence and testimonial evidence should be maintained when section 35(5) is interpreted.⁴¹⁰ This case is the sequel to the *Naidoo* case.⁴¹¹ For the reason that this case is important in the South African section 35(5) jurisprudence, it warrants detailed discussion. SBV Services in Durban was robbed by a group of seven people of a sum of R31 million. The perpetrators used mobile phones during the course of the execution of the robbery. Armed with this information, the police approached the cell phone providers, who gave them information about the users of the mobile phones in the area where and when the robbery was committed. The police monitored the telephone lines of the suspects in terms of section 2 of the Interception and Monitoring Prohibition Act⁴¹² after having obtained an order granting them permission to monitor the telephone calls. However, the order was illegally obtained, because the founding affidavit submitted to a judge in chambers contained false information. It was therefore common cause that the monitoring was, for this reason, illegal and violated the right to privacy of the suspects.

As a result of the monitoring of the telephone conversations of the suspects, the police knew that some of the money robbed from SBV was kept in the house of the accused. The police had reason to believe that the money was about to be removed from the house of the accused and that any delay on their part to seize

⁴⁰⁹ Fn 256 above. Judgment was delivered on 10 April 2008.

⁴¹⁰ Fn 11 above at par 88.

⁴¹¹ Fn 16 above.

⁴¹² Act 127 of 1992.

it, would defeat the purpose of their search. They also suspected that the firearms used in the execution of the robbery might be on the premises. On the night in question, some 12 members of the SAPS, without warning, and without a search warrant, broke down the front door of the accused and entered.

The members of the police told the accused that she would not be prosecuted if she co-operated with them. This prompted her to tell the police that the money was hidden in the ceiling. The police recovered the sum of five million rand.

The Deputy Attorney-General and the legal representatives of the accused reached an agreement that the accused or one of her family members would be called to testify as state witnesses against Naidoo and his co-accused.⁴¹³ In return, neither the accused nor any of her family members would be prosecuted. However, neither the accused, nor a family member was called as state witnesses in the Naidoo trial. This was the case, because the *Naidoo* court held that the evidence of the illegal monitoring of conversations was inadmissible. As a result, the prosecution could not prove the guilt of the Naidoos, even in the event that the accused or her family members were called as state witnesses in that trial. The prosecuting authority therefore decided to prosecute the accused in the present trial and proved its case in the court *a quo* by relying on section 218(1) of the Criminal Procedure Act, showing that the real evidence (the money) was discovered in the ceiling of the accused.

On appeal, the defence contended that the court *a quo* erred by admitting the evidence of the discovery of the money, because of: a) the breach of the undertaking not to prosecute; b) the 'inadmissible confession' made by the accused about the location of the money. In deciding the latter issue, the judges

⁴¹³ The full citation of the reported case in which she and a family member had to testify against Naidoo appears at fn 16 above.

writing the majority opinion and the judge writing the dissenting opinion, considered the provisions of section 35(5) of the Constitution.

The first factor considered by the court was a determination whether the admission of the evidence would render the trial unfair. Counsel for the prosecution, relying on *Collins*, contended that the discovery of the money did not render the trial unfair, because it was real evidence that existed independently from the violation of the accused's constitutional rights.⁴¹⁴ This contention was not followed, in view of the fact that the majority opinion held that 'the Canadian Supreme Court has since moved away from such an approach'.⁴¹⁵

Considering whether admission of the evidence would render the trial unfair, the court answered this issue in the negative,⁴¹⁶ but it should be emphasised that such ruling was not based on the fact that the evidence was 'real evidence'. The majority opinion arrived at their conclusion by relying on *Burlingham*,⁴¹⁷ where Iacobucci J articulated the conscription analyses under section 24(2) as not being dependent 'on its nature as real or testimonial', but rather on 'whether or not it would only have been found with the **compelled assistance of the accused**'.⁴¹⁸ Unlike the common law privilege against self-incrimination, where the nature of the evidence, 'real' or testimonial, is the focal point of the

⁴¹⁴ Ibid at par 88. Counsel acting for the prosecution relied primarily on the following passage of the judgment delivered by Lamer J: "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". In addition, counsel based his contention on *R v Jacoy* (fn 63 above) and a passage in *Thompson Newspapers* (fn 63 above).

⁴¹⁵ Ibid at par 88; see also *Tandwa* (fn 12 above) at par 124-125.

⁴¹⁶ Ibid at par 90.

⁴¹⁷ Ibid at paras 88-89.

⁴¹⁸ Ibid at par 88. Emphasis added.

assessment, the Supreme Court of Appeal embraced – in its stead – the principle of the ‘absence of pre-trial obligation’. This approach confirms the primary purpose that the fair trial directive seeks to achieve: the prevention of conscription. The trial of an accused would in general be rendered unfair in the event that she has to confront evidence in court, created by her compelled participation, which evidence she would not have had to face had her rights not been violated.⁴¹⁹

It is suggested that the *Pillay* court, by necessary implication, was alive to the fact that the common law privilege against self-incrimination is not sufficiently geared to protect fundamental rights. By contrast, the majority opinion opted for a purposive interpretation of the right to a fair trial by seeking the goals this right seeks to achieve. Another implication of the adoption of the principle of the ‘absence of pre-trial obligation’, is that the differential treatment of real evidence – as opposed to testimonial evidence – has finally come to an end. However, the nature of the evidence should still be considered, with the aim of determining whether it could be classified as ‘conscriptive’ or ‘non-conscriptive’.⁴²⁰ Key to such a determination is the manner in which the evidence had been obtained.

To summarise, the primary purpose of section 35(5) is to safeguard the procedural rights guaranteed to an accused to ensure trial fairness concerns. The common law privilege against self-incrimination serves the exclusive purpose of the prevention of **testimonial** compulsion. The scope of application of the common law privilege falls short of effectively protecting the fair trial rights of an accused, especially in instances where the admissibility of real evidence is in dispute. Based on the dictum in *Thebus*,⁴²¹ the common law privilege against

⁴¹⁹ This reasoning was followed by the majority opinion, relying on *Thompson Newspapers* (at par 88 of *Pillay*).

⁴²⁰ Fn 12 above at par 125.

⁴²¹ Fn 367 above.

self-incrimination – within the limited context of the section 35(5) fair trial requirement – does not adequately complement the spirit, purport and objects of the Bill of Rights.

The common law privilege falls short of effectively protecting an accused whose guaranteed rights have been violated when real evidence was discovered as a result. In this regard, it is suggested that the common law privilege fails to satisfactorily protect the fair trial right of an accused, guaranteed under section 35(5), since its protection is limited by the nature of the evidence obtained as a result of a constitutional violation. This preferential treatment of real evidence could encourage the violation of constitutional rights when police officers are aware that physical evidence had been used to perpetrate an offence. Surely, the latter result would militate against the spirit, purport and objects of the Bill of Rights? In the light hereof, the opinion of the majority judgment in *Pillay*, discarding the real evidence distinction from a determination of the fair trial directive, should be welcomed. The *Pillay* judgment has, in effect, adapted the common law privilege against self-incrimination, within the context of section 35(5).

However, the approach adopted by the Supreme Court of Appeal in *Tandwa* to determine trial fairness is in conflict with the approach followed in *Pillay*. This inconsistency should be resolved by the Constitutional Court rather sooner than later.

The *Collins* fair trial assessment calls for a discoverability analysis to determine whether admission of the disputed evidence would render the trial unfair. The doctrine of discoverability is discussed next.

2. Discoverability analysis as a means to determine trial fairness under section 35(5)

The High Court of South Africa applied the doctrine of discoverability in a number of cases.⁴²² In *Naidoo*, inculpatory real evidence was obtained in an unconstitutional manner. The court reasoned that admission of the evidence would render the trial unfair, since the accused created the evidence – for the benefit of the prosecution – in circumstances under which it would not otherwise have been lawfully discoverable.⁴²³ In *Soci*, the police failed to inform the accused of his right to legal representation before he made the pointing-out, but was informed accordingly by the magistrate who took the confession. Considering whether the violation would have a negative impact on trial fairness, the court reasoned that the accused would be prejudiced if there was a causal connection between the violation and the discoverability of the evidence.⁴²⁴ As such a connection existed, the evidence of the pointing-out had an adverse effect on the fairness of the trial and the evidence was accordingly excluded.⁴²⁵ Since a causal connection between the violation and the confession was absent, admission thereof would impact negatively on trial fairness. The confession was therefore admitted.⁴²⁶ The primary reason why the pointing-out was excluded was because the prosecution should not be seen to benefit from unlawful police conduct. A discoverability analysis has resulted in the parties being restored to the position they were in immediately before the violation.

⁴²² See, for example, *Naidoo* (fn 16 above); *Soci* (fn 256 above); *Mphala* (fn 256 above); *Mfene* (fn 256 above); *Pillay* (fn 11 above); *Tandwa* (fn 12 above).

⁴²³ *Naidoo* (ibid) at 90-91.

⁴²⁴ Fn 256 above at 392.

⁴²⁵ Ibid at 395.

⁴²⁶ Ibid at 294; see also *Tandwa* (fn 12 above), where the Supreme Court of Appeal followed a similar approach.

The Supreme Court of Appeal has adopted a discoverability analysis as part of the fair trial assessment under section 35(5).⁴²⁷ The majority judgment in *Pillay* endorsed the approach followed in *Burlingham*.⁴²⁸ Applying the doctrine of discoverability to the facts of the case, the majority judgment held that the information gathered as a result of the illegal monitoring, did not constitute 'conscriptive' evidence;⁴²⁹ and the money would have been discovered by the police in the ceiling, even in the absence of a violation of the constitutional rights of the accused.⁴³⁰ In the light hereof, the prosecution either successfully demonstrated or the judges writing the majority judgment understood that the money would probably have been discovered because the police would have searched the house, even without a warrant. Furthermore, photographs which were handed in as exhibits clearly depicted that the bags containing the money could be seen immediately upon opening the trap door of the ceiling.⁴³¹ To come to the point, the majority decision held that the money would have been discovered in a lawful manner.⁴³² In the result, it was held that admission of the evidence would not render the trial unfair.⁴³³ It should be emphasised that the

⁴²⁷ *Pillay* (fn 11 above), at par 89; see also *Hena* (fn 408 above) at 42, where Plasket J applied a discoverability analysis during the **second phase** of the analysis, thus demonstrating the seriousness of the infringement as follows: "Finally, there was no evidence on record on which it could be concluded that the evidence of Lucas would have been discovered in any event".

⁴²⁸ Fn 51 above.

⁴²⁹ Fn 11 above at par 89.

⁴³⁰ *Ibid* at paras 89-90.

⁴³¹ *Ibid* par 90. Compare *Schwikkard 2* (fn 257 above) at 794.

⁴³² The majority judgment did not expand on this hypothetical or factual finding. However, section 22 of the Criminal Procedure Act provides that a police officer is authorised to search any person, container or premises without a warrant if the officer, on reasonable grounds believes that a search warrant would be issued if he or she applied for one, but the delay in obtaining it would defeat the object of the search. This could be one of the reasons for such a finding. Yet, should this be the case, the important issue would have been whether the police had "reasonable grounds". Compare Naude (2008) 2 *SACJ* 168 at 175-179.

⁴³³ Fn 11 above at par 90.

majority opinion did not rule that admission of the evidence would not render the trial unfair because of the nature of the evidence – their ruling⁴³⁴ was premised on the fact that the real evidence would inevitably have been discovered.⁴³⁵ Put in another way, and to paraphrase the dictum in *Feeney*, the illegal monitoring and the confessional conduct of the accused was held as not constituting the '**necessary**' cause for the discovery of the money. Adhering to the approach in the Canadian case of *Mellenthin*, the court inquired whether the evidence would have been discovered 'but for' the violation. Adding to the *Mellenthin* approach, the court also determined whether the evidence would have been discovered in the absence of the violation.⁴³⁶

Scott JA, writing the dissenting minority judgment in *Pillay*, warned that a rigid application of the discoverability doctrine might lead to astonishing consequences. He mentions the often-quoted example that a murderer might have to be acquitted because evidence of the discovery of a concealed corpse (real evidence) would render the trial unfair in the event that the accused made a self-incriminating statement as a result of a violation of her rights.⁴³⁷ What is important is the fact that Scott JA, echoing the opinion of the writers of the majority judgment, held that the discovery of the money did not render the trial unfair. He arrived at this conclusion because 'it is difficult to see how real evidence having an independent existence can **ever** be said to render a trial unfair',⁴³⁸ unless it exists as a result of compulsion or it is derived from a violation of a right contained in the Bill of Rights that leads to self-incriminatory evidence that would not otherwise have come to light.

⁴³⁴ Compare *Black* (fn 50 above), where the same result was achieved, based on the principle of the 'absence of pre-trial obligation'.

⁴³⁵ *Pillay* (fn 11 above) at par 90.

⁴³⁶ Loc cit.

⁴³⁷ Fn 11 above at par 124.

⁴³⁸ *Ibid* at par 125. Emphasis added.

It is submitted that the afore-mentioned reasoning of Scott JA is tantamount to an endorsement of the principle of the 'absence of pre-trial obligation' into the South African section 35(5) jurisprudence: The judge is of the opinion that real evidence discovered as a result of compulsion, that would not otherwise have been discovered, would render the trial unfair. Applying the said principle in the matter before court, Scott JA concluded that the real evidence would inevitable have been discovered, with the result that the trial fairness directive had not been adversely affected. This view is supported.

The third *Collins* factor to be considered to assess the trial fairness requirement, is 'the nature of the right' infringed.

3. The nature of the right violated

Under this heading, the rights to legal representation and privacy are discussed, because these rights have regularly been the subject of section 35(5) challenges. The right to legal representation is discussed first, followed by the right to freedom and security of the person. The discussion of the individual rights is not comprehensive, since the primary aim of this work is to explore the structure of the section 35(5) fair trial framework.

3.1 The right to legal representation

The right to legal representation is contained in section 73⁴³⁹ of the Criminal Procedure Act and sections 35(2)(b),⁴⁴⁰ (c), 35(3)(f) and (g)⁴⁴¹ of the South African Constitution. This discussion does not deal with the right to legal representation at state expense⁴⁴² and during the trial phase.⁴⁴³ For the reason that conflicting views have been expressed by the different jurisdictions of the High Court in regard to the scope of the right to legal representation at identity parades, this issue forms the central part of this section of the work.

The nature of the right infringed has been identified in *Collins* as an important factor in the determination of the fair trial requirement.⁴⁴⁴ The fairness of most criminal trials becomes suspect whenever the right to legal representation has been violated. This does not mean that trial fairness may not adversely be affected when any of the other guaranteed right was violated. Rather, a

⁴³⁹ The relevant part of section 73 reads as follows: "(1) An accused who has been arrested ... shall ... be entitled to the assistance of his legal adviser as from the time of his arrest".

⁴⁴⁰ Section 35(2)(b) and (c) provides as follows: "(2) Everyone who is detained, including every sentenced prisoner, has the right – (a) to choose, and to consult with, a legal practitioner, and to be informed of this right promptly; (c) to have a legal practitioner assigned to the detained person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly".

⁴⁴¹ Section 35(3)(f) and (g) provides as follows: "(3) Every accused person has a right to a fair trial, which includes the right – (f) to choose, and to be represented by, a legal practitioner, and to be informed of this right promptly; (g) to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly".

⁴⁴² For a discussion of this aspect of the right, see *S v Vermaas* 1995 3 SA 292 (CC), ("*Vermaas*").

⁴⁴³ See Steytler *The Undefended Accused Before Court* (1988); Kriegler (fn 258 above) at 176-177; De Jager et al (fn 258 above) at 11-2C to 11-14A; also 18-7 to 20-8; and 22-9 to 22-28C.

⁴⁴⁴ Fn 1 above at par 37, where Lamer J reasoned as follows: "It is clear to me that the factors relevant to this determination will include the ... nature of the right ...".

purposive approach, bearing in mind the goals that the fair trial directive seeks to achieve, should be determinative in such an assessment.⁴⁴⁵

The fact that an accused is entitled to a fair trial suggests that she be represented by a legal representative when she faces serious charges.⁴⁴⁶ The right to legal representation has been described as a fundamental right that could be construed as virtually an absolute right.⁴⁴⁷ The right to legal representation is important, because its purpose is to prevent an accused from being conscripted against herself. A violation of the right to legal representation impacts negatively on a cluster of rights, collectively aimed at the prevention of conscription: the right to remain silent, the privilege against self-incrimination, as well as the presumption of innocence.⁴⁴⁸ Froneman J,⁴⁴⁹ in search of the purpose and meaning of the right to legal representation in South African context, was of the opinion that a failure to inform an 'accused of his right to consult with a legal adviser during the pre-trial stage' is tantamount to denying 'especially the uneducated, the unsophisticated and the poor, of the protection of their right to

⁴⁴⁵ See *Fose* (320 above) per Kriegler J at par 197, where a purposive approach was suggested when the court had to determine the meaning of "appropriate relief". The judge suggested the following: "Once the object of the relief in section 7(4)(a) has been determined, the meaning of 'appropriate relief' follows as a matter of course"; see also *Melani* (fn 256 above) at 347; Roach (fn 27 above) at 10-60.

⁴⁴⁶ *S v Ngwenya* 1998 2 SACR 503 (W) at 507, ("*Ngwenya*").

⁴⁴⁷ Per Kruger and Cillie JJ in *Pitso* (fn 256 above) at par 20, where the court said the following: "Die reg op regsverteenvoordiging is 'n fundamentele reg. Na my mening is dit die reg wat die naaste aan 'n absolute reg is in die Handves van Menseregte." My translation of this dictum is the following: The right to legal representation is a fundamental right. In my opinion, it is a right contained in the Bill of Rights that is the closest to an absolute right. In *S v Du Preez* 1991 2 SACR 372 (Ck), ("*Du Preez*"), decided before the constitutional era, it was held that a denial of the right to legal representation was tantamount to an abuse of power.

⁴⁴⁸ Per Froneman J in *Melani* (fn 256 above) at 347.

⁴⁴⁹ Loc cit.

remain silent and not to incriminate themselves'.⁴⁵⁰ In the light hereof, the judge concluded that violations that result in an accused 'being conscripted against himself' would 'strike at one of the fundamental tenets of the right to a fair trial, the right against self-incrimination'.⁴⁵¹ Furthermore, an accused should be afforded a reasonable opportunity to obtain legal representation, otherwise the right would be meaningless.⁴⁵²

Does the scope of the right to legal representation extend to identity parades? This issue was answered in the affirmative in *Mathebula*,⁴⁵³ and *S v Mhlakaza*.⁴⁵⁴ Furthermore, in *S v Hlalikaya and Others*,⁴⁵⁵ the court mentioned that the right to legal representation extends to pre-trial procedures where the prosecution

⁴⁵⁰ To demonstrate the seriousness of a violation of the right to legal representation, it is argued in chapter 5 that the infringement of more than one fundamental right only adds to the seriousness of the violation. In cases where the right to legal representation has been violated, it necessarily impacts on a cluster of associated rights.

⁴⁵¹ *Ibid* at 352.

⁴⁵² See section 73(2B) of the Criminal Procedure Act; see also *Tsotsetsi* (fn 256 above); *S v Radebe*; *S v Mbonani* 1998 1 SA 191 (T), ("*Radebe*") a matter decided before the constitutional era, where it was held that a presiding officer should allow an accused a reasonable opportunity to obtain legal representation, and should actually encourage her to appoint one when the charge against her is of a serious nature. Compare *S v Vumase* 2000 2 SACR 579 (W), ("*Vamuse*"), where a Full Bench held that a police officer is not duty-bound to encourage an accused to exercise the right to legal representation when affecting an arrest. This, it was said, should be the case, because the police and the accused are in an adversarial relationship: the rules of fairness differ; see also *S v Ngwenya* 1998 2 SACR 503 (W), ("*Ngwenya*") at 506, where it was held as follows: "... it was not the duty of the State to guard him [accused] against the exercise of his own volition".

⁴⁵³ Fn 256 above. This case was decided in terms of the Interim Constitution, but it is submitted that the rationale applied is applicable to the interpretation of section 35(5).

⁴⁵⁴ Fn 376 above. This case was also decided in terms of the Interim Constitution, but it is submitted that it is likewise applicable to the interpretation of section 35(5).

⁴⁵⁵ Fn 380 above. This case preceded section 35(5).

seeks 'the co-operation of the accused in order to protect the accused against an infringement'. To state the obvious, an identification parade meets the criteria of such a pre-trial procedure.⁴⁵⁶

In contrast to these decisions, Borchers J reasoned in *Monyane*,⁴⁵⁷ that a legal representative can only, in the interests of the accused, make suggestions about the line-up procedure;⁴⁵⁸ and that the police officer in charge of an identity parade has a duty to ensure that the line-up proceedings is fair.⁴⁵⁹ This argument cannot be accepted for two reasons: Firstly, lack of legal representation at an identity parade may impact negatively on the right of the accused to meaningfully cross-examine the witnesses testifying against her.⁴⁶⁰

⁴⁵⁶ *Ross* (fn 62 above); *Feeney* (fn 8 above); *Stillman* (fn 7 above).

⁴⁵⁷ Fn 256 above; see also *S v Langa and Others* 1998 1 SACR 21 (T), ("*Langa*"), where it was held that an accused is not entitled to legal representation when she has not been "detained"; *S v Hena* 2006 2 SACR 33 (SE), ("*Hena*"); *S v Zwayi* 1997 2 SACR 772 (CKH), ("*Zwayi*"), where it was held that an accused is not entitled to the right to legal representation at a photographic identity parade; *S v Vumase* (fn 452 above) where it was held that a police officer has a duty to inform an accused of the right to legal representation, but does not have to encourage the accused to appoint one; *Ngwenya* (fn 452 above), where Leveson J held that the right to legal representation does not extend to pre-trial procedures like the participation of the accused in an identity parade. In essence, it was held that the concept "fair trial" does not extend to pre-trial proceedings; *Shaba* (fn 256 above), where it was held that an accused is not entitled to be informed of the right to legal representation at every pre-trial step when incriminating evidence might be obtained against her; compare *Marx* (fn 256 above).

⁴⁵⁸ Fn 256 above at 131.

⁴⁵⁹ *Loc cit*.

⁴⁶⁰ *United States v Wade* (1967) 338 US 218 at 1157, ("*Wade*"). Van der Merwe 2 (fn 257 above) at 131, echoes this view. This argument was specifically rejected in *Monyane*. The court held that the officer in charge has a duty to ensure that the proceedings are fair, thereby intimating that legal representation is not necessary at an identity parade.

Secondly, it ignores the accurate observation made by the full bench in *Vamuse*⁴⁶¹ to the effect that, unlike a judicial officer who acts as an umpire to ensure the fairness of proceedings, 'the police are in an adversarial position *vis-à-vis* an accused and as such the rules of fairness differ'.⁴⁶² It is submitted that the reasoning of Tebutt J in *Park-Ross v Director: Office for Serious Economic Offences*,⁴⁶³ should extend to identity parades. In *Park-Ross*, section 6 of the Serious Economic Offences⁴⁶⁴ was held to be unconstitutional, because it empowered the Director of the Office for Serious Economic Offences to issue warrants. The gist of the reasoning was that the Director could not be perceived as an impartial umpire. In light of the remark made in *Vamuse*, the same can be said of a police official in charge of an identity parade. Therefore, in order to ensure that an identity parade is performed in compliance with those 'notions of basic fairness' that informs the right to a fair trial,⁴⁶⁵ it is desirable that an accused should be entitled to rely on the right to legal representation at identity parades.

The belief that police officers take on the role as impartial umpires at identity parades is a risky assumption.⁴⁶⁶ Santoro asserts that it is 'neither practical, nor realistic to expect the police to take notes that are sufficient to allow proper assessment' by presiding officers.⁴⁶⁷ He argues that there is strong evidence indicating that police officers are unwilling to, for instance, 'capture defects' in a

⁴⁶¹ Fn 452 above.

⁴⁶² *Ibid* at 581.

⁴⁶³ 1995 2 BCLR 198 (C), ("*Park-Ross*").

⁴⁶⁴ Act 117 of 1991.

⁴⁶⁵ *Zuma* (fn 13 above).

⁴⁶⁶ Santoro (2007) 52 *CLQ* 190 at 196 and 202. Although his argument relates to photo identity parades, it is submitted that this argument is also applicable to line-up identity parades.

⁴⁶⁷ *Ibid* at 196.

witness identification of a suspect 'thought to be guilty'.⁴⁶⁸ Added to this, he continues, are attitudinal obstacles, like 'tunnel vision'⁴⁶⁹ or 'noble cause corruption'⁴⁷⁰ that increases the unreliability of police note-taking.⁴⁷¹

The *Monyane* judgment could be read to postulate that, on the facts, the prosecution had shown that the discovery of the evidence (a positive identification of the accused at the parade) was 'inevitable.' In other words, the 'real' evidence would have been discovered even if the accused had exercised his right to legal representation, because a legal representative may only make suggestions at such proceedings. A consideration of this factor would have been an important issue under the trial fairness directive. However, the court reasoned that the evidence of an identity parade constitutes 'real' evidence – as opposed to testimonial evidence.⁴⁷² The judge continued by asserting that the common law privilege against self-incrimination⁴⁷³ does not extend to identification

⁴⁶⁸ Ibid at 201.

⁴⁶⁹ This is defined as follows by the Morin Commission, Toronto: Ministry of the Attorney-General of Ontario, (1998), at 1211, as "the single minded and overly narrow focus on an investigation or prosecutorial theory so as to unreasonably colour the evaluation of information received and one's conduct in response to the information".

⁴⁷⁰ Citing MacFarlane, QC (2006) 31 *Man LJ* 403, at 441, he explains that this is the case when the police "believe that it is justifiable to fabricate or artificially improve evidence, or in some other fashion bend the rules to secure the conviction of someone they are satisfied is guilty".

⁴⁷¹ Fn 466 above at 203. He mentions that MacFarlane adds (loc cit) that "this philosophy **affects** police services all over the world and has the capacity to **infect** virtually any criminal investigation". (Emphasis in original).

⁴⁷² Fn 256 above at 130.

⁴⁷³ The court relied on *Matemba* (fn 261 above) at 82, where the admissibility of a palm print was in dispute. The Appellate Division argued that when a palm print is being taken, the accused is "entirely passive", and not "being compelled to give evidence or to confess", any more than "where he is put upon an identification parade".

procedures.⁴⁷⁴ In the event, it was held that the right to legal representation was not infringed.⁴⁷⁵

It is suggested that the common law distinction between 'real' and testimonial evidence results in a narrow interpretation of the right to legal representation, which – in effect – unduly limits the purpose it was designed to protect.⁴⁷⁶ It is submitted that the interpretation of the right to legal representation by Froneman J in *Melani*, is to be preferred above that of the *Monyane* court. The reasons for this suggestion are three-fold: Firstly, the adversarial nature of our criminal justice system demands that the interests of an accused be protected, especially at the crucial stage when she is in custody. This is necessary to ensure that she is treated fairly both at the 'gatehouses' and 'mansions' of the criminal justice system;⁴⁷⁷ secondly, it was accepted practice even before 1994 that an accused has a right to legal representation at identity parades;⁴⁷⁸ and thirdly, because the Supreme Court of Appeal, in *Pillay* and *Tandwa*, rejected the 'real' evidence distinction in their determination of the fair trial requirement contained in section 35(5). Therefore, evidence of an identity parade should not be classified as real evidence that should for that reason be 'readily' admitted. This category of evidence should, in terms of the *Tandwa* judgment,⁴⁷⁹ be classified as 'conscriptive' if it had been obtained in violation of the right to legal representation.

⁴⁷⁴ Loc cit.

⁴⁷⁵ *Monyane* (fn 256 above) at 135.

⁴⁷⁶ Per Froneman J in *Melani* (fn 256 above) at 352.

⁴⁷⁷ Ibid at 349; see also Beaudoin & Ratushny (fn 23 above).

⁴⁷⁸ In *Monyane* (fn 256 above) at 132, the court acknowledged that the right to legal representation is contained in the standard from SAP329; and that it is police practice to read this to the suspect before the parade starts. The practice existed for several years.

⁴⁷⁹ Fn 12 above at par 125.

To summarise, the introduction of a justiciable Bill of Rights during 1994, which presently includes the remedy contained in section 35(5) of the South African Constitution, has created significant changes to the admissibility of evidence in South Africa: governmental power should be exercised within the ambit of the provisions of the Constitution. Mindful hereof, the drafters of the Constitution created procedural guarantees to ensure that every accused person is entitled to a fair trial. One of the mechanisms created to achieve that goal, is the constitutional guarantee of the right to legal representation. For this reason, the right to legal representation should be interpreted generously and purposively, instead of being 'cut down' to coincide with its common law meaning.⁴⁸⁰ In fact, even before 1994, an accused could rely on the right to legal representation at identity parades.

One of the interests that the right to legal representation serves to protect is to ensure that the accused is not unfairly conscripted against herself during the pre-trial phase. An identity parade is, in the same way as a confession or pointing-out, in many instances a necessary pre-trial procedure conducted at the behest of the police, with the aim of obtaining evidence against the accused.⁴⁸¹

During the trial the accused would have to face this evidence. This evidence would be presented against the accused with the aim of convincing the presiding officer of the reliability of the identification by the prosecution witnesses. During the trial, the accused would have to provide an answer to this evidence, created by herself, at the behest of the police. Do the constitutional values of 'freedom', 'human dignity', 'openness' and the notion of 'substantive fairness' not dictate

⁴⁸⁰ *Zuma* (fn 13 above).

⁴⁸¹ See in this regard, *Stilman* (fn 7 above) at par 94, where Cory J reasoned as follows: "The compulsion which results in self-incrimination by ... the use of the body itself may arise in a number of ways such as the forced participation in a line-up identification"; see also *Van der Merwe 2* (fn 257 above).

that she ought to be represented by a legal representative at this crucial stage of the proceedings? Or should fundamental rights be downgraded for the benefit of expediency? It is submitted that such an approach solely favours crime control interests.

During the pre-constitutional era public policy dictated that an accused had a right to legal representation when she participated in an identity parade. It is submitted that the Constitution did not strike a pen through the continued existence of the right to legal representation within this context.⁴⁸² The *Monyane* approach should be discarded and the judgments in *Mathebula* and *Mahlakaza* should be adopted, as the latter judgments give effect to the spirit, purport and objects of the Constitution.

In South Africa, where the criminal justice system is based on an adversarial system and many of the accused are poor, uneducated and uninformed of their rights, the long-term values of the establishment of a human rights culture would be difficult to achieve if the scope of the right to legal representation were not extended to identity parades. An accused should be entitled to rely on the right to legal representation at an identity parade.

The next fundamental right considered is the right to freedom and security of the person.

3.2 Freedom and security of the person: right to bodily integrity

The right to freedom and security of the person is guaranteed by section 12 of the Constitution.⁴⁸³ Section 12(1) protects a person's freedom and security of the

⁴⁸² It is submitted that section 39 of the Constitution provides for the existence of this right.

⁴⁸³ Section 12 of the Constitution provides as follows:

person, while subsection (2) protects the right to physical and psychological integrity of an accused person.⁴⁸⁴ However, subsection (1)(c), which guarantees the right to freedom from violence from governmental agents, should be read in conjunction with the provisions of subsection (2).⁴⁸⁵ Section 12(1)(c) places both a positive and a negative duty on government. The positive duty is for government to put measures in place (for example legislation), that will prevent the unjustifiable infringement of the right to be free from violence from either public or private sources. The negative duty placed on government is an obligation to refrain from perpetrating acts of violence by its officials on a person suspected or accused of having committed a crime.⁴⁸⁶ During the pre-trial phase, when police officers gather evidence against a suspect or accused person, section 12(2), which protects the public interest of security in and control over the body, features prominently. This would be the case when the police want to search or interrogate a suspect. With regard to the search or interrogation of a person, unwarranted police conduct may, depending on the circumstances,

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- “12(1) Everyone has the right to freedom and security of the person, which includes the right –
- (a) not to be deprived of freedom arbitrarily or without just cause;
 - (b) not to be detained without a trial;
 - (c) to be free from all forms of violence from either public or private sources;
 - (d) not to be tortured in any way; and
 - (e) not to be treated or punished in a cruel, inhuman or degrading way.
- (2) Everyone has the right to bodily and psychological integrity, which includes the right –
- (a) to make decisions concerning reproduction;
 - (b) to security in and control over their body; and
 - (c) not to be subjected to medical or scientific experiments without their informed consent”.

⁴⁸⁴ Currie & De Waal (fn 257 above) at 292.

⁴⁸⁵ Ibid at 304.

⁴⁸⁶ See *Tandwa* (fn 12 above) and *Mthembu* (fn 257 above), where real evidence obtained as a result of torture were excluded in terms of section 35(5).

infringe a cluster of rights: for instance, the right to privacy,⁴⁸⁷ freedom and security of the person,⁴⁸⁸ and human dignity.⁴⁸⁹

The intrusiveness of a search of the person may vary from a pat down search to the seizure of an object, like hair, skin or bodily fluids from the body of the suspect.⁴⁹⁰ The constitutionality of section 225(2) of the Criminal Procedure Act has to date not been challenged. This section provides that evidence of a bodily mark, finger-print or blood test result or other related evidence obtained from the body of the accused even without consent, shall not be inadmissible on the basis that it was *not* obtained in accordance with the provisions of section 37. Section 225(2) in effect immunises unconstitutional police conduct committed during the evidence-gathering process from constitutional scrutiny.⁴⁹¹ Section 37 is a law of general application that circumscribes the scope of policing authority in the evidence-gathering process, and it is not disputed for purposes of this discussion that it would survive constitutional muster. It is therefore submitted that any police conduct that exceeds the ambit of section 37, would amount to a *prima facie* violation of a fundamental right. Section 225(2), in turn, is a law of general application that seeks to protect such *prima facie* violations from judicial scrutiny. In other words, its exclusive function is to remove unlawful police conduct that defies the provisions of section 37, from the radar of section 35(5). By contrast, section 35(5) seeks to protect the right to a fair trial and the

⁴⁸⁷ See for instance, *Motloutsi* (fn 256 above).

⁴⁸⁸ *Minister of Safety and Security and Another v Xaba* 2004 1 SACR 149 (D), ("*Xaba*").

⁴⁸⁹ *Tandwa* (fn 12 above) at par 127.

⁴⁹⁰ Section 37(1)(a) of the Criminal Procedure Act authorises a police officer to take palm-prints or finger-prints from a person who has been arrested; section 37(5) dictates that the finger-prints or palm-prints be destroyed in the event that the accused is acquitted or a conviction is set aside or when the accused has not been prosecuted; section 37(2)(a) authorises a medical officer of any prison to take a blood sample to determine if the body of the suspect has any mark, characteristic or distinguishing feature or shows any condition or appearance.

⁴⁹¹ According to Van der Merwe 1 (fn 257 above) at 179.

integrity of the justice system, because one of its primary functions is to ensure that an accused is treated fairly both in the 'gate houses' as well as the 'mansions' of the criminal justice system.⁴⁹² Put in another way, section 35(5) permits the procurement of evidence in accordance with the provisions of section 37, while by the same token its function is to exclude evidence obtained in a manner that would render a trial unfair or would otherwise be detrimental to the justice system.

It is submitted that the obtainment of evidence in violation of section 37 of the Criminal Procedure Act is one of the consequences that section 35(5) was designed to protect.⁴⁹³ On the assumption that the provisions of section 225(2) do not exist, evidence obtained outside the ambit of section 37 would, to borrow the concept from *Feeney*, not be available to the prosecution in **usable** form.⁴⁹⁴ In the light hereof, the provisions of section 225(2) is in conflict with the provisions of at least sections 12, 14 and 35(2) and (3) of the Constitution. It follows that section 225(2) constitutes a *prima facie* violation of these rights. Thus, the first phase of the limitations clause analysis will have been satisfied.⁴⁹⁵

⁴⁹² *Melani* (fn 256 above) at 349; *Beaudoin & Ratushny* (fn 23 above) at 462.

⁴⁹³ See *Stillman* (fn 7 above) par 49.

⁴⁹⁴ Fn 8 above at par 67.

⁴⁹⁵ Section 36(1) of the South African Constitution provides as follows:

"The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –

- (b) the nature of the right;
- (c) the importance of the purpose of the limitation;
- (d) the nature and extent of the limitation;
- (e) the relation between the limitation and its purpose; and
- (f) less restrictive means to achieve the purpose".

During the second phase of the analysis the court would consider the nature of the right limited⁴⁹⁶ and the prosecution would, among other factors, have to convince the court of the importance of the purpose sought to be protected by section 225(2) and that alternative, less restrictive means to achieve that purpose do not exist.⁴⁹⁷ In addition, the prosecution would have to show that the effect of the limitation on the right to a fair trial is proportionate to the benefits sought to be achieved by section 225(2).⁴⁹⁸ What benefit does section 225(2) seek to achieve? Relevant evidence should be admitted, no matter how it had been obtained.⁴⁹⁹ Section 225(2) fails to consider whether the manner in which the evidence had been obtained impinges upon the constitutional values of human dignity, equality and freedom. Surely, the procurement of evidence in a manner not prescribed by section 37 would have a negative impact on a person's freedom, because if convicted, the accused would be incarcerated or be burdened by a criminal record, having an effect on her dignity.⁵⁰⁰ Again, evidence obtained without a person's consent would regularly violate her innate human dignity. The end (a conviction) does not justify the means (a violation of

⁴⁹⁶ Depending on the circumstances, the rights contained in section 35 or the rights to privacy, freedom and security of the person and human dignity may be infringed. It is suggested that the right to human dignity is important in an open and democratic society. The prosecution would have to provide compelling reasons why these rights should be limited – see Currie & De Waal (fn 257 above) at 178.

⁴⁹⁷ The purpose of the limitation is the protection of the public interest in establishing the truth. DNA analysis has the benefit of establishing the guilt or innocence of suspects with a high degree of certainty. In view hereof, the section serves the important public interest of the detection and prosecution of crime. Does alternative means exist to obtain the evidence? Yes, in terms of the common law, the informed consent of the accused is required and section 37 of the Criminal Procedure Act provides lawful, less drastic means of obtaining the evidence.

⁴⁹⁸ Section 225(2) serves the purpose of the successful prosecution of crime.

⁴⁹⁹ The common law rule on the admissibility of evidence seeks a similar goal. However, its disadvantage is that it fails to protect fundamental procedural rights, which may impact negatively on trial fairness within the context of section 35(5).

⁵⁰⁰ See the dictum of Ackermen J in *Dzukuda* (fn 357 above) at par 9-11.

human dignity, the value of a fair trial, freedom and security of the person, and the associated protection of freedom from violence, and physical and psychological integrity). Other constitutional means are available to achieve the end:⁵⁰¹ Evidence should be obtained in a lawful manner, within the confines of the provisions of section 37 and without infringing the democratic values of human dignity, equality and freedom. In view hereof, it is submitted that it is highly unlikely that the justifiability hurdle would be overcome, and it is accordingly submitted that section 225(2) would not survive constitutional muster.

Furthermore, the continued existence of section 225(2) of the Criminal Procedure Act – in a constitutional democracy – upholds the following innate, and no doubt, profound implications: On the one hand, Parliament, in breach of the doctrine of separation of powers,⁵⁰² dictates to the courts that despite the infringement of fundamental rights, evidence obtained as a result thereof should, regardless any taint connected to its procurement, be admitted; this state of affairs cannot be otherwise classified but as the return to both the supremacy of parliament and the re-incarnation of the common law inclusionary rule. On the other hand, section 225(2) in effect unjustifiably usurps the constitutional mandate of the courts to rule on the inadmissibility of unconstitutionally obtained evidence,⁵⁰³ as dictated by section 35(5).

⁵⁰¹ For example section 37 or informed consent.

⁵⁰² See the case of *Minister of Public Works v Kyalami Ridge Environmental Association* 2001 3 SA 1151 (CC), (“*Kyalami Ridge Environmental Association*”), where this doctrine was applied to determine the ambit and scope of governmental authority.

⁵⁰³ It is submitted that this would be the upshot, since evidence that has not been obtained in accordance with the provisions of section 37, would be classified as “unconstitutionally obtained evidence”.

One of the research questions posed in the introduction was whether the view held by Van der Merwe that the courts of South Africa are prepared to interpret trial fairness in such a manner that unconstitutionally obtained evidence should, despite a finding that its admission would tend to render the trial unfair, nevertheless be received since it could not be regarded as an impairment of trial fairness within the meaning of section 35(5). This issue is considered below.

4. Admission of conscriptive evidence despite trial unfairness; and the presumption in favour of exclusion

This part of the work considers the observation made by Van der Merwe that the courts of South Africa are prepared to interpret the trial fairness prong of section 35(5) in a manner that allows for the admission of evidence in the face of a finding that police non-compliance with the informational warnings contained in the Constitution has a negative impact on trial fairness. Thereafter, it proceeds to explore whether a ruling that admission of evidence would render the trial unfair should preclude a consideration of the second and third groups of *Collins* factors.

It must be emphasised that a two-phased approach is endorsed in this thesis: Trial fairness should be determined during the first leg or phase and the effects of admission or exclusion on the integrity of the justice system should be considered in the second leg or phase. The factors employed to assess each leg of the analysis should be kept separate. Van der Merwe, by contrast, favours an approach to trial fairness that allows for a consideration of factors relevant to the second leg of the *Collins* admissibility framework.

4.1 Admission of conscriptive evidence despite trial unfairness

Van der Merwe holds the view, based on the facts in *Lottering*,⁵⁰⁴ that the courts have adopted an approach to the interpretation of the fair trial requirement under section 35(5) that suggests that police failure to comply with the informational warnings may – to an extent – taint trial fairness, but that admission of the evidence thus obtained would not in itself, render the trial unfair, within the context of section 35(5).⁵⁰⁵ This approach deserves to be explored. However, it must be mentioned at the outset that it is submitted in this thesis that these factors mentioned by Van der Merwe should be considered during the second phase of the section 35(5) analysis. The reasons why such an approach should be followed are explained below.⁵⁰⁶

In *Lottering*, the accused, a young man, stabbed a person (who soon thereafter died) and ran into a night club. A witness informed a police officer that the accused ran into the night club. The witness accompanied the officer into the night club and identified the accused by pointing him out to the officer. The officer approached the accused, arrested him⁵⁰⁷ and demanded information about the whereabouts of the knife which was used to commit the crime. At no time during this confrontation was the accused informed that he has a right to legal representation; that he does not have to answer any questions; and the consequences thereof, should he choose to respond. The accused acquiesced to the demand by disclosing that the weapon was in his friend's possession. Against this background, the accused must have believed that he had no choice but to

⁵⁰⁴ Fn 256 above.

⁵⁰⁵ Van der Merwe (fn 254 above) at 215-217.

⁵⁰⁶ See also chapter 6 par A 3.3 A 3.4 below.

⁵⁰⁷ The superior power of the government was thereafter brought to bear on the accused – *Herbert* (fn 63 above).

incriminate himself.⁵⁰⁸ It can also not be disputed that the questioning by the officer, in this atmosphere, invited an inculpatory response from the accused ***after he had been arrested***. Levinsohn J recounted that the 'police and other persons who have rights of arrest and detention should not simply pay lip service these [constitutional] rights but should at all times meticulously observe them'.⁵⁰⁹

Referring to Steytler, the court confirmed the view held by the scholarly writer that evidence obtained without consent from the accused could, if admitted, render the trial unfair.⁵¹⁰ Without applying the fair trial prong to the facts of the case, the court proceeded to consider the 'detriment' requirement.⁵¹¹ Van der Merwe submits that the finding by the court that admission of the evidence would not detrimentally affect the criminal justice system, 'clearly implies that the court was also satisfied that admission would not have rendered the trial unfair'.⁵¹² He suggests that the urgency of locating the knife, together with the fact that the officer did not 'deliberately' fail to inform the accused of his constitutional rights, should have been considered as excusing factors that removed the taint of unfairness.⁵¹³ Whether the police conduct was flagrant is debatable. It could be argued that the police officer was not even aware of the scope of his informational duties in terms of the Bill of Rights.⁵¹⁴ If the courts of

⁵⁰⁸ Ibid at 1482 it was held that the accused "incriminated him in the commission of the crime".

⁵⁰⁹ Ibid at 1483.

⁵¹⁰ Loc cit.

⁵¹¹ Loc cit.

⁵¹² Fn 254 above at 216. In my view, the application of the *Collins* or *Stillman* fair trial framework would have shown that admission would render the trial unfair. However, the approach suggested by the *Tandwa* judgment makes provision for the consideration of factors mentioned by Van der Merwe. It should be emphasised that he makes this contention within this context.

⁵¹³ Ibid at 217. Van der Merwe, in the vein of the approach followed by the *Grant* court, highlights the fact that the detention lasted for a relatively short period.

⁵¹⁴ See *Kokesch* (fn 63 above) at 321, where Sopinka J wrote for the majority and reasoned that despite the honest belief of the police officers that they could proceed to search without a search

South Africa take rights protection seriously, urgency should not be regarded as an 'at large' excuse for police failure to inform an accused of his rights that are designed to protect him or her from conscription.

The focus should be on the effect that the police conduct had on the trial of the accused, rather than an attempt to show that such conduct 'does not deserve criticism'.⁵¹⁵ Added to this, it is not clear from the judgment whether the need to urgently question the accused about the location of the knife was also related to police safety or public safety concerns. If those concerns were pertinent the officer could have searched the accused, thereby rendering the urgency of such questioning unnecessary.⁵¹⁶ Can it ever be said that the police conduct was reasonable, having regard to the fact that he accorded greater importance to the *immediate* recovery of the knife, rather than complying with the informational duty created by the Constitution?

Van der Merwe further argues that the accused voluntarily made the statement, which could have been taken into account as an additional saving factor.⁵¹⁷ It is correct that the accused was not forced or threatened to conscript himself, within the context of, for example, section 217 of the Criminal Procedure Act. However, this does not mitigate the fact that the accused was not informed of at least the right to remain silent and the consequences of not remaining silent. A purposive interpretation of these rights informs that the decision to cooperate with the police and assist them in their investigation against oneself must be an

warrant, one of two scenarios materialised, either they 'knew they were trespassing, or they ought to have known'. In other words, the police acted either deliberately or negligently.

⁵¹⁵ Roach (fn 27 above) at 10-66.

⁵¹⁶ Section 40 of the Criminal Procedure Act authorises an arrest without warrant, if certain requirements are satisfied; section 23 authorises an official to search an arrested person without a warrant.

⁵¹⁷ Fn 254 above at 216.

informed one. A waiver of rights should be a voluntary, but informed decision. This explains why the informational warnings have been included in the Bill of Rights.⁵¹⁸

It is suggested that urgency, determined in a purposive manner – for police safety or public safety, or to prevent the destruction of evidence *essential* for a conviction – should, on this narrow ground, be regarded as a justifying factor in the second phase of the admissibility assessment.⁵¹⁹ The consideration of urgency as an excusing factor during the fair trial assessment is analogous to the approach suggested by the *Tandwa* judgment. Such an approach suggests that the rights of the accused should be balanced against the societal interests in crime control. By contrast, the *Pillay* judgment ensures that the fair trial guarantee is not ‘balanced’ away against the public interests in crime control. The strengths and weaknesses of such an approach were highlighted under C 1.2.2 above.

⁵¹⁸ *Hebert* (fn 63 above) at 36; see also Steytler (fn 257 above) at 112, who explains this contention, while also confirming the aptness of the principle of the “absence of pre-trial obligation” in such circumstances as follows: “The right against compelled confessions and admissions ... seeks to ensure that where an accused chooses to cooperate in the investigation by giving testimony, it is done voluntarily and with a full appreciation of the right not to do so ... The importance of these two rights [to remain silent and the right against compelled self-incrimination] during pre-trial investigations is apparent when seen in the context of proceedings as a whole ... The right to a fair trial, including the right against self-incrimination, would be rendered meaningless if the conviction could be effectively secured at the pre-trial stage”. (Footnotes omitted).

⁵¹⁹ Steytler (*ibid*) at 36 confirms this view when he asserted that “section 35(5) has created two tests which should be kept separate”. It must be mentioned that, unlike the approach endorsed in this thesis, a two phased interpretation which separates the first leg from the second – Van der Merwe favours a flexible approach, allowing a court to consider either the first or second leg. When the first leg is determined, he advocates that factors relevant to the second leg may be infused into the first.

4.2 The presumption in favour of exclusion

Should evidence, the admission of which would render a trial unfair, be excluded without a consideration of the second and third groups of factors? In other words, must evidence that would tend to render a trial unfair, be 'automatically' excluded without considering the second leg or phase of the section 35(5) analyses? It appears as if Steytler, relying on *Naidoo*, has answered this question in the affirmative.⁵²⁰ This approach of a presumption of exclusion once trial fairness has been impaired is based on the phrases 'or otherwise' and 'must be excluded', contained in section 35(5). It is assumed that this interpretation prompted the courts of South Africa to attenuate the impact of such an approach in one of the following ways: the trial fairness assessment was bypassed and the second leg or phase of the section 35(5) analysis considered;⁵²¹ alternatively, the excusing factors that should be considered under the second and third groups of factors, were added into the trial fairness prong.⁵²²

The majority opinion in *Pillay* held that section 35(5) should be read as incorporating the phrase 'all the circumstances', which forms an important part of section 24(2).⁵²³ There is an emerging body of consensus in Canada regarding the meaning of this phrase. Canadian judges and commentators are of the opinion that the phrase means that courts should consider and balance all the

⁵²⁰ Loc cit; see also Van der Merwe (fn 254 above) at 201, citing *Soci* as authority.

⁵²¹ See, for example, *Lottering* (fn 256 above); *Hena* (fn 457 above). In *Mthembu* (fn 256 above), the Supreme Court of Appeal held at par 36 that admission would be "detrimental" to the administration of justice, "irrespective of whether such evidence has an impact on the fairness of the trial".

⁵²² *Tandwa* (fn 12 above). In Canadian context, see *Grant* (fn 9 above). It can be argued that Steytler (fn 257 above) at 36, does not support this approach.

⁵²³ Fn 11 above at par 93.

factors listed by Lamer J in *Collins* to determine the admissibility issue.⁵²⁴ In other words, factors having a bearing on the fairness of the trial should be balanced and weighed against the seriousness of the infringement and the effect of exclusion on the repute of the justice system to determine whether the evidence should be received or excluded.⁵²⁵ For the reason mentioned above, it is submitted that the courts of South Africa should follow such an approach. Moreover, this view is fortified by the inclusion, in section 35(5), of the phrase 'or otherwise'. In other words, the presumption in favour of exclusion should be abandoned and the courts of South Africa should consider all the factors mentioned in *Collins* to make the admissibility assessment.

⁵²⁴ See for example *Grant* (fn 9 above) at par 67. It is submitted that this approach surfaced even before *Grant*. The Supreme Court considered all the *Collins* factors and performed a balancing exercise in for example, *Jacoy* (fn 63 above) and in *R v Tremblay* (1987) 37 CCC (3d) 565. In *Tremblay*, **conscriptive** evidence that should have been excluded because its admission would have tended to render the trial unfair, was **excluded** because its admission would cause disrepute to the justice system. The correctness of this approach was recently confirmed in *R v Orbanski* (2005) 196 CCC (3d) 481 at par 93, ("*Orbanski*"), where the Supreme Court asserted that it did not suggest in its previous judgments that "the presence of conscriptive evidence that has been obtained illegally is always the end of the matter and that the other stages and factors of the process become irrelevant". See also the arguments of the following scholars: Pottow (fn 136 above) at 42-43; Mahoney (fn 136 above); Delaney (fn 136 above) at 522 expresses his disapproval of the fact that the presumption in favour of exclusion precludes the courts of Canada from considering the following factors in the admissibility assessment: the "good faith" of the police; the seriousness of the charges; and the importance of the evidence for the prosecution; Stuart (2003) 10 CR (6TH) 233 (publication pages not available) at printed page 2.

⁵²⁵ See *Collins* (fn 1 above) at par 35, and *Ross* (fn 62 above) at 138, where this approach was suggested by Lamer J. In *Collins*, the judge said the following: "In determining whether the admission of evidence would bring the administration of justice into disrepute, the judge is directed by s 24(2) to consider 'all the circumstances'. The factors which are to be **considered and balanced** have been listed by many courts in the country ...". (Emphasis added). Lamer J continued by listing the various factors listed under the first, second, and third groups of factors. See further Pottow (*loc cit*); Stuart (fn 10 above) tends to lean in favour, it is submitted, of such an approach when he recommends a return to the principles enunciated in *Collins*.

Zeffertt concedes that section 35(5) could be read in this manner, but is of the view that such an interpretation would be implausible. He reasons as follows:⁵²⁶

We are told that evidence has to be excluded if its admission 'would render the trial unfair or otherwise be detrimental to the administration of justice'. There are at least two different ways of reading this phrase. Probably, it was intended to mean that evidence will be inadmissible if it *either* renders a trial unfair *or* its reception would be detrimental to the administration of justice. But the cumulative effect of the omission of the word 'either', together with the inclusion of word 'otherwise', may warrant a different interpretation: evidence will not be [in]admissible merely because it renders a trial unfair but only if, by doing so, it would, in addition, be detrimental to justice. Is it conceivable, however, that the admission of evidence rendering a trial unfair would not also be detrimental to justice?

It is submitted that the facts in for example, *Malefo*,⁵²⁷ decided in terms of the Interim Constitution, suggests that such an interpretation is in fact feasible. If applied to the fair trial assessment suggested in *Pillay* or *Stillman*, the following would have been the outcome: An infringement that caused the accused to be conscripted against himself, led to the discovery of the evidence. The evidence would not have been discoverable without the infringement. Therefore, admission of the evidence would have tended to render the trial unfair. However, because the violation occurred before the advent of the Interim Constitution, exclusion of the conscriptive evidence would have been 'detrimental' to the administration of justice, for the following reason: At the time the 'infringement'

⁵²⁶ 1996 *ASSAL* 803 at 804-805. (Emphasis in original).

⁵²⁷ Fn 256 above; see also, in Canadian context, *Jacoy* (fn 63 above); and *Tremblay* (fn 523 above) Pottow (fn 136 above) at 42-43.

occurred, the right to legal representation was not constitutionalised. In fact, the police conduct complied with the provisions of existing law when the 'infringement' took place. However, in terms of the judgment in *S v Mhlungu*,⁵²⁸ the accused was deemed a beneficiary of the rights guaranteed by the Interim Constitution. Would the exclusion of the evidence under these circumstances not be detrimental to the administration of justice, having regard to the factors listed under the second leg of the admissibility analysis?⁵²⁹

It is further submitted that the core of the view held by Steytler, to an extent, supports the contention favoured in this thesis.⁵³⁰ Steytler suggests that the

⁵²⁸ 1995 3 SA 867, 1995 2 SACR 277 (CC), ("*Mhlungu*").

⁵²⁹ See also the facts of *Lottering*. Conscriptio rendered the trial unfair, but the seriousness of the infringement, it could be argued, was mitigated on grounds of urgency (as suggested by Van der Merwe in his discussion of this case in 4.1 above). However, urgency and other relevant factors are to be considered during the second leg of the assessment, to determine the possible 'detriment' that might be suffered by the justice system as a result of exclusion. Whether it should be received, should be determined by means of a value judgment, by assessing and balancing all three groups of *Collins* factors. Furthermore, during the second phase, the assessment is concerned with different factors, compared to the first phase. The first phase is concerned with the interests of the accused, while the second phase is focused on the interests of society. The case of *S v R* (fn 256 above) could likewise have been considered on this basis. Since the seriousness of the infringement is of paramount importance during the second phase, the good faith of the police should likewise be accorded a prominent role during this phase. The good faith of the police should therefore be a significant consideration calling for the reception of the evidence in instances when the evidence is essential for a conviction on a serious charge, while the infringement could not be regarded as serious. Difficult decisions will have to be taken when, in such circumstances, the infringement is also deemed serious. However, the rationales of section 35(5) and the purposes sought to be achieved by the Bill of Rights in general, should be important factors in such circumstances.

⁵³⁰ Fn 257 above at 36, he is of the view that: "It should be noted that there is principally one test – whether the admission of evidence would be detrimental to the administration of justice. The test relating to the fairness of the trial is a specific manifestation of this broader enquiry; to have an unfair trial is demonstrably detrimental to the administration of justice. Having said this,

section 35(5) analysis should be undertaken to achieve primarily one goal: whether admission of the disputed evidence would be detrimental to the justice system. This argument of Steytler is supported. Taken to its logical conclusion, it is submitted that the peremptory instruction that the evidence 'must be excluded', should be based on a value judgment that should be made after 'all the circumstances' have been considered and balanced in the end of the analysis. It was mentioned above that the phrase 'all the circumstances' refers to the factors that have to be assessed during the first and the second leg of the *Collins* admissibility framework. Moreover, it is submitted that the plain meaning of the phrase 'or otherwise', within the context of section 35(5) means 'when such exclusion may be detrimental to the justice system, the evidence may (on different grounds, like, for example, police 'good faith' or urgency), be admitted'.⁵³¹ It is accordingly submitted that section 35(5) has created primarily

it should be emphasised that section 35(5) has created two tests which should be kept separate; rules applicable to one are not necessarily applicable to the other".

⁵³¹ Fowler & Fowler *The Concise Oxford Dictionary of Current English* (8th ed, 1990, reprinted 1991) at 841; see also Brown (ed) *The New Shorter Oxford English Dictionary on Historic Principles* (Vol 2, 1991) at 2032; Black, Nolan & Connolly *Black's Law Dictionary* (4th ed, 1993) at 1101; Bullon *Longman Dictionary of Contemporary English* at 1164-1165, explains the meaning of the phrase as follows: "used to refer to the opposite of what has just been mentioned"; *South African Oxford School Dictionary* (2nd ed, 2004) at 313-314. Whether the evidence would be received, should be determined by means of a value judgment, by assessing and balancing all three groups of *Collins* factors. Furthermore, during the second leg, the assessment is concerned with different factors, compared to the first leg. The first leg is concerned with the interests of the accused, while the second leg is focused on the interests of society. The case of *S v R* (fn 256 above) could likewise have been considered on this basis. Since the seriousness of the infringement is of paramount importance during the second leg, the good faith of the police should likewise be accorded a prominent role during this phase. The good faith of the police should therefore be a significant consideration calling for the reception of the evidence in instances when the evidence is essential for a conviction on a serious charge, while the infringement could not be regarded as serious. Difficult decisions will have to be taken when,

one yardstick, that is, whether exclusion or admission would be detrimental to the administration of justice: an unfair trial is a 'specific manifestation' of the broader inquiry as to whether admission of the evidence would be 'detrimental' to the justice system.⁵³² According to this interpretation, a court should weigh and balance the factors contained in the first and second leg of the *Collins* admissibility framework in the end, in order to make a ruling on the admissibility of the evidence. In the light hereof, the presumption in favour of exclusion or the rule of 'automatic exclusion' whenever trial fairness has been impaired, as it is applied in *Stillman*, should have no place in the interpretation of section 35(5).

To summarise, factors having a bearing on the second leg of the admissibility assessment should, in principle, not be considered when the fair trial prong is analysed.⁵³³ The fair trial requirement serves to protect different interests when compared to the values sought to be protected by the second phase of the analysis.⁵³⁴ The presumption in favour of exclusion after a finding that trial fairness had been impaired should not be adopted from Canadian precedent. Moreover, the experiences encountered by our Canadian counterparts have demonstrated that the regular exclusion of evidence based on the exclusive consideration of the interests of the accused, may, in the long-term, be 'detrimental' to the integrity of the justice system. A court should consider 'all the circumstances' before a decision is made whether to exclude or receive the disputed evidence.

in such circumstances, the infringement is also deemed to be serious. However, courts do make difficult decisions on a regular basis.

⁵³² Steytler (fn 256 above) at 36.

⁵³³ Loc cit.

⁵³⁴ Loc cit.

D. Conclusion

The view a court holds as to what constitutes a fair trial would heavily influence its decision on whether to admit or exclude evidence.⁵³⁵ For this reason it is important to define 'trial fairness'. Davies identified two approaches as to what constitutes a fair trial. One approach focuses on a proper verdict and the other approach underscores fairness concerns in the entire criminal process.⁵³⁶ The common law rationale for trial fairness is that the admission of evidence that could result in the conviction of an innocent person must be excluded. Evidence that is reliable should be received, and the manner of its obtainment is of no concern to the court. However, unreliable evidence, for example evidence obtained as a result of torture, should be excluded. On this view, a fair trial is one which satisfies the public interest in truth-seeking. Its aim is in ensuring a safe verdict. In the light hereof, the common law approach is verdict-centred.

The *Collins* and *Stillman* fair trial frameworks are by comparison, focused on the fairness of the pre-trial proceedings: Evidence obtained in a conscriptive manner that would not have been discovered if the rights of the accused were respected, has a negative effect on trial fairness. By the same token, evidence that was discovered in a non-conscriptive manner does not impact negatively on trial fairness. The underlying principle for this approach is rooted in the key pillars of the right to a fair trial: the presumption of innocence and the right to remain silent. In terms of this approach, an accused does not have to assist the prosecution in building a case against herself. It would therefore be unfair to allow the prosecution to compel the accused to give evidence at her trial against

⁵³⁵ Davies (fn 136 above) at 8.

⁵³⁶ Loc cit.

herself, which she had created as a result of a Charter breach.⁵³⁷ It is suggested that this approach is best suited for a constitutional democracy like South Africa, where the protection of fundamental rights is one of the primary aims of the Constitution. This approach is process-centred.

Judges should at all times be heedful to apply a generous and purposive approach to the interpretation of section 35(5). The Canadian experience has demonstrated that a rigid application of the privilege against self-incrimination leads to undesirable results when interpreting a Bill of Rights provision. They have accordingly adapted the concept. This exercise has, within the context of section 35(5), been achieved by the South African Supreme Court of Appeal in *Pillay* and *Tandwa*. This was an important development of the common law privilege against self-incrimination – albeit on the limited scale of the fair trial requirement contained in section 35(5) – because a conscription analysis is at the heart of the fair trial requirement.⁵³⁸

The scope and meaning of the fair trial directive under sections 24(2) and 35(5) are essentially similar.⁵³⁹ There appears to be no reason why these remedies should not have essentially the same impact in their respective criminal justice systems. Both serve the societal interest in rights protection, more particularly, the right to a fair trial; both aim to preserve the integrity of the criminal justice

⁵³⁷ Davies (fn 136 above) at 9; Wiseman (fn 239 above) at 440.

⁵³⁸ See *S v Cloete and Another* 1999 2 SACR 137 (C) at 149, (*"Cloete"*), where Davis J confirmed this notion as follows: "In short, our criminal procedure places significant emphasis on a lack of compulsion and upon an obligation of the State to make out a proper case without the aid of self-incrimination". See further par C 1 above.

⁵³⁹ Kentridge AJ commented in *Zuma* (fn 13 above) at par 16 that what constituted a fair trial before the advent of the Constitution does not necessarily coincide with the constitutionally entrenched right. A criminal trial would now have to comply with "notions of basic fairness", not recognised before the advent of the Constitution.

system; and both seek to enhance the truth-seeking function of criminal courts, while not losing sight of the general purposes and values sought to be achieved by the Bill of Rights.⁵⁴⁰

Some might argue – based on the approach suggested by Mahoney⁵⁴¹ – that the following three suggestions be applied to a section 35(5) assessment: Firstly, the intention of the legislature⁵⁴² should be sought when interpreting section 35(5), in order to replace the counter-majoritarian dilemma approach adopted by Lamer J in *Collins*, which was thereafter embraced in the *Stillman* analysis.⁵⁴³ Secondly, the ‘conscriptive/ non-conscriptive’ analysis should be rejected,⁵⁴⁴ and the former should be replaced with the principles enunciated by the common law privilege against self-incrimination,⁵⁴⁵ thus underscoring the importance of crime control values in the analysis. Thirdly, that the discoverability analysis should play a minor role in the fair trial assessment,⁵⁴⁶ so as to eliminate the impact of the corrective justice principle of ‘no better/no worse’ argument,⁵⁴⁷ thereby approving of the notion that the prosecution should gain from constitutional violations.⁵⁴⁸ These arguments are susceptible to criticism and it is submitted that it would not survive scrutiny.

The inappropriateness of Mahoney’s arguments in the South African context are the following and is dealt with in the same sequence as outlined above: Firstly,

⁵⁴⁰ *Dzukuda* (fn 357 above) at par 9-11.

⁵⁴¹ Fn 136 above.

⁵⁴² *Ibid* at 452 he makes his point in the following terms: “Section 24(2) must be applied with the integrity that comes from an adherence to the intent of Parliament ...”.

⁵⁴³ *Loc cit*.

⁵⁴⁴ *Ibid* at 476.

⁵⁴⁵ *Ibid* at 453.

⁵⁴⁶ *Ibid* at 477.

⁵⁴⁷ *Ibid* at 467-476.

⁵⁴⁸ *Ibid* at 477.

both the Constitutional Court judgment of *Makwanyane*⁵⁴⁹ and the Supreme Court of Appeal judgment of *Pillay*⁵⁵⁰ render the argument of the discarding the counter-majoritarian dilemma of no force and effect; secondly, neither the Supreme Court of Appeal, nor the Constitutional Court has decided whether this concept and its function as applied in the *Stillman* analysis, should be adopted. However, the majority opinion of the Supreme Court Appeal in *Pillay* has employed the concept of 'conscriptio', in conjunction with the doctrine of discoverability, to assess the trial fairness requirement.⁵⁵¹ It is submitted that this approach is strongly aligned to the *Collins* 'conscriptio' analysis. Thirdly, the Supreme Court of Appeal has adopted the doctrine of discoverability in *Pillay*. The function of this doctrine was illustrated by means of the different outcomes of the trial fairness assessments in the cases of *Naidoo* and *Pillay*, despite the fact that the judgment was based on the same factual background. In *Naidoo*, the discoverability analysis was not applied under the trial fairness prong and the evidence was excluded on the basis that its admission would render the trial unfair. By contrast, in *Pillay*, after the discoverability analysis, it was held that admission of the evidence would not render the trial unfair. The application of the corrective justice principle of 'no better/no worse' worked in favour of the prosecution in this instance.

The following submission made by Mahoney bears much weight, also within the South African section 35(5) context: consideration of the 'effect of exclusion on the repute of the criminal justice system' should be revisited.⁵⁵² The latter factor is discussed in chapter five of this work.

⁵⁴⁹ Fn 16 above.

⁵⁵⁰ Fn 11 above.

⁵⁵¹ *Ibid* at par 88-89.

⁵⁵² Unlike the proposition of Mahoney, it is not contended in this thesis that the "effect of exclusion" should be abandoned. Instead, it is submitted that the "current mood" of society

The criticism leveled by Maric in respect of the *Stillman* fair trial framework is justified.⁵⁵³ *Stillman* and *Feeney* could be read as suggesting that 'conscriptive' evidence is limited to the following categories of evidence: statements, bodily samples, use of the body of the accused in creating the evidence or a significant infringement of human dignity. It is suggested that these categories should be viewed as examples of 'conscriptive' evidence, to be developed on a case by case basis, rather than being viewed as a final list. Such an approach would broaden the fair trial framework to encompass **any** evidence obtained in a manner that violates a right contained in the Charter.

The 'refined' fair trial framework has rendered a separate consideration of the third *Collins* fair trial factor superfluous. A consideration of the nature of the right infringed has been subsumed into the first step of the *Stillman* analysis. This state of affairs was achieved by reason of the fact that the 'conscription' analysis and the function of the third *Collins* fair trial factor serve essentially the same purpose.

In a manner similar to their Canadian counterparts, the South African Supreme Court of Appeal has chosen to discard the concept 'self-incrimination' from its terminology and replaced it with 'conscription'.⁵⁵⁴ The concept 'conscription' is understood to convey the meaning of unconstitutional governmental conduct that unlawfully impinges on the pre-trial rights of an accused, which causes her to participate in the creation of the disputed evidence. The trial fairness analysis is to be determined by means of a consideration of, firstly, a 'conscription

should not be over-emphasised in determining whether exclusion of the disputed evidence would be "detrimental" to the administration of justice.

⁵⁵³ Fn 79 above.

⁵⁵⁴ See *Pillay* (fn 11 above) at par 88.

analysis, and secondly, a discoverability analysis.⁵⁵⁵ However, an important condition is attached to the first leg of the analysis: The discovery of the evidence should not be linked to the unconstitutional participation of the accused in its creation. If this is not the case, the prosecution would be called upon to show that the evidence could have been discovered in any event without a constitutional violation.

The vast experience gained by the Canadian Supreme Court in seeking a fine balance between crime control and rights protection values when interpreting section 24(2) of the Charter, should not be balked at with impertinence. It should always be borne in mind that these values are sought to be protected in all three groups of factors. Against this background, the *Stillman* court has given extensive consideration to the criticism leveled against the *Collins* fair trial requirement⁵⁵⁶ and has made attempts at developing a fair trial framework with two goals in mind: first, the aim of curing the weakness in the *Collins* test; second, and most importantly, to achieve the purpose sought to be protected by the fair trial inquiry.

However, it cannot be disputed that the *Stillman* fair trial framework constitutes a 'near automatic' exclusionary rule. This state of affairs prompted the *Grant* court to modify the fair trial framework. This modified fair trial framework has its strengths and its weaknesses. One of its strengths is the fact that it suggests that all three groups of factors (the first and the second leg of the analysis) should be balanced to determine admissibility. However, it is difficult to accept its theory that trial fairness may be impaired because of conscription, but that such taint could subsequently be 'purified' by the fact that the police acted in 'good faith' – bearing in mind the well-established constitutional policy that

⁵⁵⁵ To determine whether the evidence could have been discovered by lawful means.

⁵⁵⁶ Fn 1 above.

contradicts such an approach.⁵⁵⁷ One of the weaknesses of the *Tandwa* approach is that it suggests that, in principle, the assessment of whether the right to a fair trial has been infringed (in other words rights analysis relating to the cluster of individual rights that collectively serve to protect trial fairness) should be determined by balancing those rights against the public interest in convicting the factually guilty. Such an approach suggests that rights analysis should be undertaken while making an allowance for the constriction of fundamental rights in order to promote the public interest in crime control. In my view, such an approach is at odds with the notion that rights analysis should be engaged on the understanding that there is 'no need to shape the contours of the right in order to accommodate pressing social interests'.⁵⁵⁸ Furthermore, the approach suggested in *Tandwa* fails to take account of the fact that the South African Constitution (and Canadian Charter) – unlike the common law jurisdictions of Australia and Scotland – includes a limitations clause. The presence of the limitations clause permits the courts of South Africa to 'adopt a broad construction of the right' – as opposed to narrowing it down by means of a balancing exercise as suggested in *Tandwa* – when determining whether police conduct is in conflict with a fundamental right.⁵⁵⁹

It is suggested that one of the ways in which the problem of a 'near automatic' exclusionary rule as it is applied in Canada can be prevented (on the understanding that a two-phased analysis should be followed as suggested by Steytler), would be, despite a finding that admission would tend to render the trial unfair, to consider in addition the second and third groups of *Collins* factors. This should be done in order to determine whether exclusion because of trial unfairness would (after a consideration of factors like, for example, police 'good

⁵⁵⁷ *Hebert* (fn 63 above).

⁵⁵⁸ Cheadle "Limitation of Rights" in Chaskalson et al *South African Constitutional Law: The Bill of Rights* (2002) 698-699; Currie & De Waal (fn 257 above) at 166.

⁵⁵⁹ Currie & De Waal (ibid) at 152.

faith' or urgency) be detrimental to the administration of justice. In other words, the three groups of *Collins* factors should be considered and balanced in order to make a value judgment as to whether admission of the evidence would either render the trial unfair or be detrimental to the justice system. When a two-phased approach is followed, it is submitted that a balance between crime control interests and due process values can only be achieved when the factors contained in all three groups of *Collins* factors are considered in the admissibility assessment. In this manner, a court will have considered 'all the circumstances' before a decision is made as to whether the disputed evidence 'must be excluded' or received.