2002 CarswellOnt 992
Ontario Court of Justice

R. v. Hornick

2002 CarswellOnt 992, [2002] O.J. No. 1170, 53 W.C.B. (2d) 275, 93 C.R.R. (2d) 261

Her Majesty the Queen v. Jill Hornick Rachel Aitcheson

Hryn J.

Judgment: January 31, 2002
Docket: None given

Counsel: *Ms K. Hart*, *Ms N. Zed*, for Crown
F. Addario, *Ms V. Simpson*, for Accused

Subject: Constitutional; Criminal; Public

Table of Authorities

Cases considered by *Honourable Mr. Justice P. Hryn*:

Bennett v. Horseferry Road Magistrate's Court, [1993] 3 All E.R. 138, [1993] 3 W.L.R. 90 (U.K. H.L.) — referred to

Comité paritaire de l'industrie de la chemise c. Sélection Milton, 4 C.C.E.L. (2d) 214, (sub nom. *R. v. Potash)* 115 D.L.R. (4th) 702, (sub nom. *Comité paritaire de l'industrie de la chemise v. Potash)* 94 C.L.L.C. 14,034, (sub nom. *Comité paritaire de l'industrie de la chemise v. Potash)* 168 N.R. 241, (sub nom. *Comité paritaire de l'industrie de la chemise v. Potash)* 21 C.R.R. (2d) 193, (sub nom. *Comité paritaire de l'industrie de la chemise v. Potash)* 61 Q.A.C. 241, (sub nom. *R. v. Potash)* 91 C.C.C. (3d) 315, 1994 CarswellQue 79, 1994 CarswellQue 113, (sub nom. *Comité paritaire de l'industrie de la chemise c. Potash)* [1994] 2 S.C.R. 406 (S.C.C.) — considered

F. (S.) v. Canada (Attorney General), (sub nom. *R. v. F. (S.))* 70 C.R.R. (2d) 41, (sub nom. *R. v. F. (S.))* 182 D.L.R. (4th) 336, 2000 CarswellOnt 60, (sub nom. *R. v. F. (S.))* 141 C.C.C. (3d) 225, (sub nom. *S.F. v. Canada (Attorney General))* 128 O.A.C. 329, 32 C.R. (5th) 79 (Ont. C.A.) — referred to

G. (M.B.) v. Chicago (City) (1983), 723 F.2d 1263 (U.S. 7th Cir. Ill.) — referred to

Giles v. Ackerman (1984), 746 F.2d 614, 53 U.S.L.W. 2260, 78 A.L.R. Fed. 191 (U.S. C.A. 9th Cir.) — referred to

Law v. Canada (Minister of Employment & Immigration), 1999 CarswellNat 359, 1999 CarswellNat 360, (sub nom. *Law v. Canada (Minister of Human Resources Development))* 60 C.R.R. (2d) 1, 170 D.L.R. (4th) 1, 236 N.R. 1, [1999] 1 S.C.R. 497, 43 C.C.E.L. (2d) 49, (sub nom. *Law v. Minister of Human Resources Development)* C.E.B. & P.G.R. 8350 (headnote only) (S.C.C.) — referred to

R. v. Bohn, 2000 CarswellBC 910, 2000 BCCA 239, 33 C.R. (5th) 265, 145 C.C.C. (3d) 320, 136 B.C.A.C. 263, 222 W.A.C. 263, 74 C.R.R. (2d) 346 (B.C. C.A.) — referred to

R. v. Carosella, 112 C.C.C. (3d) 289, 98 O.A.C. 81, 4 C.R. (5th) 139, [1997] 1 S.C.R. 80, 31 O.R. (3d) 575 (headnote only), 142 D.L.R. (4th) 595, 207 N.R. 321, 41 C.R.R. (2d) 189, 1997 CarswellOnt 85, 1997 CarswellOnt 86, 2 B.H.R.C. 23 (S.C.C.) — considered

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

R. v. D. (E.), 73 O.R. (2d) 758, 2 C.R.R. (2d) 331, 78 C.R. (3d) 112, 39 O.A.C. 13, 57 C.C.C. (3d) 151, 1990 CarswellOnt 104 (Ont. C.A.) — referred to

R. v. Edwards, 45 C.R. (4th) 307, 192 N.R. 81, 26 O.R. (3d) 736 (note), 104 C.C.C. (3d) 136, 132 D.L.R. (4th) 31, 33 C.R.R. (2d) 226, 88 O.A.C. 321, [1996] 1 S.C.R. 128, 1996 CarswellOnt 2126, 1996 CarswellOnt 1916 (S.C.C.) — followed

R. v. Ferguson, 41 O.A.C. 149, 1 C.R. (4th) 53, 1 C.R.R. (2d) 227, 1990 CarswellOnt 60 (Ont. C.A.) — referred to

R. v. Flintoff, 1998 CarswellOnt 2373, 111 O.A.C. 305, 16 C.R. (5th) 248, 126 C.C.C. (3d) 321, 36 M.V.R. (3d) 1 (Ont. C.A.) — followed
R. v. Genest, 91 N.R. 161, 37 C.R.R. 252, [1989] 1 S.C.R. 59, 19 Q.A.C. 163, 45 C.C.C. (3d) 385, 67 C.R. (3d) 224, 1989 CarswellQue 13, 1989 CarswellQue 102 (S.C.C.) — referred to
R. v. Golden, 2001 SCC 83, 2001 CarswellOnt 4253, 2001 CarswellOnt 4301, 47 C.R. (5th) 1, 159 C.C.C. (3d) 449, 207 D.L.R. (4th) 18, 279 N.R. 1, 153 O.A.C. 201 (S.C.C.) — considered
R. v. Goldhart, 48 C.R. (4th) 297, 28 O.R. (3d) 480, 107 C.C.C. (3d) 481, 136 D.L.R. (4th) 502, 198 N.R. 321, 37 C.R.R. (2d) 1, [1996] 2 S.C.R. 463, 92 O.A.C. 161, 1996 CarswellOnt 2739, 1996 CarswellOnt 2740 (S.C.C.) — considered
R. v. Grant, [1993] 8 W.W.R. 257, 84 C.C.C. (3d) 173, 159 N.R. 161, [1993] 3 S.C.R. 223, 24 C.R. (4th) 1, 35 B.C.A.C. 1, 57 W.A.C. 1, 17 C.R.R. (2d) 269, 1993 CarswellBC 1168, 1993 CarswellBC 1265 (S.C.C.) — considered
R. v. Harrer, 42 C.R. (4th) 269, 101 C.C.C. (3d) 193, 128 D.L.R. (4th) 98, 186 N.R. 329, 64 B.C.A.C. 161, 105 W.A.C. 161, 32 C.R.R. (2d) 273, [1995] 3 S.C.R. 562, 1995 CarswellBC 651, 1995 CarswellBC 1144 (S.C.C.) — considered
R. v. Inco Ltd., 146 O.A.C. 66, 2001 CarswellOnt 1913, 155 C.C.C. (3d) 383, 54 O.R. (3d) 495, 41 C.E.L.R. (N.S.) 9, 83 C.R.R. (2d) 189 (Ont. C.A.) — referred to
R. v. Jewitt, [1985] 2 S.C.R. 128, [1985] 6 W.W.R. 127, 20 D.L.R. (4th) 651, 61 N.R. 159, 21 C.C.C. (3d) 7, 47 C.R. (3d) 193, 1985 CarswellBC 743, 1985 CarswellBC 813 (S.C.C.) — referred to
R. v. Kelly, 1999 CarswellNB 85, 132 C.C.C. (3d) 122, 169 D.L.R. (4th) 720, 22 C.R. (5th) 248, 213 N.B.R. (2d) 1, 545 A.P.R. 1 (N.B. C.A.) — referred to
R. v. Keyowski, 83 N.R. 296, [1988] 1 S.C.R. 657, [1988] 4 W.W.R. 97, 65 Sask. R. 122, 40 C.C.C. (3d) 481, *(*sub nom. *Keyowski v. R.)* 62 C.R. (3d) 349, 32 C.R.R. 269, 1988 CarswellSask 273, 1988 CarswellSask 463 (S.C.C.) — considered
R. v. Kokesch, [1990] 3 S.C.R. 3, [1991] 1 W.W.R. 193, 121 N.R. 161, 51 B.C.L.R. (2d) 157, 61 C.C.C. (3d) 207, 1 C.R. (4th) 62, 50 C.R.R. 285, 1990 CarswellBC 255, 1990 CarswellBC 763 (S.C.C.) — distinguished
R. v. M. (M.R.), 1998 CarswellNS 346, 166 D.L.R. (4th) 261, 129 C.C.C. (3d) 361, 233 N.R. 1, 20 C.R. (5th) 197, 171 N.S.R. (2d) 125, 519 A.P.R. 125, [1998] 3 S.C.R. 393, 57 C.R.R. (2d) 189, 1998 CarswellNS 347, 5 B.H.R.C. 474 (S.C.C.) — referred to
R. v. Mack (1988), [1989] 1 W.W.R. 577, [1988] 2 S.C.R. 903, 90 N.R. 173, 67 C.R. (3d) 1, 37 C.R.R. 277, 44 C.C.C. (3d) 513, 1988 CarswellBC 701, 1988 CarswellBC 767 (S.C.C.) — considered
R. v. Mattis, 1998 CarswellOnt 4249, 20 C.R. (5th) 93, 58 C.R.R. (2d) 93 (Ont. Prov. Div.) — considered
R. v. Mills, [1999] 3 S.C.R. 668, 1999 CarswellAlta 1055, 1999 CarswellAlta 1056, 139 C.C.C. (3d) 321, 248 N.R. 101, 28 C.R. (5th) 207, 180 D.L.R. (4th) 1, [2000] 2 W.W.R. 180, 244 A.R. 201, 209 W.A.C. 201, 75 Alta. L.R. (3d) 1, 69 C.R.R. (2d) 1 (S.C.C.) — considered
R. v. Monney, 1999 CarswellOnt 935, 1999 CarswellOnt 936, 237 N.R. 157, 133 C.C.C. (3d) 129, 171 D.L.R. (4th) 1, 24 C.R. (5th) 97, 119 O.A.C. 272, [1999] 1 S.C.R. 652, 61 C.R.R. (2d) 244, 6 B.H.R.C. 336 (S.C.C.) — considered
R. v. O'Connor (1995), [1996] 2 W.W.R. 153, [1995] 4 S.C.R. 411, 44 C.R. (4th) 1, 103 C.C.C. (3d) 1, 130 D.L.R. (4th) 235, 191 N.R. 1, 68 B.C.A.C. 1, 112 W.A.C. 1, 33 C.R.R. (2d) 1, 1995 CarswellBC 1098, 1995 CarswellBC 1151 (S.C.C.) — considered
R. v. Pithart, 57 C.R. (3d) 144, 34 C.C.C. (3d) 150, 29 C.R.R. 301, 1987 CarswellBC 499 (B.C. Co. Ct.) — referred to
R. v. Plant, [1993] 8 W.W.R. 287, 145 A.R. 104, 55 W.A.C. 104, 17 C.R.R. (2d) 297, 12 Alta. L.R. (3d) 305, 84 C.C.C. (3d) 203, [1993] 3 S.C.R. 281, 24 C.R. (4th) 47, 157 N.R. 321, 1993 CarswellAlta 94, 1993 CarswellAlta 566 (S.C.C.) — considered
R. v. Power, 2 M.V.R. (3d) 161, [1994] 1 S.C.R. 601, 89 C.C.C. (3d) 1, 117 Nfld. & P.E.I.R. 269, 365 A.P.R. 269, 165 N.R. 241, 29 C.R. (4th) 1, 1994 CarswellNfld 9, 1994 CarswellNfld 278 (S.C.C.) — followed
R. c. Robillard, 2000 CarswellQue 2576, 39 C.R. (5th) 189, *(*sub nom. *Regina v. Robillard)* 151 C.C.C. (3d) 296, [2001] R.J.Q. 1 (Que. C.A.) — referred to
R. v. Sanelli, *(*sub nom. *R. v. Duarte)* 53 C.C.C. (3d) 1, *(*sub nom. *R. v. Duarte)* 65 D.L.R. (4th) 240, 103 N.R. 86, 37 O.A.C. 322, 74 C.R. (3d) 281, *(*sub nom. *R. v. Duarte)* 71 O.R. (2d) 575, *(*sub nom. *R. v. Duarte)* [1990] 1 S.C.R. 30, *(*sub nom. *R. v. Duarte)* 45 C.R.R. 278, 1990 CarswellOnt 77, 1990 CarswellOnt 986 (S.C.C.) — considered
R. v. Simpson, 88 C.C.C. (3d) 377, 117 Nfld. & P.E.I.R. 110, 365 A.P.R. 110, 29 C.R. (4th) 274, 1994 CarswellNfld 12 (Nfld. C.A.) — referred to

R. v. Simpson, 95 C.C.C. (3d) 96, 178 N.R. 145, 127 Nfld. & P.E.I.R. 171, 396 A.P.R. 171, 1995 CarswellNfld 34, 1995 CarswellNfld 119, [1995] 1 S.C.R. 449 (S.C.C.) — referred to

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

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

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

R. v. Thompson, [1990] 6 W.W.R. 481, [1990] 2 S.C.R. 1111, 49 B.C.L.R. (2d) 321, 50 C.R.R. 1, 114 N.R. 1, 73 D.L.R. (4th) 596, 59 C.C.C. (3d) 225, 80 C.R. (3d) 129, 1990 CarswellBC 218, 1990 CarswellBC 760 (S.C.C.) — distinguished

R. v. White, 1999 CarswellBC 1224, 1999 CarswellBC 1225, 63 C.R.R. (2d) 1, 240 N.R. 1, 24 C.R. (5th) 201, 135 C.C.C. (3d) 257, 174 D.L.R. (4th) 111, 42 M.V.R. (3d) 161, 123 B.C.A.C. 161, 201 W.A.C. 161, [1999] 2 S.C.R. 417, 7 B.H.R.C. 120 (S.C.C.) — considered

R. v. Wong, 1 C.R. (4th) 1, 120 N.R. 34, 60 C.C.C. (3d) 460, [1990] 3 S.C.R. 36, 2 C.R.R. (2d) 277, 45 O.A.C. 250, 1990 CarswellOnt 58, 1990 CarswellOnt 1008 (S.C.C.) — considered

R. v. Young, 46 O.R. (2d) 520, 13 C.C.C. (3d) 1, 3 O.A.C. 254, 40 C.R. (3d) 289, 10 C.R.R. 307, 1984 CarswellOnt 57 (Ont. C.A.) — followed

Reference re s. 94(2) of the Motor Vehicle Act (British Columbia), [1985] 2 S.C.R. 486, 24 D.L.R. (4th) 536, 63 N.R. 266, 69 B.C.L.R. 145, 23 C.C.C. (3d) 289, 18 C.R.R. 30, 36 M.V.R. 240, [1986] 1 W.W.R. 481, 48 C.R. (3d) 289, 1985 CarswellBC 398, [1986] D.L.Q. 90, 1985 CarswellBC 816 (S.C.C.) — referred to

Schreiber v. Canada (Attorney General), 124 C.C.C. (3d) 129, 158 D.L.R. (4th) 577, 1998 CarswellNat 752, 1998 CarswellNat 753, 225 N.R. 297, 16 C.R. (5th) 1, 51 C.R.R. (2d) 253, [1998] 1 S.C.R. 841, 147 F.T.R. 309 (note), 5 B.H.R.C. 145 (S.C.C.) — considered

United States v. Cobb, 2001 SCC 19, 2001 CarswellOnt 964, 2001 CarswellOnt 965, 152 C.C.C. (3d) 270, 197 D.L.R. (4th) 46, 41 C.R. (5th) 81, 267 N.R. 203, 145 O.A.C. 3, [2001] 1 S.C.R. 587, 81 C.R.R. (2d) 226 (S.C.C.) — referred to

Wilson v. Ray (April 20, 2001), Doc. 00-CV-20006 (Ont. S.C.) — referred to

Statutes considered:

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

Generally — referred to

s. 7 — referred to

s. 8 — considered

s. 11(d) — referred to

s. 15 — referred to

s. 24(1) — considered

s. 24(2) — considered

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

Generally — considered

Customs Act, R.S.C. 1985, c. 1 (2nd Supp.)

s. 98(4) — referred to

Immigration Act, R.S.C. 1985, c. I-2

s. 110.1(3) [en. 1992, c. 49, s. 100] — referred to

Liquor Licence Act, R.S.O. 1990, c. L.19

Generally — referred to

ss. 43-44 — referred to

s. 43(1) — referred to

s. 44(1) — referred to

Regulations considered:

Ministry of Correctional Services Act, R.S.O. 1990, c. M.22

General, R.R.O. 1990, Reg. 778

s. 23

APPLICATION by accused for judicial stay of proceedings or exclusion of evidence due to unreasonable search and seizure.

***Honourable Mr. Justice P. Hryn*:**

1 *THE COURT*: In the matter of Her Majesty the Queen, Respondent and Jill Hornick and Rachel Aitcheson, Applicants/Defendants.

2 This is an application for an order under Section 24(1) and/or 24(2) of the Charter of Rights and Freedoms and/or at common law granting the Applicants a stay of proceedings, or in the alternative, an order excluding evidence.

Charges

3 The Applicants are each charged with six counts under the Liquor Licence Act R.S.O. 1990, Chapter L19:

Three counts of Permit Disorderly Conduct;

One count of Fail to Provide Sufficient Security;

One count of Permit Liquor to be Removed from Premises; and

One count of serve Liquor Outside of Prescribed Hours.

Facts

4 Below is a brief outline of the facts which will be expanded on throughout these reasons.

5 The fourth Pussy Palace was held on September 14th and 15th, 2000 at a rented bathhouse as 231 Mutual Street in Toronto. This was an event organized by women for women only. The purpose of the event, as set out in Exhibit 2, the Pussy Palace Rules was, "about having fun and exploring sexuality in a supportive safe environment." The event was licensed, the Applicants are named on the Special Occasion Permit. It was a fundraiser and an admission charge was collected. Most of the patrons at the event were in some state of undress in a highly sexualized environment. As the result of two anonymous complaints received by the Toronto Police Services earlier that month the police sent in two female undercover police officers. The undercover officers made observations of alleged breaches of the Liquor Licence Act. These observations were communicated to male police officers waiting nearby. Five male police officers then entered the premises to conduct a liquor inspection pursuant to the Liquor Licence Act.

Summary of the Applicants' Requests for Relief

6 The Applicants ask for remedies under three different headings.

First:

7 The Applicants allege a breach of Section 8 and ask for an order under Section 24(2) of the Charter excluding the evidence of the police observations. The Applicants submit that as the hosts of the event they have standing. They submit that they had a reasonable expectation of privacy with respect to men, including male police officers. They submit the entry of male police officers at an event for women, most of which were in some state of undress in a highly sexualized environment was unreasonable and so serious that the evidence should be excluded.

Second:

8 The Applicants allege the police conduct undermines their right to a fair trial guaranteed at common law and by Section 7 and 11(d) of the Charter of Rights and Freedoms and ask for an order excluding evidence pursuant to the common law or under Section 24(1) as opposed to exclusion under Section 24(2).

Third:

9 The Applicants' principle argument is that the police misconduct amounted to an abuse of process. The Applicants submit their liberty interest under Section 7 are affected in that the sentencing regime under the Liquor Licence Act includes jail. They submit the police misconduct is so serious that to continue the prosecution would violate the principles of fundamental justice protected by Section 7.

10 The Applicants submit this is one of those "clearest of cases" and ask for an order staying the proceedings as an abuse of process under Section 24(1) or at common law.

11 The Applicants rely on Section 15 of the Charter as a tool in interpreting the actions of the police.

Materials Filed

12 I thank the Applicants and Respondents for the materials filed.

13 From the Applicants I have the Notice of Application, the Applicants' Factum, two Books of Authorities, Volumes I and II and a Supplementary Book of Authorities.

14 From the Respondents I have the Notice of Response to the Charter Motion, the Respondent's Factum, a Casebook, and a copy of the Supreme Court of Canada decision in *R. v. Golden*, [2001] S.C.J. No. 81 (S.C.C.).

15 For ease of reference the Index of the Applicants' Books of Authorities, Volumes I and II is Appendix A to these reasons, the Index of the Applicants' Supplementary Book of Authorities is Appendix B, the Table of Contents of the Respondents' Casebook is Appendix C.

16 There are cases referred to in the Factums which are not found in the Book of Authorities or Casebook. For the vast majority of cases referred to in these reasons, case citations are found in the Appendices. For those few not found in the Appendices, the case citation will be found in these reasons.

17 I have also had the benefit of having the transcripts of the evidence on this application taken on October 22nd and 23rd, 2001.

18 I will now deal with the alleged breach of Section 8 and relief under Section 24(2).

> **Section 8** The first issue to be determined is do the Applicants have standing to bring an application alleging a breach of Section 8 in the circumstances of this case? Did the Applicants have a reasonable expectation of privacy? Were the Applicants' personal rights to privacy violated?

Reasonable Expectation of Privacy

19 The factors to be examined in determining whether there is a reasonable expectation of privacy are found in the Supreme Court of Canada decisions of *R. v. Edwards*, *R. v. M. (M.R.)* and *R. v. Plant*. In *R. v. Edwards* the Supreme Court of Canada states at page 9, paragraph 45:

> A review of the recent decisions of this Court and those of the U.S. Supreme Court which, I find convincing and properly applicable to the situation presented in the case at bar, indicates that certain principles pertaining to the nature of the s. 8 right to be secure against unreasonable search or seizure can be derived. In my view they may be summarized in the following manner:
>
> 1. A claim for relief under s. 24(2) can only be made by the person whose Charter rights have been infringed...
>
> 2. Like all Charter rights, s. 8 is a personal right. It protects people and not places...
>
> 3. The right to challenge the legality of a search depends upon the accused establishing that his personal rights to privacy have been violated...
>
> 4. As a general rule, two distinct inquiries must be made in relation to s. 8. First, has the accused a reasonable expectation of privacy. Second, if he has such an expectation, was the search by the police conducted reasonably...
>
> 5. A reasonable expectation of privacy is to be determined on the basis of the totality of the circumstances...
>
> 6. The factors to be considered in assessing the totality of the circumstances may include, but are not restricted to, the following:
>
> (i) presence at the time of the search;
>
> (ii) possession or control of the property or place searched;
>
> (iii) ownership of the property or place;
>
> (iv) historical use of the property or item;
>
> (v) the ability to regulate access, including the right to admit or exclude others from the place;
>
> (vi) the existence of a subjective expectation of privacy; and
>
> (vii) the objective reasonableness of the expectation...
>
> 7. If an accused person establishes a reasonable expectation of privacy, the inquiry must proceed to the second stage to determine whether the search was conducted in a reasonable manner.

Looking at the factors set out in item 6,

(i) presence at the time of the search:

The Applicants were present at the time of the search.

(ii) possession or control of the property or place searched:

The Applicants were part of the organizing committee hosting the event and that committee and the Applicants had possession and control of the property by virtue of having rented the premises for that event. The Applicants had personally obtained a Special Occasion Permit. Jill Hornick was in charge of security, Rachel Aitcheson was in charge of the bar.

(iii) ownership of the property or place:

The Applicants did not own, but were involved in renting the premises as noted above.

(iv) historical use of the property or item:

This was the fourth such event being held with the first one having been held in September of 1998, all of which had excluded men.

(v) the ability to regulate access, including the right to admit or exclude others from the place:

There was a demonstrated ability to regulate access and the right to admit or exclude from the place. The male police officers were originally denied entry until the officer in charge cautioned the woman in charge of entry.

(vi) the existence of a subjective expectation of privacy:

The Applicants and their witnesses testified to a subjective expectation of privacy vis a vis men.

(vii) the objective reasonableness of the expectation:

The following is a discussion in the main, of factors (vi) and (vii) above; that is, the existence of a subjective expectation to privacy and the objective reasonableness of the expectation.

20 The Respondent submits there was no reasonable expectation of privacy for three main reasons:

1. The documents given to patrons at the door.

2. The nature of the event.

3. The licensing of the premises.

(1) The Handouts at the Door: Exhibits Number 2 and 3.

21 Exhibit Number 2 is entitled Pussy Palace Rules.

22 Exhibit Number 3 has the following headings, "What's Illegal?", "If the Police Come," "If You Get Arrested," "The Media."

23 Exhibit 2 on page 2 states:

Public sex is illegal.

24 Exhibit 3 states in part:

Over the last year Toronto's Police Force has been engaging in a campaign of targeted policing. They have raided men's sex bars and arrested people for indecent acts. They have often closed down these clubs on liquor licence violations.

25 And further down under "What's Illegal?"

Public Nudity — Having your genitals exposed in a public area. You can be topless, but being bottomless in a public space is illegal.

Gross indecency — having sex in a public area.

26 Further down:

Public areas include everywhere in the Pussy Palace except the private rooms.

27 And under the heading "If the Police come:"

> Be polite. You have the right to remain silent. To avoid problems, we suggest giving name, address, if asked. You don't have to go anywhere with a police officer unless you are under arrest.

28 The Respondent submits that the police searched public areas. The Respondent submits that the patrons were put on notice that certain areas of the bathhouse were public and were put on notice that the police could attend and so could not have had a reasonable expectation of privacy subjectively, or objectively. The Respondent submits that the patrons chose to disrobe and to attend public areas in various states of undress.

(2) The Nature of the Event

29 The Respondent submits the event was public in nature. It was a fundraiser in rented premises with an admission charge. Exhibit 1 are tickets purchased by the undercover female officers to enter the event.

(3) The Premises were Licensed

30 The Applicants had obtained a Special Occasion Permit. The Respondent submits that it is prima facie evidence of the public nature of the event. By agreeing to the terms of the Special Occasion Permit, the Applicants undertook to comply with the Liquor Licence Act which allows for inspection.

31 The submissions of the Respondent above establish, as conceded by the Applicants, that this was a limited access public event and that there was a reduced expectation of privacy, but the Respondent's submissions do not establish that there was no reasonable expectation of privacy. Individuals at borders, under arrest or serving sentence have a reduced expectation of privacy, but still have a reasonable expectation of privacy in certain circumstances; for example, vis a vis strip searches except in exigent circumstances. In the case at bar, the fact that the event was a fundraiser in rented premises with an admission charge and licence under the Liquor Licence Act which allows for inspections resulted in a reduced expectation of privacy, but there was still a reasonable expectation of privacy vis a vis men entering the event.

32 There was testimony that the expectation was that if the police were to carry out a Liquor Licence inspection that that would be done be female, and not male police officers. As conceded by the Respondent, Exhibits 1, 2 and 3, and the evidence of the Applicants' witnesses and of the undercover female police officers establishes that this was an event for women and "trans people" only. It is not relevant that patrons disrobed voluntary if they had a reasonable expectation of privacy vis a vis men.

33 In *R. v. Wong* the Supreme Court of Canada states at page 480:

> I think, with respect, that the conclusions of the Court of Appeal cannot be reconciled with the implications of this court's subsequent decision in **R. v. Duarte**. The Court of Appeal has, in effect, applied a variant of the risk analysis rejected by this court in that case, for it has chosen to rest its conclusion on the notion that the appellant, by courting observation by the other persons in the room, has effectively relinquished any right to maintain a reasonable expectation of freedom from the much more intrusive violation of privacy constituted by surreptitious video surveillance on the part of the state.

34 In this case, the fact that most of the patrons disrobed in front of other women does not mean that they gave up their reasonable expectation of privacy vis a vis men. The discussion in Exhibits 2 and 3 about what is "public" and "private" excludes men. It does not nullify an expectation of privacy vis a vis male police officers. There were no exigent circumstances here, no issue of urgency.

35 In the circumstances of this case, the issue is whether there is a reasonable expectation of privacy vis a vis male police officers, not vis a vis the police in general. There is no issue that the police had authority to inspect under the Liquor Licence Act. The Applicants did not take issue with respect to the female undercover officers that attended the event.

36 In *R. v. Edwards* the Supreme Court of Canada states at page 7, paragraph 33:

> It is important to emphasize that generally, the decision as to whether an accused had a reasonable expectation of privacy must be made without reference to the conduct of the police during the impugned search. There are two distinct questions which must be answered in any s. 8 challenge. The first is whether the accused had a reasonable expectation of privacy. The second is whether the search was an unreasonable intrusion on that right to privacy... Usually, the conduct of the police will only be relevant when consideration is given to this second stage.

37 The specific conduct of the police in this case is relevant to, and will be addressed when I discuss the second question posed in *Edwards*; that is, whether the manner of the search was reasonable. But at this stage in determining whether the Applicants had a reasonable expectation of privacy vis a vis male police officers, some consideration must be given to the general implications of male police officers entering an all female event where many women are known to be in some state of undress and in a highly sexualized environment.

38 In this discussion strip search cases are of relevance as they will be when addressing the reasonableness of the search. Contrary to the Respondent's submission that there was no strip search here, and that therefore the policies and laws with respect to strip searches are irrelevant, I find strip searches to be analogous to the search conducted in this case. The Respondent did not take issue with the Applicants' submissions about the impropriety of male on female strip searches, but simply argued they were not applicable to this case.

39 Societal, institutional, policy and legislative norms, guidelines, regulations, rules, directives and law are set out in the Applicants' Book of Authorities, Appendix A, at tab 25: Customs Act, tab 26: Immigration Act, tab 27: Commissioner's Directive 571, Correctional Services Canada, tab 28: Ministry of Correctional Services Act, tab 29: Lyons, Q.C., Jeffry S., Toronto Police Services Board Review — Search of Persons Policy — "The Search of Persons — A Position Paper", tab 30: Policy 01-02, Policy & Procedure Manual, Toronto Police Services, tab 31: Arbour, Louise, The Honourable. Commission of Inquiry into Certain Events at The Prison for Women in Kingston, Public Works and Government Services Canada (1966), and in the Applicants' Supplementary Book of Authorities, Appendix B, tab 1: pages 253 and 254 of the aforementioned Commission of Inquiry into Certain Events at the Prison for Women in Kingston.

40 The case law is set out in the Applicants' Book of Authorities at tab 20: *R. v. Flintoff*, tab 21: *R. v. Ferguson* and the Applicants' Supplementary Book of Authorities tab 2: *R. v. Mattis*, and in the Supreme Court of Canada decision *R. v. Golden*. In *R. v. Flintoff* the Ontario Court of Appeal states at page 332, paragraphs 23 and 24:

> The public places a great deal of power in the hands of its police forces to meet the heavy responsibility police forces take upon themselves every day in protecting our safety and security. The public also places a corresponding amount of trust in its police forces to wield this power in accordance with common sense and in compliance with our laws. The strip search conducted in this case is not justified in law. It was not incidental to arrest. The strip search was an unreasonable search and accordingly was a violation of the appellant's s. 8 Charter right "to be secure against unreasonable search or seizure". The strip search was also a violation of the public's trust in its police forces and at odds with common decency. I agree with the Summary Conviction Appeal judge when he concluded that the breach of the appellant's Charter rights in this case was "outrageous". I would add that the breach was flagrant since, in the words of Mitchell J. A. in **R v. MacDonald**... "the actions of the police were quite deliberate, unjustified and in no way could one characterize the violations as trivial, inadvertent, merely technical or made in good faith." Furthermore, I find that the Charter violations in this case would shock the public.
>
> I also agree with the Summary Conviction Appeal judge's comments on the law governing strip-searches as incidental to arrest. Strip-searching is one of the most intrusive manners of searching and also one of the most extreme exercises of police power. Though the common law allows the police to search a person as an incident to arrest, the degree of intrusion must be reasonable and in pursuit of a valid objective such as safety...

41 In *Flintoff* the search was not justified in law, while here the search was justified under the Liquor Licence Act, but that does not take away from the significance of the Ontario Court of Appeal's comments when determining the reasonable expectation of privacy and the reasonableness of the search.

42 In *R. v. Golden* the Supreme Court of Canada states at page 23, paragraph 83:

> While the respondent and the interveners for the Crown sought to downplay the intrusiveness of strip searches, in our view it is unquestionable that they represent a significant invasion of privacy and are often a humiliating, degrading and traumatic experience for individuals subject to them. Clearly, the negative effects of a strip search can be minimized by the way in which they are carried out, but even the most sensitively conducted strip search is highly intrusive.

43 Paragraph 88:

> As noted by Dickson C. J. In Simmons, supra, the different types of searches raise different constitutional considerations: the more intrusive the search, the greater the degree of justification and constitutional protection that is appropriate. The party seeking to uphold the validity of a warrantless personal search will face a lower burden in the case of a quick pat or frisk search than in the case of highly invasive body cavity search.

44 Paragraph 89:

> Given that the purpose of s. 8 of the Charter is to protect individuals from unjustified state intrusions upon their privacy, it is necessary to have a means of preventing unjustified searches before they occur, rather than simply determining after the fact whether the search should have occurred... The importance of preventing unjustified searches before they occur is particularly acute in the context of strip searches, which involve a significant and very direct interference with personal privacy. Furthermore, strip searches can be humiliating, embarrassing and degrading for those who are subject to them, and any post facto remedies for unjustified strip searches cannot erase the arrestee's experience of being strip searched. Thus, the need to prevent unjustified searches before they occur is more acute in the case of strip searches than it is in the context of less intrusive personal searches, such as pat or frisk searches. As was pointed out in **Flintoff**,... "strip searching" is one of the most intrusive manners of searching, and also one of the most extreme exercises of police power.

45 Paragraph 90:

> Strip searches are thus inherently humiliating and degrading for detainees regardless of the manner in which they are carried out and for this reason they cannot be carried out simply as a matter of routine policy. The adjectives used by individuals to describe their experience of being strip searched give some sense of how a strip search, even one that is carried out in a reasonable manner, can affect detainees: "humiliating," "degrading," "demeaning," "upsetting," and "devastating" ... Some commentators have gone as far as to describe strip searches as "visual rape" ... Women and minorities in particular may have a real fear of strip searches and may experience such a search as an equivalent to a sexual assault... The psychological effects of strip searches may also be particularly traumatic for individuals who have previously been subject to abuse...

46 Male or female strip searches are not permitted even when there is a reduced expectation of privacy except in exigent circumstances. As stated in *Golden*, "the more intrusive the search, the greater degree of justification and constitutional protection that is appropriate."

47 In *R. v. Plant* the Supreme Court of Canada adds another factor to those listed in *Edwards* in determining whether there is a reasonable expectation of privacy: "the seriousness of the crime being investigated." The offences here are not criminal matters under the Criminal Code but provincial offences under the Liquor Licence Act. The seriousness of the offence is one of the factors when "balancing of the societal interests in protecting individual dignity, integrity and autonomy with effective law enforcement."

48 I find that in this case there was a reasonable expectation of privacy vis a vis men in general, including male police officers in particular.

49 *The Applicants' Personal Rights to Privacy* The next issue to be determined is were the Applicants' personal rights to privacy violated as required under *Edwards* ? The Applicants submit every woman present had a reasonable expectation of privacy vis a vis men, and that was sufficient to trigger a Section 8 analysis.

50 Relying on *R. v. Inco Ltd.* and *Edwards* the Respondent submits that the Applicants personal rights were not infringed. Rachel Aitcheson did not encounter the male police officers when she was in a state of partial undress. She was either in a private room or dressed when she left the room to close the bar.

51 Jill Hornick was on duty and dressed when the male police officers entered. She spoke to the police. She was described as being polite, articulate and cooperative.

52 The Respondent submits neither Applicant was seen by the male police officers in a state of any undress, and therefore could not claim to have suffered personal distress, and therefore could not claim to have standing to ask for remedy under Section 24(2).

53 But, Rachel Aitcheson and Jill Hornick are not simply patrons of this event. They were part of the organizing committee. They had applied for and obtained a Special Occasion Permit in their names. They performed duties at the event. The Applicants were members of the organizing committee hosting an event as described in Exhibit 3, "an event for women to explore their sexuality in a safe and supportive environment" without the presence of men.

54 As organizers and hosts, the Applicants' personal reasonable expectation of privacy was not limited to their personal state of dress or undress but extended to their reasonable expectation of privacy with respect to the event as a whole, which event by definition would have nude or partially nude women present exploring their sexuality with the expectation that men were excluded.

55 I find that the Applicants' personal rights to privacy were violated and I find that the Applicants have standing to bring this application.

Was There a Search?

56 The ruling to this point has assumed that what occurred here, entry to look for evidence, was a search.

57 The Respondent concedes that there was a search in paragraphs 32 to 34 of the Respondent's Factum. Confirmation of that position is found in the New Brunswick Court of Appeal decision in *R. v. Kelly* at page 135, paragraph 29, which refers to the Supreme Court of Canada decisions in *R. v. Grant* and *R. v. Kokesch* and that position is confirmed in the Ontario Court of Appeal decision *R. v. Inco Ltd.* at page 11, paragraph 28 and 29 referring to the Supreme Court of Canada decision *Comité paritaire de l'industrie de la chemise c. Sélection Milton*.

Reasonableness of the Manner of Search

58 I now turn to the second question set out in *Edwards*, was the search conducted in a reasonable manner? There is no issue that the search was authorized by law; that is, the Liquor Licence Act. There is no argument that the law itself is unreasonable or unconstitutional. Was the search an unreasonable intrusion on the Applicants' right to privacy? Warrantless searches are prima facie unreasonable. The burden is on the Respondent seeking to justify the warrantless search to prove that it was not unreasonable.

59 As indicated earlier in these reasons, I will now deal with strip search cases and their relevance to the reasonableness of the manner of search.

60 The Respondent's submissions are that the law on strip searches does not apply. There was no strip search. There was no contact between the police and patrons. The police did not ask the patrons to remove their clothing. The patrons that were in a state of undress had disrobed voluntarily before the police attended, after receiving Exhibit 3 which put them on notice

that the police could attend. The Respondent points to the definition of strip search found in *Golden* where at paragraph 47 the Supreme Court of Canada states:

> The appellant submits that the term "strip search" is properly defined as follows: the removal or rearrangement of some or all of the clothing of a person so as to permit a visual inspection of a person's private areas, namely genitals, buttocks, breasts (in the case of a female), or undergarments. This definition in essence reflects the definition of a strip search that has been adopted in various statutory materials and policy manuals in Canada and other jurisdictions... In our view, this definition accurately captures the meaning of the term "strip search" and we adopt it for the purpose of these reasons.

61 The Respondent further submits that Section 8 protects people and not places and that by definition a strip search is a search of a person and what occurred here was a search of a place.

62 The Applicants are not submitting that this was a strip search, but that it was the functional equivalent of a strip search. The Applicants submit I should look at the values and principles underlying the policy and law of strip searches referred to earlier. I agree that I should look at those underlying values and principles and those underlying Section 8. In doing so, as noted earlier, I find that the search in this case is analogous to a strip search as the Supreme Court of Canada in *R. v. Monney* (1999), 133 C.C.C. (3d) 129 (S.C.C.) , held that in that case a passive "bedpan vigil" was analogous to a strip search.

63 If any patron had been arrested and taken to a police station and if a strip search was necessary and appropriate at law, it would have been conducted by a female police officer.

64 The patrons that disrobed did so voluntarily but their intent was to be disrobed before other women and not men.

65 The search here was planned as one single transaction where two female undercover officers would go in followed by male police officers. There were no exigent circumstances and no urgency.

66 The female undercover officers obtained evidence with respect to all of the counts except the count of serve liquor outside of prescribed hours before the male officers entered. The female undercover officers then also obtained the evidence of serve liquor outside of prescribed hours after the male officers entered.

67 The Respondent concedes that the necessary evidence was obtained by the female undercover officers in taking the position that if I exclude the evidence of the female undercover officers, the Respondents would then withdraw all of the charges.

68 Why did the male officers enter? They knew the patrons were female and most were in some state of undress in a highly sexualized atmosphere. They did collect some evidence, but as noted above, the female undercover officers collected the bulk of the evidence necessary for a prosecution. The names of the Applicants were on the Special Occasion Permit. The names on the Special Occasion Permit were available to the police without entry, or they could have been confirmed at the door without further entry. The police spoke to Jill Hornick at the door and no police officers ever spoke to Rachel Aitcheson on that evening. There were no arrests on September 14th or 15th. Summonses were issued on October 20th, 2000.

69 There was no announcement of entry or delay so that the patrons could get their clothing which was relatively inaccessible on the first floor.

70 None of the above is to suggest that the police had no right of entry. On the contrary, they had the right to enter under the Liquor Licence Act. But in these circumstances of a search analogous to a strip search, it was not appropriate for male police officers to enter. Of significance is that female officers could have been used, but no check was made to determine if female officers were available.

71 The Respondent concedes that the invasion of privacy of third parties is constitutionally relevant to the issue of whether there has been an unreasonable search or seizure.

72 In *R. v. Thompson* the Supreme Court of Canada states at page 272:

> In my view, the extent of invasion into the privacy of these third parties is constitutionally relevant to the issue of whether there has been an "unreasonable" search or seizure. To hold otherwise would be to ignore the purpose of s. 8 of the Charter which is to restrain invasion of privacy within reasonable limits. A potentially massive invasion of the privacy of persons not involved in the activity being investigated cannot be ignored simply because it is not brought to the attention of the court by one of those persons.

73 In this case one of the male police officers counted the number of patrons. His final count was 355 women of which 60 to 70 percent were topless. These persons had a reasonable expectation of privacy vis a vis male police officers which was breached by the police conduct.

74 The Respondent submits the search was reasonable for the following reasons:

75 The police had received two complaints before the event. The police first sent in two female undercover officers to substantiate whether there was any unlawful conduct. The officer in charge chose male officers in which he had confidence. The male police officers avoided entering areas such as the hot tub and shower areas where patrons were totally nude, and did not enter private rooms until identifying themselves and obtaining consent. The police did not want to reveal the identity of the undercover officers for reasons of safety and to protect their identity. The police did not physically search any patrons or their belongings.

76 The police believed they had the right to enter pursuant to Sections 43(1) and 44(1) of the Liquor Licence Act and acted under that authority. The Respondent also relies on what the Supreme Court of Canada states in *Comité paritaire de l'industrie de la chemise c. Sélection Milton* about legislated rights of inspection and about reduced expectations of privacy. As noted previously, there is no issue that the police had a right of inspection under the Liquor Licence Act and that the patrons of the Pussy Palace had a reduced expectation of privacy.

77 None of these submissions by the Respondent answer the question of why male police officers, rather than female police officers, were used in a search of females analogous to a strip search.

78 The Respondent also submits that a ruling that the search was unreasonable would not just protect an existing right to privacy, but create a new right for specific groups to be policed by a specific type of police officer. I disagree. A ruling in favour of the Applicants does not mean that women will have the right to be policed only be female police officers. It is simply a re-statement of the law, that where there is a search analogous to a strip search of females, it must be done by female officers unless there are exigent circumstances.

79 The Respondent submits that the search was not unreasonable because the police evidence was that the patrons did not appear to be embarrassed or uncomfortable when the male police officers entered. They expected that the police may attend as suggested in Exhibit 3. The police evidence was that the patrons were cooperative, friendly, continued to dance, to line up at the bar for drinks, joke with the police, did not leave en masse, did not reach for clothing or towels or bed linen to cover themselves and except for the woman at the door, did not object to the presence of the male police officers. One of the female undercover officers did testify that the atmosphere changed when the male police officers entered but the Respondent submits that is to be expected in any police entry to search.

80 On the other hand, Exhibit 3 advised patrons to be polite if the police attended. The patrons clothing was not easily accessible. There was evidence that some patrons remained in, or went into private rooms when the male police officers entered and that the patrons in the pool exited the pool. The evidence of patrons testifying in this application, including the Applicants, was that they were upset, frightened, embarrassed and felt violated, intimidated and shocked. This evidence is not dissimilar to what is described as noted earlier in *R. v. Golden* where the Supreme Court of Canada states at paragraph 89 and 90:

> ... "Strip searches can be humiliating, embarrassing and degrading for those who are subject to them"... "Strip searches are thus inherently humiliating and degrading for detainees regardless of the manner in which they are carried out..." The adjectives used by individuals to describe their experience of being strip searched give some sense of how a strip

> search, even one that is carried out in a reasonable manner, can affect detainees: "humiliating," "degrading," "demeaning," "upsetting," and "devastating" ... Some commentators have gone as far as to describe strip searches as "visual rape"... "Women and minorities in particular may have a real fear of strip searches and may experience such a search as equivalent to a sexual assault... The psychological effects of strip searches may also be particularly traumatic for individuals who have previously been subject to abuse."

81 There was evidence that some of the patrons in attendance at the Pussy Palace had previously suffered abuse.

82 I prefer the evidence of the patrons as to what they subjectively felt over the allegedly objective observations of the police witnesses.

83 In summary, I find that the search was carried out in an unreasonable manner for the following reasons:

> It is contrary to policy and law that clearly sets out that a male on female strip search is wrong. The search here is analogous to a strip search.
>
> There was no attempt made to find female police officers to enter.
>
> The police had prior knowledge that the patrons were in various states of undress and in a highly sexualized environment.
>
> The decision for male police officers to enter was made before the undercover female officers entered.
>
> There were no exigent circumstances, no urgency.
>
> The significant evidence was collected by the female undercover officers.
>
> The names of the Applicants were on the Special Occasion Permit.
>
> The patrons were not given notice that male police officers were entering.
>
> The patrons were distressed. The search infringed the rights of many third parties.

84 The Respondent has not discharged their onus to establish the search was reasonable. The search was patently unreasonable.

85 The Applicants' Section 8 rights to be secure against unreasonable search or seizure have been breached.

Question of Relief Section 24(2)

86 The next issue is to determine whether the Applicants are entitled to a remedy under Section 24(2).

Nexus

87 The first issue to determine under Section 24(2) is whether the "evidence was obtained in a manner that infringed" the Charter.

88 The Applicants are asking that the evidence of all of the officers be excluded. The significant or key evidence was collected by the female undercover officers before the male officers entered in breach of the Applicants' Section 8 rights.

89 The Applicants concede there is no causal nexus between the breach and the collection of evidence. The Applicants rely on a temporal link.

90 The Respondent submits there is no nexus, not even a temporal nexus, between the evidence of the female undercover officers and the entry of the male police officers because the breach occurred after the evidence was collected.

91 The Applicants rely on *R. v. Therens* in the Supreme Court of Canada which states at page 509:

In my opinion, the words "obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter" particularly when they are read with the French version... do not connote or require a relationship of causation. It is sufficient if the infringement or denial of the right or freedom has preceded, or occurred in the course of, obtaining of the evidence. 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 the Charter right or freedom, apart from its bearing on the obtaining of evidence.

92 The Applicants also rely on the Supreme Court of Canada decision of *R. v. Strachan* where the Court states at page 498:

In my view, all of the pitfalls of causation may be avoided by adopting an approach that focuses on the entire chain of events during which the Charter violation occurred and the evidence was obtained. Accordingly, the first inquiry under s.24(2) would be to determine whether a Charter violation occurred in the course of obtaining the evidence. A temporal link between the infringement of the Charter and the discovery of the evidence figures prominently in this assessment, particularly where the Charter violation and the discovery of the evidence occur in the course of a single transaction.

93 The Supreme Court of Canada in *R. v. Grant* states at page 198:

I disagree with that submission on the basis that an infringement of s. 8 of the Charter has occurred in the investigatory process in the case at bar, quite apart from the fact that a reasonable search was undertaken subsequently pursuant to a valid warrant.

In the case at bar, there is a sufficient temporal connection between the warrantless perimeter searches and the evidence ultimately offered at trial by the Crown to require a determination as to whether the evidence should be excluded. The warrantless searches, while perhaps not causally linked to the evidence tendered, were nevertheless an integral component in a series of investigative tactics which led to the unearthing of the evidence in question. 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. The temporal and tactical connections between the warrantless perimeter searches and the evidence finally offered at trial were sufficient to warrant the conclusion that the evidence was obtained in a manner that violated the constitutional rights of the respondent so as to attract the provisions of s. 24(2) of the Charter.

94 In *R. v. Goldhart* the Supreme Court of Canada states at page 494:

The warrantless search was an integral part of the investigation. The unbroken temporal link between the warrantless search and the seizure permitted these two events to be treated as part of a single transaction. In view of these circumstances, consideration of a causal connection, which was undoubtedly present, was of little importance.

The searches were, however, tainted by illegal warrantless searches which formed an integral part of a single investigatory transaction. The temporal and tactical connections were sufficiently strong to permit the court to conclude that it was not realistic to view the perimeter searches as severable from the total investigatory process. In these cases, given the strength of the factors that I have mentioned, it was not necessary to consider specifically the strength of the causal connection.

95 And in *R. v. Flintoff* the Ontario Court of Appeal starting at page 336, paragraph 30 states:

It is my opinion that this case is of the nature of one that Sopinka J. contemplated in **Goldhart**, supra, where the temporal connection is so strong that the Charter breach should be seen as "an integral part of a single transaction". Even with the absence of a causal connection, a court faced with a flagrant and intrusive violation of s. 8 of the Charter must give, as Le Dain J. stated in **R. v. Therens**... "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"... As well, if an approach that focuses on the entire chain of events during which the Charter violation occurred and the evidence was obtained is adopted, then the temporal

> connection takes on greater importance. The breathalyzer test was tainted by the humiliating and unconstitutional strip search, which formed an integral part of a single investigatory transaction. It was also totally unnecessary. The investigating officer had already performed a search incident to arrest when he "patted the appellant down" on the highway. The temporal connection is sufficiently strong to permit me to conclude that it is not realistic to view the strip search as severable from the total investigatory process. the strip search was one link in the continuous chain of events involved in the investigation of the over 80 milligram offence.

96 Paragraph 33:

> The Charter was enacted as the supreme law of Canada to set out the rights, freedoms and responsibilities of Canadians. We cannot appear to condone a flagrant violation of the Charter occurring minutes before evidence was obtained by refusing to engage in the s. 24(2) inquiry because the evidence would have been obtained regardless of the violation. Subsection 24(2) does not only allow for the remedy of situations where through unconstitutional means the police obtain evidence they would not otherwise have been able to obtain. Subsection 24(2) allows for the exclusion of evidence that is obtained in a manner that infringes the Charter. A court cannot look at the results of the breathalyzer and not consider the immediately preceding strip search. Dickson C.J.C. rejected such a narrow and technical approach because it would encourage a restrictive approach to the rights and freedoms guaranteed by the Charter. The Charter reflects the principle underlying criminal justice in Canada: when it comes to criminal proceedings and the imposition of the state's coercive powers, it is obligatory that the police follow procedures mandated by law and not impose rules of their own making that are directed to concerns that are irrelevant to the case at hand.

97 I note that in *Flintoff* the Ontario Court of Appeal found a nexus between the strip search and the charge of over 80 where the evidence for the charge of over 80 was collected after the strip search, but found no nexus between the strip search and the charge of impaired driving where the evidence for the impaired driving was collected before the strip search.

98 But in the case at bar, the evidence of the officer in charge was that at the time that the female undercover officers were dropped off, it was intended that the male police officers enter a short time later.

99 In those circumstances I find that there is a temporal link, a nexus that "the Charter violation and the discovery of the evidence occurr[ed] in the course of a single transaction" see *Strachan* , that the breach of Section 8 "has occurred in the investigatory process" and was "an integral component" of that investigatory process, see *Grant* , that the Section 8 breach "formed an integral part of a single investigatory transaction" and that the "temporal and tactical connections" were sufficient, see *Goldhart* .

100 I find that the evidence was obtained in a manner that infringed the Charter.

Exclusion of Evidence

101 The remaining issue is whether the evidence of all of the police officers should be excluded.

102 In applying the test set out in *R. v. Collins*, the Applicants concede inclusion of the evidence would not affect the fairness of the trial. The evidence here is non-conscriptive. The most important factor is the seriousness of the violation. The Applicants rely on *R. v. Flintoff* where the Ontario Court of Appeal states as noted earlier starting at page 333:

> I agree with the Summary Conviction Appeal judge when he concluded that the breach of the appellant's Charter rights in this case was "outrageous". I would add that the breach was flagrant, since ... "the actions of the police were quite deliberate, unjustified and in no way could one characterize the violations as trivial, inadvertent, merely technical or made in good faith". Furthermore, I find that the Charter violation in this case would shock the public.

103 At page 339:

> The second factor, the seriousness of the breach, is conclusive. The evidence at issue could have been obtained without the violation of the Charter. The police failed to proceed properly, but instead flagrantly violated the Charter and strip searched

> the appellant. As I have stated, I find that the flagrant violation of the appellant's Charter rights would shock the public especially if this court was seen to condone the introduction into the investigative process available to police in the taking of breathalyzer samples, requirements that are contrary to the Code, the common law and the Charter. It was unreasonable to strip search the appellant and there was no tenable justification for the intrusive violation of the appellant's Charter rights. The protection against unreasonable search of one's person is a very important Charter right. The seriousness of the Charter violation is so great that the admission of the evidence would bring the administration of justice into disrepute.

104 The breach in this case is more serious than the breach in *Flintoff* in that the search here is a male on female search, and not a male on male search as was in *Flintoff*. And it is aggravated by the fact that in this case, the patrons had a reasonable expectation of privacy to explore their sexuality in a safe and supportive environment, and were not under arrest in a private room at a police station as in *Flintoff* .

105 The male police officers knew of the sexualized environment when they went in. They had received that information from the undercover officers.

106 The Respondent submits that the police acted in good faith, that any breach was inadvertent, that the police acted on complaints, sent in female undercover officers to investigate, believed they were acting under authority of the Liquor Licence Act and used experienced officers who acted professionally in carrying out the search.

107 The Respondent relies on *R. v. Thompson* where at page 39 the Supreme Court of Canada quotes from their judgment in *R. v. Sanelli* [(1990), 53 C.C.C. (3d) 1 (S.C.C.)]:

> But what strikes one here is that the breach was in no way deliberate, wilful or flagrant. The police officers acted entirely in good faith. They were acting in accordance with what they had good reason to believe was the law as it had been for many years before the advance of the Charter... In short the Charter breach stemmed from an entirely reasonable misunderstanding of the law by the police officer who would otherwise have obtained the necessary evidence to convict the accused in any event. Under these circumstances, I hold that the appellant has not established that the admission of evidence would bring the administration of justice into disrepute.

108 But here, the male police officers knew the female patrons were in various states of undress and in a highly sexualized atmosphere. There was no attempt to find female police offices to attend to search under the authority of the Liquor Licence Act. There were no exigent circumstances, no urgency. This case is distinguishable from *R. v. Thompson* or *R. v. Kokesch*. *Flintoff* was released on June 10th, 1998 and *Mattis* on October 29th, 1998. The Toronto Police Services policy with respect to strip searches is from 1999. The inspection here occurred in September of 2000. *Flintoff* and *Mattis* and the Toronto Police Service policy all make it clear that male on female strip searches are improper and here the search is analogous to a strip search.

109 Other factors listed in *Collins* that are to be considered in determining the seriousness of the breach are the availability of other means to obtain the impugned evidence and the seriousness of the offence.

110 With respect to the availability of other means to obtain the evidence, the obvious other means would have been to have used female police officers. If there were female police officers available, then they should have been used. If there were no female police officers available, and I would find that difficult to believe, then as Justice Wilson stated in *Wong*, dissenting in the result, the prosecution could not rely on "discriminatory hiring practices as a justification for violating the rights" of women in this case. In this case no attempt was made to use female police officers to conduct the liquor licence inspection.

111 Furthermore, before the male officers' entry, the police had the evidence of the undercover officers, the names on the Special Occasion Permit. There was no urgency. No arrests were made that night. There was no reason why male, rather than female officers were used.

112 With respect to the seriousness of the offence, the police had determined that this was to be a Liquor Licence inspection, not a Criminal Code investigation before the male police officers entered. The less serious the offence is, as here, the more serious is the breach.

113 I find the breach to be serious and I adopt what the Ontario Court of Appeal said in *Flintoff* at pages 273 and 339 as referred to above.

114 In considering the third factor in the *Collins* test whether the judicial system's repute will be better served by the admission or exclusion of evidence, I again turn to *Flintoff* where at page 340, paragraph 39, the Ontario Court of Appeal states:

> ... I agree with the conclusion of the trial judge that a reasonable person, dispassionate and fully apprised of the circumstances of the case, would conclude that the seriousness of the Charter violation in this case overshadows the impact of the exclusion of the evidence on the administration of justice.

115 I find that the admission of the evidence could and would bring the administration of justice into disrepute, and I find that the evidence of all police officers; that is, the evidence of the female undercover officers and the male officers should be excluded.

Fair Trial

116 In the alternative, the Applicants submit that if I find that they have no standing under Section 24(2), or otherwise deny them a remedy under Section 24(2) for the Section 8 breach, then, as the Respondent concedes they have standing under Section 24(1) and so ask for an order under Section 24(1) or at common law excluding evidence.

117 The Applicants rely on the Supreme Court of Canada decisions in *R. v. Harrer*, *Schreiber v. Canada (Attorney General)* and *R. v. White*. In *White* the Supreme Court of Canada states at page 235, starting at paragraph 88:

> Thus it may be seen that this Court has never affirmatively decided that s. 24(1) of the Charter may serve as the mechanism for the exclusion of evidence whose admission at trial would violate the Charter.

118 Paragraph 89:

> Although I agree with the majority position in **Harrer**, supra, that it may not be necessary to use 24(1) in order to exclude evidence whose admission would render the trial unfair, I agree also with McLachlin J.'s finding in that case that s.24(1) may appropriately be employed as a discrete source of a court's power to exclude such evidence... Although the trial judge could have excluded the evidence pursuant to his common law duty to exclude evidence whose admission would render the trial unfair, he chose instead to exclude the evidence pursuant to s. 24(1) of the Charter. I agree that he was entitled to do so.

119 The Applicants submit that the breach is serious and deliberate, out of proportion to the offence and affects third parties. The Applicants submit that the Court should not be seen to condone serious violations of Charter rights. The Applicants ask for a remedy excluding evidence because the unreasonable search renders the trial unfair.

120 The Respondent submits the only issue to determine is trial fairness. Trial fairness is not definitively defined in *Harrer*, *Schreiber* or *White*. The Respondent submits I should look to *Collins* and *Stillman* decided under Section 24(2) for the definition of trial fairness to be applied under Section 24(1). As the Applicants have conceded that the evidence here is non-conscriptive and that trial fairness under 24(2) is not at issue, the Respondent submits that similarly there can be no remedy under Section 24(1).

121 Trial fairness under Section 24(1) is broader than the definition in *Stillman*. An example of that is that the doctrine of abuse of process, for which relief is granted under Section 24(1), sometimes entails the concept of trial fairness and in those cases trial fairness is not always determined and limited to whether the evidence is conscriptive or not. In this case I have found that a remedy is available under Section 24(2) and will not determine this argument by the Applicants.

Abuse of Process

122 This is the Applicants' final and principle argument. The Applicants, relying on *Reference re s. 94(2) of the Motor Vehicle Act (British Columbia)* in the Supreme Court of Canada, submit their liberty interests under Section 7 are affected in that the sentencing regime under the Liquor Licence Act includes a possible jail sentence. The Applicants also rely on *United States v. Cobb* in the Supreme Court of Canada to argue that if the Charter is not engaged then they rely on the common law doctrine of abuse of process.

123 The Respondent concedes that the Applicants' liberty interests are engaged and concedes as noted earlier that unlike their position with respect to Section 24(2), that the Applicants have standing under Section 24(1).

124 The Applicants rely on the Supreme Court of Canada decisions in *Keyowski*, *O'Connor*, *Mack*, *Carosella* and *Simpson* and on the Ontario Court of Appeal decision in *E.D.* and on the British Columbia County Court decision in *Pithart*.

125 The Respondent relies on the Supreme Court of Canada decisions in *Jewitt*, *Power*, and *Mills*, and on the Ontario Court of Appeal decisions in *Young* and *F. (S.) v. Canada (Attorney General)* (2000), 141 C.C.C. (3d) 225 (Ont. C.A.).

126 The Respondent relying on *R. v. Mills* and *F. (S.) v. Canada (Attorney General)*, submits search and seizure cases should be determined by analysis under Section 8 and not by an analysis under Section 7. The Supreme Court of Canada states in *R. v. Mills* at page 35, paragraph 87:

> In re B.C. Motor Vehicle Act... Lamer J. stated for the majority:
>
> Sections 8 to 14, in other words, address specific deprivations of the "right" to life, liberty and security of the person in breach of the principles of fundamental justice, and as such, violations of s. 7. They are designed to protect, in a specific manner and setting, the right to life, liberty, and security of the person set forth in s. 7. It would be incongruous to interpret s. 7 more narrowly than the rights in ss. 8 to 14.

127 Paragraph 88:

> Given that s. 8 protects a person's privacy by prohibiting unreasonable searches or seizures, and given that s. 8 addresses a particular application of the principles of fundamental justice, we can infer that a reasonable search or seizure is consistent with the principles of fundamental justice.

128 The Ontario Court of Appeal states in *F. (S.) v. Canada (Attorney General)* at page 237, paragraph 22:

> In my opinion, an analysis of this DNA warrant legislation under s. 8 is determinative of its constitutionality. If the legislation passes s. 8 scrutiny, it is a valid means of gathering evidence. As such, it can hardly be said to be contrary to the principles of fundamental justice under s. 7. Accordingly, our analysis of whether the legislation relating to DNA warrants is constitutional, begins and ends with s. 8.

129 Those cases determine that if a search or seizure is reasonable under Section 8, then it will not ordinarily contravene Section 7. But in this case I have found that the search was unreasonable and therefore it is in breach of Section 8 and in breach of Section 7.

130 The issue is whether this is one of those "clearest of cases" which would justify a stay.

131 In *Keyowski* the Supreme Court of Canada states at page 350:

> The availability of a stay of proceedings to remedy an abuse of process was confirmed by this court in **R. v. Jewitt**... On that occasion the court stated that the test for abuse of process was that initially formulated by the Ontario Court of Appeal in **R. v. Young** ... A stay should be granted where "compelling an accused to stand trial would violate those fundamental principles of justice which underlie the community's sense of fair play and decency"... or where the proceedings are

"oppressive or vexatious"... The court in **Jewitt** also adopted the "caveat" added by the court in **Young** that this is a power which can be exercised only in the "clearest of cases".

132 In *R. v. Mack* the Supreme Court of Canada states at page 30:

It is my view that in criminal law the doctrine of abuse of process draws on the notion that the state is limited in the way it may deal with its citizens. The same may be said of the Charter, which sets out particular limitations on state action and, as noted, in the criminal law context s. 7 to 14 are especially significant.

In the context of the Charter, this court has stated that disrepute may arise from "judicial condonation of unacceptable conduct by the investigatory and prosecutorial agencies"... The same principle applies with respect to the common law doctrine of abuse of process. Conduct which is unacceptable is, in essence, that which violates our notions of "fair play" and "decency" and which shows blatant disregard for the qualities of humanness which all of us share.

133 In *R. v. O'Connor* the Supreme Court of Canada states at page 39:

As I have already noted, the common law doctrine of abuse of process has found application in a variety of different circumstances involving state conduct touching upon the integrity of the judicial system and the fairness of the individual accused's trial. For this reason, I do not think that it is helpful to speak of there being any one particular "right against abuse of process" within the Charter. In addition there is a residual category of conduct caught by s. 7 of the Charter. This residual category does not relate to conduct affecting the fairness of the trial or impairing other procedural rights enumerated in the Charter, but instead addresses the panoply of diverse and sometimes unforeseeable circumstances in which a prosecution is conducted in such a manner as to connote unfairness or vexatiousness of such a degree that it contravenes fundamental notions of justice and thus undermines the integrity of the judicial system.

134 The Applicants rely on the residual category set out above in *O'Connor* .

135 In *R. v. Young* the Ontario Court of Appeal states at page 27:

I am satisfied on the basis of the authorities that I have set forth above that there is a residual discretion in a trial court judge to stay proceedings where compelling an accused to stand trial would violate these fundamental principles of justice which underlie the community's sense of fair play and decency and to prevent the abuse of a court's process through oppressive or vexatious proceedings. It is a power, however, of special application which can only be exercised in the clearest of cases.

136 In *R. v. Jewitt* the Supreme Court of Canada adopted the statement above in *R. v. Young*.

137 In *R. v. Power* the Supreme Court of Canada states at page 7:

I therefore conclude that, in criminal cases, courts have a residual discretion to remedy an abuse of the court's process but only in the "clearest of cases," which, in my view, amounts to conduct which shocks the conscience of the community and is so detrimental to the proper administration of justice that it warrants judicial intervention.

To conclude that the situation "is tainted to such a degree" and that it amounts to one of the "clearest of cases," as the abuse of process has been characterized by the jurisprudence, requires overwhelming evidence that the proceedings under scrutiny are unfair to the point that they are contrary to the interest of justice.

138 The Applicants submit that the search by the male police officers of females, where the search is analogous to a strip search and in a highly sexualized atmosphere, is so serious and contrary to policy and law that it is not fair to allow the prosecution to continue. That a stay is necessary to avoid "the improper invocation by the state of the judicial process," see *Mack* . And that this is one of those "clearest of cases" where a stay is required.

139 The Applicants also rely on *Carosella*, *Simpson*, and *Pithart* for the proposition as stated in *Carosella* that "the absence of any alternative remedy... justifies the exercise of discretion in favour of a stay." That is, the Applicants further submit that

if I deny them a remedy under Section 24(2) and I deny them any other remedy under Section 24(1), then that would further justify a stay.

140 The Respondent submits that this is not one of those "clearest of cases" where the breach violates those "fundamental principles of justice which underlie the community's sense of fair play and decency," see *Young*, or "shocks the conscience of the community," see *Power*.

141 The Respondent submits that on the evidence not even the patrons of the Pussy Palace themselves were shocked. Earlier in these reasons I dealt with that submission. I found that I preferred the evidence of the patrons over the evidence of the police as to the effect of the search on them and found that they were upset, frightened, embarrassed and felt violated intimated and shocked.

142 The Respondent also relies on the factors discussed in the Respondent's earlier submissions that the search was reasonable to argue that it is not the "clearest of cases," but I have found that the search was unreasonable.

143 As noted earlier, the Ontario Court of Appeal on *Flintoff* found that the strip search in that case of a male by a male police officer was "outrageous," "flagrant," "deliberate," "unjustified," "not in good faith" and that it would "shock the public." I adopt the findings in *Flintoff*. As noted earlier the search here is more egregious than in *Flintoff* in that the search here was male on female and in a highly sexualized environment.

144 The test in *Young* and *Power* is met in this case in that the conduct of the police violates "the community's sense of fair play and decency" and "shocks the conscience of the community."

145 As set out above in *Mack* the Supreme Court of Canada states that "conduct which is unacceptable is, in essence, that which violates our notions of fair play and decency and which shows blatant disregard for the qualities of humanness which all of us share."

146 What the Supreme Court of Canada stated in *Golden* about strip searches establishes that the police conduct here "shows blatant disregard for the qualities of humanness which all of us share."

147 I find this to be one of those "clearest of cases."

148 In *Flintoff* the Court of Appeal stated at page 334:

> The usual remedy for an unreasonable search in violation of s.8 of the Charter is to exclude under s. 24(2) the evidence that is the product of the unconstitutional search.

149 The usual remedy for a breach of Section 8 is exclusion of evidence under Section 24(2). I have found that to be the remedy in this case.

150 If, however, there was no remedy under Section 24(2) or otherwise under 24(1), then the appropriate and just remedy is a stay of proceedings under 24(1) pursuant to a finding of an abuse of process.

151 The relief granted in this case, subject to what I have said about abuse of process above is an order under Section 24(2) for a breach of Section 8 excluding all of the police evidence of their observations inside the bathhouse.

152 That is my ruling on this Charter application.

153 *MR. ADDARIO*: Thank you Your Honour. Your Honour it is not clear to me because of my failing memory whether or not the defendants were arraigned, but if they weren't, I would ask that they be arraigned now.

154 *MS. HART*: It is my understanding Your Honour I believe the defendants were arraigned. And your Honour at this point the Crown would ask you to dismiss the charges.

155 *THE COURT*: They were arraigned and that is confirmed on the informations. The charges are dismissed.

156 *MS. HART*: Thank you Your Honour.

157 *MR. ADDARIO*: Thank you Your Honour.

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Application granted.