During the course of investigation, police occasionally gather evidence by conduct which infringes constitutionally guaranteed rights. This type of evidence is subject to exclusionary rules in both Canada and the United States. Both jurisdictions have struggled in dealing with evidence derived from a constitutional infringement. While the American position seems largely settled, Canadian courts continue to grapple with the issue. This note compares and contrasts the two approaches and suggests that Canada and the United States exclude evidence for fundamentally different purposes.

I. CLASSIFICATION OF EVIDENCE

There are three distinct classes of evidence: primary evidence, secondary evidence, and derivative evidence. The following is a brief description of each, with examples.

1. Primary Evidence

Primary evidence is gained as a direct result of unconstitutional conduct. Such evidence may be physical or testimonial. For example, an illegal search yields the seizure of a bloodstained sweater. The sweater is a direct fruit of the unlawful search and will be subject to exclusionary rules.

† B.A. (Hons.) (Carleton), LL.B. anticipated 1997 (Dalhousie).

2. Secondary Evidence

Secondary evidence is discovered or generated as a result of primary evidence. For example, having found a blood-stained sweater as a result of an illegal search, police obtain a statement from an accused who is present at the scene of the search. This statement is secondary evidence as it has come to light as a result of the illegal search.

3. Derivative Evidence

Derivative evidence is actually a subset of secondary evidence. In R. v. Church of Scientology (No. 2), Southey J. notes this evidence is "obtained as a result of information learned or leads gained during [unconstitutional activities]. It is causally connected to the obtaining of the primary evidence." Having discovered the blood-stained sweater in an illegal search, for example, the police confront the suspect and obtain a statement. The statement may disclose the location of the murder weapon (e.g. a knife). If the knife is discovered as a result of information gleaned from the illegal search, it is derivative evidence.

II. THE AMERICAN APPROACH

Exclusionary rules have developed differently between states' and federal courts. This note deals only with the federal exclusionary rules as developed by the U.S. Supreme Court.

1. The General Exclusion Rule

For many years American courts had no exclusionary remedy available where evidence was obtained in an illegal manner. This is not to say the courts did not canvass the matter. However, it was not until the decision of Mapp v. Ohio that the Supreme Court sent out a firm message that virtually all evidence obtained in violation of the Constitution would be excluded. The intention was
to deter unconstitutional behaviour by law enforcement officials. In *Elkins v. United States*, the Court held:

The rule is calculated to prevent, not repair. Its purpose is to deter—to compel respect for the constitutional guarantee in the only effectively available way—by removing the incentive to disregard it.  

The *Elkins* Court also held that exclusion of evidence is necessary to ensure that “judicial integrity” remains intact. This secondary purpose was affirmed in *Terry v. Ohio*:

Courts which sit under our Constitution cannot and will not be made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions. Thus in our system evidentiary rulings provide the context in which the judicial process of inclusion and exclusion approves some conduct as comporting with constitutional guarantees and disapproves other actions by state agents. A ruling admitting evidence in a criminal trial, we recognize, has the necessary effect of legitimizing the conduct which produced the evidence, while an application of the exclusionary rule withholds the constitutional imprimatur.

Notwithstanding this recognition of the need to preserve judicial integrity through the exclusion of evidence, American courts in more recent cases have relied almost exclusively on deterrence as the purpose for excluding evidence. Furthermore, the courts have consistently held that evidence obtained as a result of constitutional breaches, save limited exceptions, will be subject to an “automatic” exclusionary rule.

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7 Ibid. at 13.
2. Fruit of the Poisonous Tree

American courts are concerned with evidence obtained as a direct result of constitutional infringements as well as evidence uncovered from facts discovered by unconstitutional conduct. Evidence of the latter type (i.e. derivative evidence) has come to be known as “fruit of the poisonous tree.” The phrase has been adopted to signify evidence which has been tainted as a result of a constitutional violation. In *Silverthorne Lumber Co. v. United States*, Holmes J. articulated the purpose behind the doctrine:

The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it in the way proposed. 10

Although the tone of this passage suggests that virtually all evidence obtained as a result of unconstitutional conduct will be excluded, Justice Holmes acknowledges that situations will arise where the same evidence will ultimately be admissible. This notion has given rise to a series of exceptions to the exclusionary rule under the doctrine of attenuation.

3. Attenuation

Attenuation is a curative doctrine which may sufficiently purge evidence of its unconstitutional taint to allow for its admission. The two most prominent attenuation exceptions are the “independent source” and “inevitable discovery” doctrines.

i. Independent Source

In *Wong Sun v. United States*, 11 the Supreme Court accepted that the exclusionary rule will cease to apply in situations where law enforcement officials have learned of the evidence from an

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10 *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920).
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"independent source." An independent source is one which existed completely distinct from the constitutional violation. For example, if police locate a murder weapon as a result of having taken an illegal statement from the accused, the murder weapon may be suppressed. However, if an unknown accomplice later comes forward of her own volition and provides the police with a statement identifying the exact location of the murder weapon, this independent source would allow for the admission of the weapon into evidence. As LaFave has stated, "the 'independent source' limitation upon the taint doctrine is unquestionably sound."\(^\text{12}\)

Quoting from *Sutton v. United States*,\(^\text{13}\) LaFave highlighted the rationale behind the independent source doctrine as follows:

> It is one thing to say that officers shall gain no advantage from violating the individual's rights; it is quite another to declare that such a violation shall put him beyond the law's reach even if his guilt can be proved by evidence that has been obtained lawfully.\(^\text{14}\)

The danger inherent in the independent source doctrine is that once police illegally obtain evidence, it can be difficult to discern whether the independent source would have truly surfaced independently. In such a situation, new evidence may have been generated by information obtained as a result of access to the tainted evidence. As LaFave points out, a somewhat controversial approach to this problem has evolved.\(^\text{15}\) In both *United States v. Friedland*,\(^\text{16}\) and *United States v. Bacall*,\(^\text{17}\) it was held that unconstitutional conduct which merely leads the police to *focus* their investigation should not be viewed as part of an everlasting taint. This stands in contrast to the argument that for the sake of deterrence, police should not be permitted to benefit from their wrong-doings in any way. Despite the early emphasis given to deterrence, it would appear that the independent source doctrine has gained wide acceptance and will remain intact.

\(^{12}\) Supra note 1 at 374.

\(^{13}\) *Sutton v. United States*, 267 F.2d 271 (4th Cir. 1959).

\(^{14}\) Ibid. at 272.

\(^{15}\) LaFave, supra note 1 at 376-381.

\(^{16}\) *United States v. Friedland*, 441 F. 2d 855 (2d Cir. 1971).

\(^{17}\) *United States v. Bacall*, 443 F.2d 1050 (9th Cir. 1971).
Tainted evidence may also be attenuated through the doctrine of inevitable discovery. The doctrine operates where evidence obtained as a result of unconstitutional conduct would inevitably have been discovered in a lawful manner, had the violation of rights not occurred. LaFave, referring to *Nix v. Williams*, 18 states:

[The] inevitable discovery doctrine is analytically similar to the independent source doctrine, in that both are intended to ensure that suppression does not outrun the deterrence objective: the prosecution is neither 'put in a better position that it would have been if no illegality had transpired' nor 'put in a worse position simply because of some earlier police error or misconduct.' 19

The inevitable discovery doctrine has only been applied in the clearest of cases. In other words, courts have taken the approach that the doctrine is available where the evidence would have been discovered; not where the evidence could have been discovered. Despite some criticism, 20 this doctrine has become firmly entrenched in American jurisprudence. Since its first application in 1943, 21 the inevitable discovery doctrine has been accepted by federal courts and many state courts.

4. The American Approach: Summary

While other exceptions to the exclusionary rule have arisen in American courts, most have been rejected. 22 American courts constantly affirm the notion that creating a vast body of exceptions to the rule would severely undermine its purpose. The courts have also made it clear that, for the most part, primary and derivative evidence will be treated in the same manner. Both types of evidence are subject to the strict application of the exclusionary rule.

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19 LaFave, *supra* note 1 at 381.
20 See e.g. H.S. Hovikoff, “The Inevitable Discovery Exception to the Constitutional Exclusionary Rules” (1974) 74 Colum. L. Rev. 88 at 88-89.
21 *Somer v. United States*, 138 F.2d 790 (2d Cir. 1943).
22 For example, some courts have considered the remoteness of the breach in connection with obtaining the evidence, as well as intervening circumstances which may have attenuated the taint.
In discussing the American approach to the exclusion of evidence, Professor Bradley asserts:

It is hardly surprising that this system causes great consternation among both liberals and conservatives. Liberals criticize the courts, with ample justification, for ignoring the rules (or, in the case of the Supreme Court, watering them down) in order to avoid the suppression of evidence. Conservatives criticize the courts, again with ample justification, for excluding evidence in cases of technical and unimportant violations. . . .

Many Americans, particularly conservatives, believe that the U.S. rules are much more pro-defendant than those of other countries. These commentators are urging lawmakers to consider the practices of other countries where the police are afforded greater leeway. Judge Wilkey, for example, has argued that “one proof of the irrationality of the exclusionary rule is that no other civilized nation in the world has adopted it.”

Professor Bradley remarks that in adopting a new Charter of Rights and Freedoms, it is interesting that Canada “chose not only to copy the U.S. Fourth Amendment virtually verbatim, but also to adopt, as a constitutional requirement, the much maligned exclusionary rule, albeit in a more limited form.”

III. THE CANADIAN APPROACH

1. Exclusion of Evidence in the Pre-Charter Era

Prior to the advent of the Charter in 1982, Canadian courts had the discretionary power to exclude relevant evidence under the common law. The exercise of this power rarely led to the exclusion of evidence, however, save where it was determined that the

26 Supra note 23 at 196.
prejudicial value of the evidence outweighed its probative value. In fact, even involuntary statements were admissible when their reliability was confirmed by a subsequent finding of fact.\(^{27}\) Thus, for example, if police were able to locate a murder weapon by forcing the accused to talk, both the murder weapon and the statement leading to its discovery could be tendered as evidence. The primary concern in the pre-Charter era was the reliability of the evidence obtained.\(^{28}\)

2. Section 24(2) of the Charter

The Charter substantially changed the Canadian position with respect to the exclusion of evidence. Section 24 provides:

(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

3. The Purpose of Section 24(2) of the Charter

The purpose of section 24(2) of the Charter is not to deter unconstitutional behaviour on the part of law enforcement officials, although such result may be a byproduct of the exclusionary remedy.\(^{29}\) Instead, section 24(2) is designed to prevent the administration of justice from being brought into further disrepute by the admission of evidence obtained in an unconstitutional


\(^{28}\) See e.g. Wray, ibid.

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manner. This purpose was fully set out by Lamer J. (as he then was) in the landmark case of *R. v. Collins:*

Misconduct by the police in the investigatory process often has some effect on the repute of the administration of justice, but s. 24(2) is not a remedy for police misconduct, requiring the exclusion of the evidence if, because of this misconduct, the administration of justice was brought into disrepute. Section 24(2) could well have been drafted in that way, but it was not. Rather, the drafters of the Charter decided to focus on the admission of evidence in the proceedings, and the purpose of s. 24(2) is to prevent having the administration of justice brought into further disrepute by the admission of the evidence in the proceedings. This further disrepute will result from the admission of evidence that would deprive the accused of a fair hearing, or from judicial condonation of unacceptable conduct by the investigatory and prosecutorial agencies.

Essentially, the primary purpose of section 24(2) is to safeguard a basic respect for justice in Canada.

4. Section 24(2): A Two-Step Process

As is apparent from the structure of section 24(2), the Canadian approach to the exclusion of evidence is a two-step process. First, the evidence sought to be excluded must have been obtained in a manner that infringed or denied a right or freedom guaranteed by the *Charter.* This may be termed the “infringement requirement.” Note here that when a constitutional infringement is found, the tainted evidence, for the time being, remains admissible. After the infringement requirement has been satisfied, the second step is to determine whether the admission of the evidence would bring the administration of justice into disrepute. The Supreme Court of

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31 *Supra* note 29 at 280–281.
33 *Collins, supra* note 29.
Canada has set out and approved this two-stage process in a number of cases.34

i. Stage One: The Infringement Requirement

At the first stage of the exclusion analysis, the applicant must demonstrate that the events leading to the discovery of the evidence are sufficiently linked to a Charter breach. The question thus becomes: what type of relationship establishes a sufficient link?

In order to determine when section 24(2) will be engaged, one must interpret the statutory meaning of "obtained in a manner" vis-à-vis the infringement of a right or freedom. In R. v. Therens, Le Dain J. held that the phrase "obtained in a manner" did not require a strict relationship of causation between the unconstitutional conduct and the evidence sought to be excluded.35 Le Dain J. explained:

It is not necessary to establish that the evidence would not have been obtained but for the violation of the Charter. Such a view gives adequate recognition to the intrinsic harm that is caused by a violation of a Charter right or freedom, apart from its bearing on the obtaining of evidence. I recognize, however, that in the case of derivative evidence which is not what is in issue here, some consideration may have to be given in particular cases to the question of relative remoteness.36

Thus, the Court in Therens held that a Charter violation must merely precede or occur in the course of obtaining the evidence. Three years later, in R. v. Strachan,37 the Court affirmed this threshold test and expressly rejected the need for a causation requirement. Dickson C.J.C. held:

In my view, reading the phrase "obtained in a manner" as imposing a causation requirement creates a host of difficulties. A strict causal nexus would place the courts in the position of having to speculate whether the evidence would have been discovered had the Charter violation not occurred. Speculation on what might have

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36 Ibid. at 649.
37 Strachan, supra note 34.
happened is a highly artificial task. Isolating the events that caused the evidence to be discovered from those that did not is an exercise in sophistry. Events are complex and dynamic. It will never be possible to state with certainty what would have taken place had a Charter violation not occurred. Speculation of this sort is not, in my view, an appropriate inquiry for the courts.  

Following Justice Le Dain’s reasoning in *Therens*, the Chief Justice held that as long as a violation preceded the discovery of the evidence, it then made little sense to draw distinctions based on the circumstances surrounding the violation and the type of evidence discovered. The Court highlighted the importance of a temporal link, but cautioned that situations will arise where evidence obtained following the breach of a Charter right will be too remote from the violation to be “obtained in a manner” that infringed the Charter. As a result, a case by case approach has evolved which considers the remoteness of the violation with regard to the evidence obtained.

As Fenton notes, *R. v. Grant* represents the “high-water mark” for the application of the test for determining whether evidence was obtained in a manner that violated the Charter. In *Grant* the Supreme Court held that there was a sufficient temporal and tactical connection between the illegal perimeter searches and the evidence ultimately offered at trial to attract the provisions of section 24(2) of the Charter. As Sopinka J. stated:

> It is unrealistic to view the perimeter searches as severable from the total investigatory process which culminated in discovery of the impugned evidence. Furthermore, to find otherwise would be to ignore the possible tainting effect which a Charter violation might have on the otherwise legitimate components of searches by state authorities.

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38 Strachan, *supra* note 34 at 1002.
42 *Grant*, *supra* note 40 at 255.
The Supreme Court of Canada recently reconsidered the test for triggering section 24(2) in *R. v. Goldhart*. Writing for the majority of the Court, Sopinka J. held that section 24(2) did not apply because there was no temporal connection between the impugned evidence and the *Charter* breach. The Court added that any causal connection was too remote. In an attempt to clear up what has become a somewhat confusing area of law, Sopinka J. explained the concepts of causation and remoteness and their relation to the exclusion of evidence:

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

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44 *Supra* note 43 at 494-495.
Emphasizing the importance of examining the entire relationship between the impugned evidence and the illegal search and seizure, Sopinka J. held that evidence may be causally related to an initial Charter breach yet causally too remote to justify exclusion. Ultimately, Justice Sopinka adopted Justice Rehnquist's majority opinion in *United States v. Ceccolini*:

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

-ii. Stage Two: Bringing the Administration of Justice into Disrepute

Having found a Charter breach, the court must determine whether the admission of the impugned evidence would bring the administration of justice into disrepute. In *Collins*, Lamer J. (as he then was) set out the threefold test for determining whether evidence ought to be excluded pursuant to Section 24(2) of the Charter. The Collins test was neatly summarized in *R. v. Jacoy,* where Dickson C.J.C. wrote as follows:

> First, the court must consider whether the admission of evidence will affect the fairness of the trial. If this inquiry is answered affirmatively, “the admission of evidence would tend to bring the administration of justice into disrepute and, subject to a consideration of other factors, the evidence generally should be excluded” (*Collins*, p. 284 S.C.R.). One of the factors relevant to this determination is the nature of the evidence; if the evidence is real evidence that existed irrespective of the Charter violation, its admission will rarely render the trial unfair.

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46 *Supra* note 29.
The second set of factors concerns the seriousness of the violation. Relevant to this group is whether the violation was committed in good faith, whether it was inadvertent or of a merely technical nature, whether it was motivated by urgency or to prevent the loss of evidence, and whether the evidence could have been obtained without a Charter violation.

Finally, the court must look at factors relating to the effect of excluding the evidence. The administration of justice may be brought into disrepute by excluding evidence essential to substantiate the charge where the breach of the Charter was trivial. While this consideration is particularly important where the offence is serious, if the admission of the evidence would result in an unfair trial, the seriousness of the offence would not render the evidence admissible.48

a. Fairness of the trial

In assessing what effect the admission of evidence will have on the fairness of the trial, courts will consider whether the accused has been conscripted to assist the prosecution. Evidence which emanates directly from the accused tends to be excluded. Conversely, “real” evidence (i.e. evidence which exists independent of any participation by the accused) will rarely be excluded. As LaForest J. pointed out in R. v. Colarusso:

In this part of the analysis, this court has affirmed that the classification of evidence as being either “real” or “conscriptive” is of importance, although, as this court has noted on other occasions, the mere fact that the impugned evidence is classified as either real or conscriptive should not in and of itself be determinative of the admissibility of the evidence. . . . 49

This approach is based on the principle that the admission of self-incriminating evidence, manufactured in whole or in part by the authorities, may bring the administration of justice into disrepute.50

48 Supra note 47 at 558-559.
50 Supra note 29 at 280-281.
Some commentators critique the Court’s “real” versus “conscriptive” evidentiary distinction, and argue that both forms of evidence flow from a Charter breach and, thus, ought to be subject to the same exclusionary remedy.\textsuperscript{51}

Regardless of its real or conscriptive nature, the admission of evidence which could not have been discovered but for the participation of the accused may render the trial unfair. In Burlington, the Supreme Court concluded that the participation of the accused in the obtaining of the evidence is central to the question of whether its admissibility would render the trial unfair. Sopinka J. wrote for the majority:

The rationale for this view is that it is unfair for the Crown to make out its case in whole or in part by the use of evidence that it obtained in breach of the rights of the accused and involving his or her participation.

The participation of the accused in providing incriminating evidence involving a breach of Charter rights is the ingredient that tends to render the trial unfair as he or she is not under any obligation to assist the Crown to secure a conviction.\textsuperscript{52}

More recently, in \textit{R. v. Evans},\textsuperscript{53} the Court considered whether the admission of narcotic evidence discovered following an unreasonable search could affect the fairness of the trial. Emphasizing the non-conscriptive nature of the breach, Sopinka J. held:

[I] would find that the admission of the impugned evidence would not render the appellant's trial unfair. The evidence in question is real evidence that existed irrespective of a Charter violation. Moreover, the appellants were not conscripted against themselves in the creation of the evidence, as the evidence pre-existed the violation of s. 8. Any participation of the accused persons

\textsuperscript{51} See \textit{e.g.} R. J. Delisle, "Collins: An Unjustified Distinction " (1987) 56 C.R. (3d) 216.

\textsuperscript{52} Burlington, supra note 39 at 290.

in the discovery of this evidence involving a breach of their Charter rights was minimal at best.\textsuperscript{54}

The Supreme Court has left little doubt that the touchstone of trial fairness is self-incrimination. The Ontario Court of Appeal recently echoed this sentiment in \textit{R. v. Belnavis}.\textsuperscript{55} After reviewing the authorities, Doherty J. held that:

\ldots the involvement of the accused in the obtaining of the evidence remains a touchstone when determining whether the admission of the evidence would render the trial unfair. Where evidence pre-exists the breach and is independent of the accused, but is obtained through the participation of the accused, then the discoverability of the evidence without that participation determines whether the evidence is self-incriminatory.\textsuperscript{56}

Our justice system has a clear aversion to self-incrimination. Fenton aptly notes:

Trial fairness, as one of the three organizing principles under our exclusionary rule is not primarily concerned with whether the state has gained an evidentiary advantage as a result of a Charter breach, but rather whether the state has \textit{taken advantage of the accused}.\textsuperscript{57}

\textbf{b. Seriousness of the breach}

While the courts have recognized that a breach of a Charter right is always a serious matter, not every breach will warrant the exclusion of evidence.\textsuperscript{58} Some infringements of the Charter will be more serious than others. Le Dain J. in \textit{Therens} set out relevant criteria for determining the seriousness of the Charter violation:

The relative seriousness of the constitutional violation has been assessed in the light of whether it was committed in good faith, or was inadvertent or of a merely technical nature, or whether it was deliberate, willful or flagrant.

\textsuperscript{54} \textit{Supra} note 53 at 26.
\textsuperscript{56} \textit{Ibid.} at 346.
\textsuperscript{57} \textit{Supra} note 41 at 26.
\textsuperscript{58} \textit{Strachan}, \textit{supra} note 34.
Another relevant consideration is whether the action which constituted the constitutional violation was motivated by urgency or necessity to prevent the loss or destruction of the evidence.\(^{59}\)

The *Collins* Court approved these criteria and added that the availability of alternative investigatory techniques serves to exasperate the seriousness of the *Charter* breach.\(^{60}\)

Good faith on the part of police has been held to minimize the significance of a *Charter* breach.\(^{61}\) Where police officers reasonably rely on existing authority for the purposes of investigation, and their conduct is later found to be unconstitutional, courts will be much less likely to order exclusion of the evidence.\(^{62}\) On the other hand, where police knowingly disregard the law in order to collect evidence, the breach will be considered more serious and courts will be much more likely to exclude such evidence.\(^ {63}\) Such was the case in *R. v. Elshaw*,\(^ {64}\) where the Supreme Court excluded incriminating statements of the accused taken in violation of his right to counsel. Writing for the majority, Iacobucci J. held that a violation of rights which jeopardizes the fairness of the trial cannot be saved by mitigating factors, such as the good faith of the police.\(^ {65}\)

c. The effects of exclusion

The last branch of the *Collins* test requires that courts balance the effects of excluding impugned evidence against the effects of admitting such evidence. For example, excluding evidence on the basis of a purely technical breach of the *Charter* would tend to bring the administration of justice into disrepute. Conversely, admitting evidence obtained as a result of a gross violation of the

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\(^{59}\) *Supra* note 35 at 652.

\(^{60}\) *Supra* note 29 at 285.

\(^{61}\) Note: The Supreme Court’s “good faith” reasoning has been the subject of some criticism. See *e.g.* S. Coughlan, “Good Faith and Exclusion of Evidence under the Charter” (1992), 11 C.R. (4th) 304.

\(^{62}\) See *e.g.* Grant, *supra* note 40; Evans, *supra* note 53.


\(^{65}\) *Ibid.* at 43.
Charter would also bring the administration of justice into disrepute. A court must balance these two considerations in light of the seriousness of the crime with which the accused has been charged. Furthermore, determining admissibility at this stage calls for a court to consider the totality of the circumstances.

Section 24(2) was not intended to deter or punish the police for misconduct committed during the investigative process. As Fenton points out, the section is directed to the consideration of whether, misconduct having been found, the administration of justice would be brought into further disrepute by the admission of evidence discovered as a result of the misconduct.

IV. ANALYSIS

1. Purpose of Excluding Evidence

There is a marked difference between the Canadian and the American approach to the exclusion of evidence. The main difference lies in the purpose behind the exclusion of evidence. As mentioned above, the purpose of the American exclusionary rule is to deter law enforcement officials from engaging in unconstitutional activities. The purpose of the Canadian exclusionary rule, on the other hand, is to prevent the administration of justice from being brought into further disrepute. These fundamentally different purposes significantly affect the administration of justice. The automatic exclusion rule is justified by its deterrent value in the United States. This unforgiving approach is said to prevent the police from employing unconstitutional conduct as a last resort investigative technique. If, for example, the police run out of legitimate avenues or clues, they may be tempted to "roll the dice" and engage in unconstitutional behaviour in the absence of an automatic exclusion rule. Even if the primary evidence is excluded, valuable clues may be gained, which could lead to derivative evidence. This derivative evidence, under a less strict regime, may be admissible and sufficient to secure a conviction. The strict application of the American exclusionary rule is necessary in order to achieve its deterrent purpose.

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66 Supra note 29 at 286.
67 Supra note 41 at 34.
The Canadian approach, on the other hand, involves a more elaborate balancing process. This process seeks to achieve results which will ensure a basic respect for the administration of justice. The Collins test provides the Crown with a number of opportunities to justify the admission of evidence. The only area in which the courts have taken a firm position is in regard to evidence which is manufactured by the authorities through the accused. This type of evidence is inadmissible due to its effect on the fairness of the trial. Once the Crown clears the “fairness of the trial” branch of Collins, however, the odds of admissibility are quite good. In other words, the Canadian approach is more tolerant to minor or mere technical breaches of the Charter.

But a focus on deterrence may not be entirely foreign to Canadian courts. At least this is one way of explaining Burlingham. As noted above, the Court concluded that the participation of the accused in the obtaining of the evidence was central to the question of trial fairness. Nevertheless, one gets the sense that the Burlingham Court was attempting to send a message to law enforcement officials. On this point, Iacobucci J.’s comments are illustrative:

... I underscore that we should never lose sight of the fact that even a person accused of the most heinous crimes, and no matter the likelihood that he actually committed those crimes, is entitled to the full protection of the Charter: Shortcutting or short-circuiting those rights affects not only the accused, but also the entire reputation of the criminal justice system. It must be emphasized that the goals of preserving the integrity of the criminal justice system, as well as promoting the decency of investigatory techniques, are of fundamental importance in applying s. 24(2). 68

Perhaps the most fundamental difference between the Canadian and American approaches to the exclusion of evidence is not as fundamentally different as it once was.

2. Evidentiary Presumptions

Another difference between the two approaches is the status of evidence immediately after it has been held to be the fruit of

68 Supra note 39 at 242.
unconstitutional conduct. The American approach immediately labels such evidence *prima facie* inadmissible as a result of the taint. In contrast, the Canadian approach deems that the evidence remain admissible, notwithstanding the taint, until the applicant demonstrates that its admission will bring the administration of justice into disrepute. Once the applicant demonstrates that evidence has been obtained as a result of unconstitutional conduct, the two approaches differ with respect to the onus requirement. In the American context, the onus rests with the prosecution to prove that there has been sufficient attenuation to allow the admission of evidence. The Canadian approach, on the other hand, requires that the applicant prove, on the balance of probabilities, that the admission of the evidence would bring the administration of justice into disrepute. This reverse onus requirement obviously makes it more difficult for the Canadian accused person to obtain an exclusionary remedy.

3. One-Step versus Two-Step Analysis

The American approach to the exclusion of evidence is often referred to as a one-step process (i.e. if the evidence is tainted, then it should be excluded). The Canadian approach, however, is said to involve two analytical steps: 1) Was the evidence obtained in a manner which offends the *Charter*, and, 2) Would the admission of the evidence bring the administration of justice into disrepute. I would suggest that the American approach can also be described as a two-step process. The first stage asks if the evidence was obtained in an unconstitutional manner. If the evidence was obtained in an unconstitutional manner, the second stage determines whether the doctrine of attenuation can sufficiently purge the evidence of its unconstitutional taint to allow the evidence to be admitted. Considered in this framework, the American and Canadian approaches are quite similar. In both jurisdictions, the evidence-gathering must be linked to a constitutional infringement, and the interests of justice must be balanced in determining the ultimate status of the evidence. While the Canadian approach places more emphasis on this balancing exercise, the American approach takes similar considerations into account. Through the attenuation exceptions, U.S. courts are attempting to preserve the reputation and effective administration of justice. It is submitted that the approaches are similar in this regard.
4. Threshold Tests

Both Canada and the United States utilize fairly low threshold tests in determining whether there is a connection between a constitutional violation and the obtaining of evidence. Canadian courts now require a sufficient temporal and/or causal connection between the breach and the obtaining of evidence. 69 Courts in the U.S., on the other hand, require that the evidence be obtained as a factual consequence of the unconstitutional behaviour. 70 While some may argue that the American approach requires a strict causal relationship, it differs little from the approach taken by Canadian courts. The American approach allows evidence even loosely connected to unconstitutional behaviour to trigger the exclusionary rule. The "factual consequences" require little more than a relationship whereby unconstitutional behaviour somehow led to evidence. Because of its focus on deterrence, the American approach is less concerned with the remoteness of the breach. Nevertheless, both jurisdictions are relatively quick to find that a constitutional breach has tainted evidence.

5. Discoverability

Another similarity is that both jurisdictions focus on discoverability, which is to say that evidence obtained through unconstitutional means may be admissible if it could have been obtained in the absence of a Charter breach. In R. v. S. (R.J.), 71 Iacobucci J. held that discoverability is a determinative consideration in Canada. It is submitted that this is merely the inevitable discovery doctrine restated. In Burlingham, for example, the Court held that the murder weapon was inadmissible because it could not have been found but for the constitutional violation. A murder weapon which would have been discovered in the course of investigation is, however, admissible. 72 In the past, Canadian courts have been reluctant to exclude real evidence, regardless of discoverability. Recent decisions in R.J.S. and Burlingham suggest that Canadian courts are embracing the American approach to discoverability. In fact, the Canadian position on discoverability is largely a reflection

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69 Supra note 43 at 494-495.
72 See e.g. Black, supra note 34.
of the rule laid down by the United States Supreme Court in *Nix v. Williams.\textsuperscript{73}

6. Balancing

Although the purposes for excluding evidence differ between jurisdictions, both Canada and the United States employ a balancing component in their analysis. The balancing process in the Canadian context takes place in the second stage of section 24(2), with most occurring in the third branch of the *Collins* test. Admittedly, the balancing which takes place in the Canadian approach is more pronounced. Nevertheless, the doctrine of attenuation has been employed as an exception to ensure that those who commit crimes are not completely insulated as a result of unconstitutional conduct. It is submitted that such exceptions have been created to balance the deterrent purpose with the interests of justice in the United States.

V. CONCLUSION

Evidence is excluded for fundamentally different purposes in Canada and the United States. Each purpose, deterrence and the promotion of respect for the administration of justice, has structured the process for excluding evidence in its own unique way. Although there is a marked difference in the processes adopted by each jurisdiction, it would appear as though Canada and the U.S. employ many common principles.

Notwithstanding the similarities between the two jurisdictions, the Canadian approach to the exclusion of evidence has incorporated more considerations into the process. While some may embrace this thoughtful approach, others find it unnecessarily complicated, preferring instead the American approach which is arguably more straightforward. Perhaps Canadian courts have also seen some value in the American approach. In *Burlingham*, the Supreme Court of Canada demonstrated a willingness to take incremental steps toward a new approach to section 24(2) of the *Charter*. Sopinka J. stated:

\textsuperscript{73} *Supra* note 18 at 441-448.
Various proposals have been made as to the future direction that this court should take with respect to s. 24(2). Some would favour an approach that is less exclusionary and others more exclusionary. It has been suggested that the distinction between real and other evidence be eliminated as well as any distinction between the nature of the Charter right that has been infringed: see Delisle, supra. It has been proposed that the distinction based on participation of the accused be eliminated, and that discoverability be the main touchstone of admissibility.

While we have not rushed in to adopt every current theory on the application of s. 24(2), these are serious proposals that have been and should be taken into account in the incremental evolution of the jurisprudence in this area. Accordingly, as my colleague Iacobucci J. points out, the distinction between real and conscriptive evidence is not treated as determinative and greater emphasis has been placed on discoverability or the "but for" test. . . . In my opinion, we should proceed to develop the law relating to s. 24(2) on this basis. . . .

Does this passage foreshadow a movement toward the American approach? R. v. Goldhart suggests otherwise. As Fenton notes:

One false step in an investigation should not immunize an accused from the probative value of relevant evidence subsequently discovered unless the value of the truth seeking function of the criminal trial is outweighed by the need to protect the accused's right to a fair trial or the need to deter abusive police practices and avoid the long term consequences of the regular admission of evidence gained through serious breaches of the Charter. [emphasis in original] 75

74 Supra note 39 at 448.
75 Fenton, supra note 41 at 34.