



SUPREME COURT OF CANADA

CITATION: R. v. Fox, 2026 SCC 4

APPEAL HEARD: May 20, 2025

JUDGMENT RENDERED: February 6, 2026

DOCKET: 41215

BETWEEN:

His Majesty The King
Appellant

and

Sharon Fox
Respondent

- and -

**Director of Public Prosecutions,
Attorney General of Ontario,
Attorney General of Alberta,
Canadian Civil Liberties Association and
British Columbia Civil Liberties Association**
Interveners

CORAM: Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Kasirer, Jamal, O'Bonsawin and Moreau JJ.

**REASONS FOR
JUDGMENT:**
(paras. 1 to 132)

Jamal J. (Wagner C.J. and Karakatsanis, Côté, Martin, Kasirer and Moreau JJ. concurring)

DISSENTING O'Bonsawin J. (Rowe J. concurring)

REASONS:

(paras. 133 to 159)

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His Majesty The King

Appellant

v.

Sharon Fox

Respondent

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**Director of Public Prosecutions,
Attorney General of Ontario,
Attorney General of Alberta,
Canadian Civil Liberties Association and
British Columbia Civil Liberties Association**

Interveners

Indexed as: R. v. Fox

2026 SCC 4

File No.: 41215.

2025: May 20; 2026: February 6.

Present: Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Kasirer, Jamal,
O’Bonsawin and Moreau JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Criminal law — Fair trial — Full answer and defence — Solicitor-client privilege — Innocence at stake exception — Police intercepting call between lawyer and her client during drug trafficking investigation — Lawyer charged with obstruction of justice based on portion of call not covered by solicitor-client privilege — Portion of call covered by solicitor-client privilege inaccessible to lawyer — Lawyer seeking to have non-privileged portion of call excluded at trial on basis that admitting only that portion and not privileged portion deprived her of right to fair trial — Whether innocence at stake exception to solicitor-client privilege could apply to permit lawyer to access privileged portion of call for use in her own defence.

Constitutional law — Charter of Rights — Remedy — Exclusion of evidence — Police intercepting call between lawyer and her client during drug trafficking investigation — Civilian monitor listening to call despite wiretap authorization requiring authorities to stop listening to call if lawyer party to communication — Crown conceding that monitor's violation of terms of wiretap authorization breached lawyer's right to be secure against unreasonable search and seizure — Whether intercepted call should be excluded from evidence — Canadian Charter of Rights and Freedoms, s. 24(2).

As part of an investigation by the RCMP into cocaine trafficking, a judge authorized a wiretap to intercept the phone calls of several individuals. The wiretap authorization contained several standard terms to protect solicitor-client privilege, including a requirement that any person monitoring an intercepted call should

discontinue the interception if they reasonably believed that a lawyer was a party to the communication. During the investigation, the entirety of a call between F, a criminal defence lawyer, and her client was recorded. As well, a civilian monitor employed by the police listened to the call live for several minutes. After reviewing the recording of the call, a judge ruled that the first part of the call (lasting 2 minutes and 25 seconds) was not protected by solicitor-client privilege and could be accessed by the RCMP, but that the second part (the remaining 4 minutes and 15 seconds) was privileged and could not be accessed by anyone, including F, without further order of the court. Based on the non-privileged part of the call, F was charged with obstruction of justice. The Crown alleged that F had warned her client about potential police searches and that she had counselled her client to remove or destroy evidence of criminal conduct.

F applied to the trial judge to exclude from evidence the non-privileged part of the call, on the basis that the civilian monitor breached the wiretap authorization, and thus infringed F's right to be free from unreasonable search and seizure under s. 8 of the *Charter*. F also argued that the admission into evidence of the non-privileged part of the call, when she could not access the privileged part to defend herself, deprived her of the right to a fair trial under ss. 7 and 11(d) of the *Charter*.

The trial judge found no breach of s. 8 but agreed that F's right to a fair trial was infringed. In the trial judge's view, given F's obligations as a solicitor, she could not invoke the innocence at stake exception to solicitor-client privilege to access her client's privileged communications for use in her own defence; as a result, F was

deprived of the right to make full answer and defence to the charge against her. To prevent an unfair trial, the trial judge excluded the non-privileged part of the call from evidence under s. 24(1) of the *Charter* and F was acquitted. A majority of the Court of Appeal dismissed the Crown's appeal.

Held (Rowe and O'Bonsawin JJ. dissenting): The appeal should be dismissed.

Per Wagner C.J. and Karakatsanis, Côté, Martin, Kasirer, **Jamal** and Moreau JJ.: A lawyer charged with a criminal offence can invoke the innocence at stake exception to solicitor-client privilege to seek access to their client's privileged communications for use in their own defence. The procedure outlined in *R. v. McClure*, 2001 SCC 14, [2001] 1 S.C.R. 445, can be adapted for this purpose. In the instant case, it was premature to conclude that F's right to a fair trial was infringed and then to exclude the impugned evidence prior to F bringing a *McClure* application. However, the Crown concedes that the evidence was obtained in a manner that breached s. 8 of the *Charter*. Applying the relevant legal framework, the evidence should be excluded under s. 24(2) of the *Charter*.

Solicitor-client privilege describes a client's right to communicate with their lawyer in confidence. It belongs to the client and can be waived only by the client with informed consent. The purpose of solicitor-client privilege is to facilitate full and frank communication in the seeking and giving of legal advice. The privilege helps to protect individual rights, but it also has systemic importance for the administration of

justice. The important relationship between a client and their lawyer stretches beyond the parties and is integral to the workings of the legal system itself. Solicitor-client privilege is also a principle of fundamental justice under s. 7 of the *Charter*, and is part of a client's fundamental right to privacy under s. 8. It is recognized as the strongest privilege protected by law, and may be set aside only in the most unusual cases.

Although solicitor-client privilege is near-absolute, it is subject to limited common law exceptions based on competing societal values. One such exception is the innocence at stake exception, when core issues going to the guilt of the accused are involved and there is a genuine risk of a wrongful conviction. In *McClure*, the Court recognized the innocence at stake exception, in relation to a third party's solicitor-client privilege; in *R. v. Brown*, 2002 SCC 32, [2002] 2 S.C.R. 185, it reaffirmed that both solicitor-client privilege and the right to make full answer and defence to a criminal charge are principles of fundamental justice under s. 7 of the *Charter*. When these principles clash, solicitor-client privilege may, in rare circumstances, be subordinated and required to yield to permit an accused to make full answer and defence.

The *McClure* test for setting aside solicitor-client privilege imposes a stringent threshold and is available only as a last resort when the accused's innocence is at stake. The accused must first establish that the information sought from a solicitor-client communication is not available from any other source, and that the accused is otherwise unable to raise a reasonable doubt as to their guilt. This threshold ensures that the innocence at stake test is not engaged lightly. If the threshold has been

satisfied, a reviewing judge should proceed to the two stages of the test. Under the first stage, the accused seeking production of a solicitor-client communication must demonstrate an evidentiary basis to conclude that the communication could raise a reasonable doubt as to their guilt. If such an evidentiary basis exists, at the second stage the judge should examine the communication to determine whether it is in fact likely to raise a reasonable doubt. The burden in the second stage is stricter than that in the first stage; evidence that merely attacks the Crown's case will not suffice. If the test is satisfied, the judge should order disclosure of any communications likely to raise a reasonable doubt.

A lawyer can invoke the innocence at stake exception to solicitor-client privilege when they seek to obtain access to their client's privileged communications for use in the lawyer's own defence. Courts and legal regulators have consistently rejected an absolutist conception of solicitor-client privilege and of a lawyer's ethical and legal duties. A lawyer's duties cannot override their constitutional right to make full answer and defence to a criminal charge against them, a constitutional right held by any accused person. An absolutist conception of a lawyer's duties would also inevitably have the unacceptable consequence of treating lawyers charged with a crime more favourably than other criminal defendants, since it would mean that lawyers could establish a breach of their right to a fair trial whenever they are denied access to privileged communications, even if those communications might not raise a reasonable doubt. Moreover, s. 189(6) of the *Criminal Code*, which preserves privilege where information is intercepted by an authorized wiretap, does not prevent a lawyer from

invoking the innocence at stake exception; it does not purport to eliminate any exceptions to privilege, nor can it be interpreted to do so, either expressly or by implication.

The *McClure* test can be adapted to a situation where a lawyer seeks access to their client's solicitor-client privileged communications to defend themselves against a criminal charge. Courts should consider three guiding principles at every stage of the *McClure* test: (i) solicitor-client privilege should be safeguarded to the greatest degree reasonably possible and should be minimally impaired; (ii) the privilege-holder client should have a voice throughout the process, since the privilege belongs to the client, not the lawyer; and (iii) the court should consider the extent to which the accused lawyer is already privy to the privileged communications.

At the first stage of the test, the evidentiary burden is flexible and can accommodate limitations on the accused lawyer's knowledge. At the same time, the test should account for the accused lawyer's familiarity with, and inability to disclose, the content of the privileged communications; the accused lawyer can simply attest to the existence of a solicitor-client communication that could raise a reasonable doubt as to their guilt, and the court can take that assertion at face value. At the second stage of the test, when deciding whether the privileged communication is likely to raise a reasonable doubt, the court has broad discretion to fashion procedures to account for the reality that the accused lawyer will usually be within the circle of privilege.

In the instant case, F had the right to bring a *McClure* application to seek access to her client's privileged communications for use in her own defence. The lower courts erred in ruling that F's right to a fair trial was infringed before she had even brought a *McClure* application; it was premature to do so and then to exclude the evidence on the basis of a breach of F's rights under ss. 7 and 11(d) of the *Charter*.

As to whether the evidence should be excluded on the basis of a breach of F's rights under s. 8 of the *Charter*, s. 24(2) provides that when a court concludes that evidence was obtained in a manner that infringed a *Charter* right, the evidence shall be excluded if, in all the circumstances, its admission would bring the administration of justice into disrepute. The analysis under s. 24(2) proceeds in two stages. First, the court considers a threshold requirement, which asks whether the evidence was obtained in a manner that infringed or denied a *Charter* right or freedom. This involves a generous and purposive approach to examining the entire chain of events involving the *Charter* breach and the impugned evidence and whether they were part of the same transaction or course of conduct. The connection between the *Charter* breach and the impugned evidence can be temporal, contextual, or causal, or a combination of all three, but the connection should not be remote or tenuous. Second, if the threshold requirement is met, the court considers an evaluative component, which asks whether admitting the evidence would bring the administration of justice into disrepute. This involves balancing three lines of inquiry: (1) the seriousness of the *Charter*-infringing state conduct; (2) the impact of the breach on the *Charter*-protected interests of the accused; and (3) society's interest in the adjudication of the case on its merits.

In the instant case, there is no dispute that the evidence was obtained in a manner that infringed F's rights under s. 8 of the *Charter*. Because the breach and the obtaining of the evidence were simultaneous and part of the same context, there were temporal and contextual connections that were neither remote nor tenuous. Such connections are sufficient to meet the threshold requirement under s. 24(2).

With respect to the seriousness of the *Charter*-infringing state conduct, the breach in the instant case is at the more serious end of the spectrum of culpability. The civilian monitor negligently ignored the clear terms of the wiretap authorization, trespassed on solicitor-client privilege and eavesdropped on a lawyer's phone call with her client for several minutes, even though it should have been obvious to her that she should have stopped listening. Although the monitor acted through mere inadvertence, inadvertent conduct that precipitates a *Charter* breach can be very serious, particularly when a wiretap authorization is specifically worded to prevent such inadvertence. The seriousness of this breach was then exacerbated by a failure to take appropriate remedial action and by a casualness that did not match the occasion nor the need for a near-absolute protection of solicitor-client privilege. Further, there was no evidence that this breach triggered a reprimand or any ameliorative efforts, leading to systemic concerns that only elevate its seriousness.

As to the impact of the breach on F's *Charter*-protected interests, the breach was moderately intrusive: although the breach was not causally connected to obtaining the evidence, which was discoverable in any event since the call was

automatically recorded, F had a high expectation of privacy in her private phone call with her client. Any intrusion into the lawyer-client relationship has a potential chilling effect.

Regarding society's interest in the adjudication of a case on its merits, this line of inquiry pulls strongly towards admission of the evidence. The evidence is reliable, consisting of a recording and verbatim transcript of a phone call; it is critical evidence for the prosecution and forms the bulk of the Crown's case; and the offence alleged — attempted obstruction of justice by a lawyer — is undeniably serious. As a result, society has a strong interest in the adjudication of this case on its merits.

The final balancing of these three lines of inquiry is qualitative and does not admit of mathematical precision. No single line of inquiry can overwhelm the exercise. Instead, it is the cumulative weight of the first two lines of inquiry that trial judges must consider and balance against the third line. In the present situation, this balancing makes a strong case for exclusion. Taken together, the seriousness of the breach and the impact on F's *Charter*-protected interests outweigh the otherwise strong interest that society has in the adjudication of this case on its merits. Admitting the evidence of the non-privileged part of the phone call would bring the administration of justice into disrepute; as such, this evidence should be excluded under s. 24(2).

Per Rowe and **O'Bonsawin JJ.** (dissenting): The appeal should be allowed and a new trial ordered. There is agreement with the majority that a lawyer can invoke the innocence at stake exception to solicitor-client privilege when seeking to obtain

access to their client's privileged communications for use in their own defence. There is also agreement that it was premature for the courts below to conclude in the instant case that F's right to a fair trial was infringed before she had even brought an application pursuant to *McClure*. However, the wiretap evidence should not have been excluded under s. 24(2) of the *Charter* despite the state's infringement of F's privacy rights under s. 8 of the *Charter*.

Section 24(2) first requires the applicant to meet the threshold of whether the impugned evidence was obtained in a manner that infringed their *Charter* rights. In the present case, while there was no causal connection between the *Charter* breach and the way the evidence was later obtained, there are several temporal and contextual factors which satisfy this threshold. While those temporal and contextual factors satisfy the "obtained in a manner" precondition, causation remains relevant at the next step of the s. 24(2) analysis, in determining whether the admission of evidence would bring the administration of justice into disrepute. There are three avenues of inquiry to be considered in deciding this question: (1) the seriousness of the breach; (2) the impact of the breach; and (3) society's interest in the adjudication of the case on its merits.

With respect to the first line of inquiry, while the *Charter* breach in the instant case was serious, the seriousness of the breach was attenuated by several factors. The breach was inadvertent and was isolated in nature, there was nothing wilful or flagrant about it, and the seriousness of the state misconduct cannot be characterized as particularly egregious. The breach occurred against the backdrop of preventative

measures to respect *Charter* rights and to minimize and prevent any intrusion upon privacy rights. These systemic efforts attenuate the seriousness of the *Charter*-infringing conduct. While the police's handling of solicitor-client communications post-breach can bear on the seriousness of the infringing conduct, the systems in place to protect the underlying privacy interests in the instant case demonstrate that there was no pattern of institutional or systemic misconduct that would aggravate the seriousness of the breach. Further, the Court should not substitute its own view for the trial judge's finding, barring a clear error; in this case, it was open to the trial judge to conclude that the misconduct arose only to the level of mere inadvertence, and there is no justification for interfering with that conclusion.

With respect to the second line of inquiry, the impact of the breach on F's *Charter*-protected interests was also attenuated by several factors, including a lack of causal relationship between the *Charter* breach and the subsequent review of the evidence. This mitigates the impact of the breach, as a lack of causation operates as a pro-inclusionary consideration. Given that the evidence was later obtained through *Charter*-compliant means, and there is no evidence to suggest that the s. 8 *Charter* breach prompted the later discovery of the wiretap, the impact of the breach, while serious, does not pull strongly toward exclusion of the evidence.

The third line of inquiry focuses on society's interest in ensuring that its justice system is above reproach. Confidence in lawyers and the solicitor-client relationship is a cornerstone of maintaining such an irreproachable justice system. As

part of their broad duty to the administration of justice, lawyers maintain specific duties of honesty, candour, and fairness meant to foster and maintain public trust in the justice system. Whenever lawyers are charged with obstructing the very same justice system they are duty-bound to protect, the exclusion of evidence risks inviting the public perception that lawyers may compromise the truth-seeking function of the criminal justice system in order to obtain an unjust advantage for their client, which undermines the public's confidence in the administration of justice. In such circumstances, society has a significant interest in having the charge adjudicated on its merits. In the instant case, excluding the evidence would undermine the court's truth-seeking function, would effectively gut the prosecution, and would negatively impact the reputation of the administration of justice.

On a final balancing, given the strength of society's interest under the third avenue of inquiry, and the diminished seriousness and impact of the *Charter* breach under the first two avenues, the admission of the evidence in the instant case would not bring the administration of justice into disrepute.

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2 S.C.R. 189; *R. v. Brassington*, 2018 SCC 37, [2018] 2 S.C.R. 616; **referred to:** *Solosky v. The Queen*, [1980] 1 S.C.R. 821; *Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31, [2004] 1 S.C.R. 809; *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44, [2008] 2 S.C.R. 574; *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, 2002 SCC 61, [2002] 3 S.C.R. 209; *R. v. Campbell*, [1999] 1 S.C.R. 565; *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860; *R. v. Durham Regional Crime Stoppers Inc.*, 2017 SCC 45, [2017] 2 S.C.R. 157; *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53, [2016] 2 S.C.R. 555; *Blank v. Canada (Minister of Justice)*, 2006 SCC 39, [2006] 2 S.C.R. 319; *R. v. Gruenke*, [1991] 3 S.C.R. 263; *Canada (National Revenue) v. Thompson*, 2016 SCC 21, [2016] 1 S.C.R. 381; *Canada (Attorney General) v. Chambre des notaires du Québec*, 2016 SCC 20, [2016] 1 S.C.R. 336; *Canada (Attorney General) v. Federation of Law Societies of Canada*, 2015 SCC 7, [2015] 1 S.C.R. 401; *Maranda v. Richer*, 2003 SCC 67, [2003] 3 S.C.R. 193; *Smith v. Jones*, [1999] 1 S.C.R. 455; *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353; *R. v. Leipert*, [1997] 1 S.C.R. 281; *R. v. Murray* (2000), 48 O.R. (3d) 437; *Canadian National Railway Co. v. McKercher LLP*, 2013 SCC 39, [2013] 2 S.C.R. 649; *R. v. Cunningham*, 2010 SCC 10, [2010] 1 S.C.R. 331; *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235; *R. v. Neil*, 2002 SCC 70, [2002] 3 S.C.R. 631; *Strother v. 3464920 Canada Inc.*, 2007 SCC 24, [2007] 2 S.C.R. 177; *R. v. Cuthill*, 2018 ABCA 321, 368 C.C.C. (3d) 261; *R. v. Meer*, 2015 ABCA 141, 323 C.C.C. (3d) 98; *Lloyd v. The Queen*, [1981] 2 S.C.R. 645; *R. v. Jean* (1979), 7 C.R. (3d) 338, *aff'd* [1980] 1 S.C.R. 400; *R. v. D.L.W.*, 2016 SCC 22, [2016] 1 S.C.R. 402; *R. v. Basque*, 2023 SCC 18; *R. v. Samaniego*, 2022 SCC 9, [2022]

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By O'Bonsawin J. (dissenting)

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APPEAL from a judgment of the Saskatchewan Court of Appeal (Leurer C.J. and Caldwell and Tholl JJ.A.), **2024 SKCA 26**, 434 C.C.C. (3d) 289, 555 C.R.R. (2d) 21, [2024] S.J. No. 45 (Lexis), 2024 CarswellSask 66 (WL), affirming a decision of Rothery J., 2022 SKKB 235, [2022] S.J. No. 396 (Lexis), 2022 CarswellSask 523 (WL). Appeal dismissed, Rowe and O’Bonsawin JJ. dissenting.

Pouria Tabrizi-Reardigan, for the appellant.

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Dana Achtemichuk, for the intervener Attorney General of Ontario.

Tom Spark, for the intervener Attorney General of Alberta.

Anil K. Kapoor, for the intervener Canadian Civil Liberties Association.

Daniel J. Song, K.C., and *Safiyya Ahmad*, for the intervener British Columbia Civil Liberties Association.

The judgment of Wagner C.J. and Karakatsanis, Côté, Martin, Kasirer, Jamal and Moreau JJ. was delivered by

JAMAL J. —

I. Introduction

[1] The main issue on this appeal is whether a lawyer charged with a criminal offence can invoke the “innocence at stake” exception to solicitor-client privilege recognized in *R. v. McClure*, 2001 SCC 14, [2001] 1 S.C.R. 445, and *R. v. Brown*, 2002 SCC 32, [2002] 2 S.C.R. 185, to seek access to their client’s solicitor-client communications for use in their own defence. Under this exception, solicitor-client

privilege may be set aside in rare circumstances to allow an accused to make full answer and defence to a criminal charge. A second issue is whether evidence in this case that was obtained in a manner that breached s. 8 of the *Canadian Charter of Rights and Freedoms* should be excluded under s. 24(2). The evidence consists of the non-privileged part of a phone call between a lawyer and her client, which formed part of a longer call that included privileged communications. The s. 8 breach arose when state authorities violated the terms of a wiretap authorization that required them to stop listening immediately if they reasonably believed that a lawyer was a party to the communication.

[2] For the reasons that follow, I conclude that a lawyer can invoke the innocence at stake exception to solicitor-client privilege recognized in *McClure* and *Brown* to seek access to their client's privileged communications for use in their own defence. The procedure outlined in *McClure* and *Brown* can readily be adapted for this purpose. Moreover, I agree with the majority of the Court of Appeal for Saskatchewan that the evidence in this case was obtained in a manner that breached s. 8 of the *Charter* and should be excluded under s. 24(2). Accordingly, I would dismiss the appeal.

II. Background

[3] The respondent, Sharon Fox, is a criminal defence lawyer practising with the law firm of Nychuk & Company in Regina, Saskatchewan.

[4] In 2019, the RCMP were investigating cocaine trafficking in the area around Estevan, Saskatchewan. As part of this investigation, on October 9, 2019, a judge of the Saskatchewan Court of Queen’s Bench authorized a wiretap under Part VI of the *Criminal Code*, R.S.C. 1985, c. C-46, to intercept the phone calls of several individuals, including one of Ms. Fox’s clients, A.Y.

[5] The wiretap authorization contained several standard terms to protect solicitor-client privilege (see R. W. Hubbard, M. Lai and D. Sheppard, *Wiretapping and Other Electronic Surveillance: Law and Procedure* (loose-leaf), at § 6:8). In particular, the authorization: (a) prohibited the interception of communications at the office or residence of a solicitor or at any other place ordinarily used by a solicitor for the purpose of consultation with clients; (b) required a monitor to discontinue the interception if they reasonably believed a solicitor was a party to the communication, and prohibited the monitor from accessing any recorded communication to which a solicitor was a party, except as authorized by the court; (c) permitted communications at certain identified telephone numbers to be automatically recorded, and required a monitor who reviewed such communications to stop reviewing them as soon as the monitor reasonably believed that a solicitor was a party to them; and (d) provided for *ex parte* judicial review if it was reasonably believed that a communication with a solicitor may not be subject to solicitor-client privilege. The relevant terms of the authorization were as follows:

6. It is further ordered that:

Terms and Conditions in relation to solicitor-client privilege

- a. No communications may be intercepted at the office or residence of a solicitor, or at any other place ordinarily used by solicitors for the purpose of consultations with clients; and
- b. When a monitor reasonably believes that a solicitor is a party to a communication, intercepted at any place or over any device, the monitor must discontinue the interception. At reasonable intervals, the monitor may resume the interception for the purpose of determining whether the solicitor remains a party to the communication. When communications have been intercepted while on automatic monitoring, the monitor who subsequently reviews the communication must cease reviewing the communication as soon as the monitor reasonably believes that a solicitor is a party to the communication, but may monitor the communication by reviewing at reasonable intervals for the purpose of determining whether the solicitor remains a party to the communication. No person shall access any communication to which a solicitor is a party that is recorded pursuant to this authorization except as authorized by this Court.

Provided however, that in the event that a communication or communications have been intercepted and to which access has been denied pursuant to this paragraph, and it is reasonably believed that a communication may not be subject to solicitor-client privilege, then the communication or communications may be submitted to this Court for an ex-parte determination whether access will be allowed to any of the communications. [Emphasis deleted.]

(A.R., vol. I, at pp. 203-4)

[6] On October 21, 2019, one of the individuals under investigation, K.G., was arrested for drug trafficking and exercised her right to counsel by phoning Ms. Fox from the police station. This call was not monitored. Five minutes later, Ms. Fox phoned her client, A.Y., whose phone number was being automatically recorded under the authorization. As a result, the entire call between Ms. Fox and A.Y. was recorded.

[7] Ms. Fox’s call to A.Y. was also live monitored. Two RCMP officers were listening at the start of the call and heard Ms. Fox identify herself as “Sharon Fox . . . from Nychuk and Company” (A.R., vol. I, at p. 217). They knew that Ms. Fox was a criminal defence lawyer and realized that they were listening to a call potentially protected by solicitor-client privilege. As a result, 20 seconds into the call, the officers stopped listening. Two minutes later, they classified the call as “privileged” in their system, which locked the recording from being accessed by the police without the authorization of the Saskatchewan Provincial Intercept Program.

[8] Eight seconds after the two RCMP officers stopped live monitoring the call, a civilian monitor employed by the Saskatchewan Provincial Intercept Program began to listen to the call. The civilian monitor, who was located in Saskatoon, listened to the call live for the next 3 minutes and 49 seconds. She heard Ms. Fox tell A.Y. that she had “not yet” been retained by K.G. and that K.G. had called Ms. Fox as “her one call to a lawyer” (A.R., vol. I, at p. 219). The monitor also listened to part of the call that was later found to be protected by solicitor-client privilege.

[9] Right after Ms. Fox’s phone call to A.Y., the police intercepted several calls from A.Y. to his family members. A.Y. asked them to check his house to ensure that his firearms were stored in compliance with gun storage laws and to remove a Ziploc bag of “legal cash”, later said to be rent money, because he expected a search warrant to be executed at his house imminently (2024 SKCA 26, 434 C.C.C. (3d) 289, at para. 12). There was no mention of drugs or other illegal items.

[10] On December 16, 2020, as permitted under the wiretap authorization, the Crown applied *ex parte* to the Saskatchewan Court of Queen’s Bench for a ruling on whether the recording of Ms. Fox’s call to A.Y. was protected by solicitor-client privilege. After reviewing the recording, which lasted 6 minutes and 40 seconds, on December 21, 2020, Tochor J. (now A.C.J.) ordered that the first part of the call (lasting 2 minutes and 25 seconds) was not privileged and could be accessed by the RCMP, but ruled that the second part (the remaining 4 minutes and 15 seconds) was privileged and could not be accessed by anyone without further order of the court. A transcript of the non-privileged part of the call appears in the Appendix below. Tochor J. placed written reasons for his order under seal. That order was not appealed. There has been no application to access Tochor J.’s reasons and they were not before this Court.

[11] In the non-privileged part of the call, Ms. Fox introduced herself and mentioned the name of her firm. She then told A.Y. that K.G. had just been arrested for trafficking and possession for the purpose of trafficking. Ms. Fox said that K.G. had been under surveillance and that A.Y. “should know what that means” (A.R., vol. I, at p. 218). She stated that the police would probably be working on search warrants “in the next two or three hours”, if they did not already have them (p. 218). When A.Y. asked where the police would be going, Ms. Fox replied, “[y]ou tell me, you know that” (p. 218). Ms. Fox explained that K.G. had been arrested for trafficking because “she’s gone to a place where there has been product located” (p. 219). Ms. Fox added that, “based on their surveillance of [K.G.,] [the police] will be, if they haven’t already, . . . drafting a search warrant for wherever places she’s been frequenting” (p. 219). A.Y.

asked Ms. Fox if she was acting for K.G., to which Ms. Fox replied: “No I’m not yet, I have to be retained first. She just called me, so I was her one call to a lawyer, she called me and asked me to pass the message along” (p. 219).

[12] Based on the non-privileged part of the call, Ms. Fox was charged with attempting to obstruct or defeat justice contrary to s. 139(2) of the *Criminal Code*. The Crown’s position was that Ms. Fox had warned A.Y. that the police might be searching places that K.G. had frequented and that she had counselled A.Y. to remove or destroy evidence of criminal conduct. Ms. Fox’s position was that, as a lawyer, she had an ethical duty to keep her client reasonably informed. She thus had to tell her client that K.G. had called her about being arrested and that K.G. had asked her to pass on that information.

III. Judgments Below

A. *Court of King’s Bench for Saskatchewan, 2022 SKKB 235 (Rothery J.)*

[13] In advance of her trial before judge and jury, Ms. Fox applied before the trial judge to exclude from evidence the non-privileged part of her call with A.Y. on the basis that it breached her *Charter* rights. Ms. Fox argued that the civilian monitor breached the authorization by listening to her call, and thus infringed s. 8 of the *Charter*. She also argued that admitting only the non-privileged part of the call, when she could not obtain access to the privileged part, deprived her of the right to a fair trial under ss. 7 and 11(d) of the *Charter*.

[14] The trial judge found no breach of s. 8 of the *Charter*. She accepted that it was “clear” that the monitor heard Ms. Fox say that K.G. had called her as her “one call to a lawyer” and that she had not been “retained” yet, but nevertheless the monitor continued listening to the call (para. 29). Even so, the trial judge noted that the monitor had no recollection of any part of the call and could not say why she kept listening for almost four minutes. The trial judge observed that the monitor was in Saskatoon and may not have known that Nychuk & Company is a law firm, since it is based in Regina. The trial judge described the monitor’s breach of the authorization as “mere inadvertence” (para. 29). Because the trial judge saw no breach of s. 8, she found it unnecessary to address s. 24(2).

[15] At the same time, the trial judge agreed with Ms. Fox that her right to a fair trial under ss. 7 and 11(d) of the *Charter* was infringed. The trial judge ruled that given Ms. Fox’s obligations as a solicitor, she could not invoke the innocence at stake exception to solicitor-client privilege to access her client’s privileged communications for use in her own defence. Further, s. 189(6) of the *Criminal Code* — which states that “[a]ny information . . . that, but for the interception, would have been privileged remains privileged and inadmissible as evidence without the consent of the person enjoying the privilege” — barred Ms. Fox from betraying A.Y.’s solicitor-client privilege. As a result, the trial judge ruled that Ms. Fox was deprived of the right to make full answer and defence to the charge against her. To prevent an unfair trial, the trial judge excluded the non-privileged part of the call from evidence under s. 24(1) of the *Charter*.

[16] After this ruling, the Crown decided not to call any further evidence, and Ms. Fox was acquitted.

B. *Court of Appeal for Saskatchewan, 2024 SKCA 26, 434 C.C.C. (3d) 289 (Tholl and Caldwell JJ.A., Leurer C.J. Dissenting)*

(1) Majority

[17] A majority of the Court of Appeal for Saskatchewan dismissed the Crown’s appeal from Ms. Fox’s acquittal.

[18] The majority agreed with the trial judge that Ms. Fox’s right to a fair trial under ss. 7 and 11(d) of the *Charter* was infringed. They rejected the Crown’s argument that Ms. Fox’s *Charter* application was premature because she had not waited until the close of the Crown’s case before bringing a *McClure* application to seek access to her client’s privileged information. The majority noted that, in the unusual circumstances of this case, the bulk of the Crown’s evidence against Ms. Fox consisted of the non-privileged part of her phone call with A.Y., which was already before the court. In addition, since this was a jury trial, a pre-trial application was more efficient.

[19] Aside from the prematurity issue, the majority ruled that it would be “fundamentally unfair” to require Ms. Fox to bring a *McClure* application and invoke the innocence at stake exception to seek access to her own client’s solicitor-client communications (para. 66). In the majority’s view, *McClure* is a “poor fit” for such a

circumstance (para. 66). It was impossible for Ms. Fox to meet her evidentiary burden under either stage of the *McClure* test to show that her communications with her client could or would likely raise a reasonable doubt as to her guilt, given her duties of loyalty and confidentiality to her client and her duty to protect her client's solicitor-client privilege.

[20] The majority declined to discuss whether s. 189(6) of the *Criminal Code* prevented Ms. Fox from bringing a *McClure* application, but noted in *obiter* that the provision could be understood as clarifying “that the privilege does not have to be asserted in order to exist . . . as opposed to attempting to eliminate limited exceptions that are rooted in the *Charter*” (para. 75).

[21] The majority agreed with the trial judge that admitting the non-privileged part of the call, when the privileged part was inaccessible to her, would significantly prejudice Ms. Fox by impeding her ability to make full answer and defence, thereby infringing ss. 7 and 11(d) of the *Charter*. As a result, the “only viable option was to exclude the evidence” under s. 24(1) of the *Charter* (para. 84).

[22] The majority further held that there was an “obvious breach” of Ms. Fox's rights under s. 8 of the *Charter* (para. 102). By continuing to listen after “the conversation clearly indicated Ms. Fox was a lawyer”, the monitor violated an “unambiguous and critically important term of the [a]uthorization” (para. 102).

[23] Based on the breach of s. 8 of the *Charter*, the majority excluded the evidence under s. 24(2). The evidence was “obtained in a manner” that breached the *Charter*. Although there was no causal connection between the monitor’s conduct and the obtaining of the evidence since the call was automatically recorded under the authorization, there were temporal and contextual connections. As a result, “[t]he process of gathering the evidence was directly tainted by [the monitor]’s actions” (para. 110). The majority found that the breach of s. 8 was “substantial” and “highly serious”, involving a “demonstrably significant degree of negligence” by the monitor (paras. 112-14). The breach also intruded substantially on Ms. Fox’s s. 8 rights: the effect on a lawyer of having their privileged conversations recorded was “self-evident and significant” (para. 114). The majority stated that although society has a significant interest in prosecuting attempts to obstruct justice, in this case the evidence of the offence, while reliable, was not particularly strong. Balancing these factors under s. 24(2), the majority ruled that the evidence “was obtained through a very serious breach, had a significant impact on Ms. Fox’s *Charter*-protected rights, and while it [was] reliable evidence upon which the prosecution of a weighty offence hinge[d], its admission would bring the administration of justice into disrepute” (para. 116).

(2) Dissent

[24] The dissenting judge would have allowed the appeal and ordered a new trial.

[25] In the dissenting judge's view, the trial judge erred in finding a breach of ss. 7 and 11(d) of the *Charter*. Ms. Fox's status as a lawyer did not prevent her from bringing a *McClure* application. Although a lawyer owes duties to their client, "a lawyer is not required to go to jail for their client" (para. 177). The dissenting judge stated that Ms. Fox met the threshold and the first stage of the *McClure* test, because she had "proof of the existence of the two parts of the recorded conversation" (para. 168). This provided some evidentiary basis that a communication existed that could raise a reasonable doubt as to her guilt and that the information was not available from any other source. As for the second stage of the *McClure* test, the dissenting judge stated that the trial judge erred by failing to examine the privileged communication to determine whether it was likely to raise a reasonable doubt as to Ms. Fox's guilt. She was required to do so before concluding that Ms. Fox's right to make full answer and defence would be infringed if the first part of the call were admitted into evidence.

[26] The dissenting judge added that s. 189(6) of the *Criminal Code* does not preclude the operation of the innocence at stake exception to solicitor-client privilege. The provision preserves solicitor-client privilege without affecting existing exceptions.

[27] The dissenting judge agreed with the majority that the monitor breached s. 8 of the *Charter*. The monitor should have stopped listening when Ms. Fox said she was K.G.'s "one call to a lawyer" (para. 246).

[28] Even so, the dissenting judge would not have excluded the evidence under s. 24(2). He accepted that the evidence was "obtained in a manner" that breached the

Charter, given the temporal and contextual connections. He deferred to the trial judge's findings that the breach was "inadvertent" (para. 277 (emphasis deleted)), and while serious, it "was an isolated occurrence, limited to the actions of one state actor" (para. 283). The dissenting judge noted that the monitor's act of listening to the call was "momentary in the sense that she had nothing to do with creating the recording and had no memory of her intrusion" (para. 286). The existence or discovery of the evidence was also not causally related to the monitor's actions, which reduced the seriousness of the breach. The dissenting judge stated that society's interest in having the case decided on its merits was high. The evidence was reliable and crucial to the prosecution's case for the serious offence of attempting to obstruct justice. Balancing the three lines of inquiry, the dissenting judge concluded that the reputation of the justice system over the long term would be harmed if the evidence were excluded.

IV. Issues

[29] This appeal raises two issues:

- (1) Can a lawyer invoke the innocence at stake exception to solicitor-client privilege, in order to seek access to their client's privileged communications for use in their own defence?
- (2) Given the Crown's concession that s. 8 of the *Charter* was infringed, should the non-privileged part of the intercepted call be excluded from evidence under s. 24(2)?

V. Analysis

[30] I will first review general legal principles regarding solicitor-client privilege, including the recognized innocence at stake exception. I will then address the two issues raised by the appeal.

A. *General Principles Regarding Solicitor-Client Privilege*

(1) The Nature and Scope of Solicitor-Client Privilege

[31] Solicitor-client privilege describes a client's right to communicate with their lawyer in confidence. The privilege arises if three conditions are met: (i) a communication between lawyer and client; (ii) which entails the seeking or giving of legal advice; and (iii) which the parties intend to be confidential (*Solosky v. The Queen*, [1980] 1 S.C.R. 821, at p. 837; *Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31, [2004] 1 S.C.R. 809, at para. 15). The privilege does not extend to communications that are criminal in themselves or that have the purpose of furthering unlawful conduct, because such communications form no part of a lawyer's professional role (*Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44, [2008] 2 S.C.R. 574, at para. 10; *Pritchard*, at para. 16; *Solosky*, at pp. 835-36).

[32] Solicitor-client privilege belongs to the client and can be waived only by the client with informed consent (*Lavallee, Rackel & Heintz v. Canada (Attorney*

General), 2002 SCC 61, [2002] 3 S.C.R. 209, at para. 39; *McClure*, at para. 37; *R. v. Campbell*, [1999] 1 S.C.R. 565, at paras. 67-71). Subject to limited exceptions, solicitor-client privilege protects against any intrusion upon solicitor-client communications without the client’s consent (A. M. Dodek, *Solicitor-Client Privilege* (2014), at p. li; S. N. Lederman, M. K. Fuerst and H. C. Stewart, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada* (6th ed. 2022), at ¶14.48; R. W. Hubbard and K. Doherty, *The Law of Privilege in Canada* (loose-leaf), at § 11:1; M. Vauclair, T. Desjardins and P. Lachance, *Traité général de preuve et de procédure pénales* 2025 (32nd ed. 2025), at para. 43.8).

[33] Generally, the privilege applies when “the communication falls within the usual and ordinary scope of the professional relationship” (*Pritchard*, at para. 16). A solicitor-client relationship arises “as soon as the potential client takes the first steps, and consequently even before the formal retainer is established” (para. 16, quoting *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860, at p. 893). The privilege is a broad “umbrella” protecting “confidences of differing centrality and importance” (*Celanese Canada Inc. v. Murray Demolition Corp.*, 2006 SCC 36, [2006] 2 S.C.R. 189, at para. 34; *Pritchard*, at para. 16).

(2) The Purpose of Solicitor-Client Privilege

[34] The purpose of solicitor-client privilege is to facilitate full and frank communication in the seeking and giving of legal advice. The privilege “facilitate[s] the administration of justice by encouraging clients to speak freely to their lawyers, so

that lawyers can advise clients to the best of their abilities” (*R. v. Durham Regional Crime Stoppers Inc.*, 2017 SCC 45, [2017] 2 S.C.R. 157, at para. 24; *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53, [2016] 2 S.C.R. 555, at para. 34).

[35] Solicitor-client privilege helps to protect individual rights, but it also has systemic importance for the administration of justice. The privilege “commands a unique status within the legal system. The important relationship between a client and [their] lawyer stretches beyond the parties and is integral to the workings of the legal system itself. The solicitor-client relationship is a part of that system, not ancillary to it” (*McClure*, at para. 31; *University of Calgary*, at paras. 20 and 26). The confidential relationship between solicitor and client is “a necessary and essential condition of the effective administration of justice” (*Blank v. Canada (Minister of Justice)*, 2006 SCC 39, [2006] 2 S.C.R. 319, at para. 26). “Access to justice is compromised where legal advice is unavailable” (*Campbell* (1999), at para. 49).

[36] Solicitor-client privilege is a “class” privilege, which automatically protects confidential communications falling within the scope of a defined class of relationship because of the important societal interests involved. Other examples of class privileges are informer privilege, spousal privilege, litigation privilege, and settlement privilege. Class privileges contrast with “case-by-case” privileges, which protect only certain confidential communications meeting the four-part “Wigmore test” based on the facts of each case. Examples of relationships that may be protected by a

case-by-case privilege include doctor-patient, psychologist-patient, journalist-informant, and religious communications (*McClure*, at paras. 27-29; *R. v. Gruenke*, [1991] 3 S.C.R. 263, at p. 286; Lederman, Fuerst and Stewart, at ¶¶14.12-14.362; Hubbard and Doherty, at § 11:8; Vauclair, Desjardins and Lachance, at paras. 43.3-43.5).

(3) The Evolution of Solicitor-Client Privilege

[37] Although solicitor-client privilege has been part of the common law since the 16th century (*Solosky*, at p. 834; *McClure*, at para. 19; Dodek, at §1.4; Lederman, Fuerst and Stewart, at ¶14.47; Hubbard and Doherty, at § 11:4), it has been transformed under Canadian law over the past 50 years, evolving from a mere rule of evidence, to a substantive right, to a right with constitutional dimensions (*University of Calgary*, at para. 20; *Canada (National Revenue) v. Thompson*, 2016 SCC 21, [2016] 1 S.C.R. 381, at para. 17; *Canada (Attorney General) v. Chambre des notaires du Québec*, 2016 SCC 20, [2016] 1 S.C.R. 336, at para. 28; Dodek, at §§2.2-2.12; Vauclair, Desjardins and Lachance, at para. 43.6).

[38] Before 1980, solicitor-client privilege was simply a rule of evidence, acting “as a shield to prevent privileged materials from being tendered in evidence in a court room” (*Solosky*, at p. 836; see also *McClure*, at para. 22). In *Solosky*, this Court recognized that recent judicial decisions had placed the privilege “on a new plane”, such that the privilege had become a “fundamental civil and legal right, founded upon the unique relationship of solicitor and client”, including a “right to privacy in solicitor-

client correspondence” (pp. 836 and 839-40). A few years later, in *Descôteaux*, the Court confirmed that solicitor-client privilege had become a substantive right. This Court stated that “the fundamental right of a lawyer’s client to have [their] communications kept confidential” extends beyond the courtroom and “follows a citizen throughout [their] dealings with others” (pp. 871 and 888).

[39] Almost 20 years later, in *McClure*, solicitor-client privilege crossed the Rubicon into constitutional territory and was recognized as a principle of fundamental justice under s. 7 of the *Charter* (para. 41; see also *Lavallee*, at paras. 24 and 49; *University of Calgary*, at para. 20; *Thompson*, at para. 17; *Chambre des notaires du Québec*, at para. 28). The next year, in *Lavallee*, the Court ruled that solicitor-client privilege is also protected as part of a client’s fundamental right to privacy under s. 8 of the *Charter* (para. 46; see also *University of Calgary*, at para. 20). Since then, this Court has affirmed that “the reasonable expectation of privacy in relation to communications subject to solicitor-client privilege is invariably high, regardless of the context” (*Canada (Attorney General) v. Federation of Law Societies of Canada*, 2015 SCC 7, [2015] 1 S.C.R. 401, at para. 38; see also *Chambre des notaires du Québec*, at paras. 30 and 39; *Maranda v. Richer*, 2003 SCC 67, [2003] 3 S.C.R. 193, at para. 57).

[40] Today, solicitor-client privilege is recognized as “the strongest privilege protected by law” (Dodek, at p. xlix, citing *Smith v. Jones*, [1999] 1 S.C.R. 455, at para. 44; Vauclair, Desjardins and Lachance, at para. 43.13). As this Court has underscored, “[t]he protection of solicitor-client confidences is a matter of high importance”

(*Celanese*, at para. 54). The privilege is “near-absolute” (*Blank*, at para. 23), and must be “jealously guarded” (*Pritchard*, at para. 17). It may be set aside “only in the most unusual cases”, because if people cannot “be certain that their communications with their solicitors will remain entirely confidential, their ability to speak freely will be undermined” (*McClure*, at para. 46). The privilege must be “as close to absolute as possible to ensure public confidence and retain relevance” (para. 35; *Lavallee*, at para. 36).

(4) The Limited Exceptions to Solicitor-Client Privilege

[41] Although solicitor-client privilege is “near-absolute”, it is subject to limited common law exceptions based on competing societal values. Those exceptions apply only in certain “clearly defined circumstances” and do not involve a balancing of interests on a case-by-case basis (*McClure*, at para. 35; see also *Dodek*, ch. 8; *Hubbard and Doherty*, ch. 13; *Vauclair, Desjardins and Lachance*, at paras. 43.17-43.26). The exceptions include: (a) a “public safety” exception, when there are real concerns that an identifiable individual or group is in imminent danger of death or serious bodily harm (*Smith*, at para. 85; *Chambre des notaires du Québec*, at para. 83; *Dodek*, at §§8.6-8.20; *Hubbard and Doherty*, at § 11:54; *Vauclair, Desjardins and Lachance*, at para. 43.26); (b) a “wills” exception, to determine the true intention of a deceased testator or settlor relating to a will or trust (*Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353, at p. 387; *Dodek*, at §§8.130-8.131; *Hubbard and Doherty*, at § 11:59); and (c) an “innocence at stake” exception, when “core issues going to the guilt of the

accused are involved and there is a genuine risk of a wrongful conviction” (*McClure*, at para. 47; *Brown*, at paras. 3-4; Dodek, at §§8.38-8.48; Hubbard and Doherty, at §§ 11:49-11:50; Vauclair, Desjardins and Lachance, at para. 43.19). The Court has also mentioned the possibility of recognizing a national security exception (*Smith*, at para. 53; Dodek, at §§8.53-8.62).

(5) The Innocence at Stake Exception

[42] In *McClure*, this Court adapted the innocence at stake exception to informer privilege recognized in *R. v. Leipert*, [1997] 1 S.C.R. 281, to recognize an innocence at stake exception to a third party’s solicitor-client privilege. The following year, in *Brown*, the Court clarified the *McClure* test and reaffirmed that both solicitor-client privilege and the right to make full answer and defence to a criminal charge are principles of fundamental justice under s. 7 of the *Charter*. When these principles clash, solicitor-client privilege may, in rare circumstances, be “subordinated” and “required to yield” to permit an accused to make full answer and defence (*McClure*, at para. 4; *Brown*, at para. 1). As this Court explained, “[o]ur system will not tolerate conviction of the innocent” (*McClure*, at para. 40). “Canadians’ abhorrence at the possibility of a faulty conviction tips the balance slightly in favour of innocence at stake over solicitor-client privilege” (*Brown*, at para. 2).

[43] The *McClure* test imposes a “stringent” threshold and is available only as a “last resort” when the accused’s innocence is at stake; the test is met in “rare circumstances” (paras. 4-5; *Brown*, at paras. 3, 27 and 63). The *McClure* test includes

a threshold question and a two-stage innocence at stake test (paras. 46-61), which was summarized in *Brown*, at para. 4, as follows:

- To satisfy the threshold test, the accused must establish that:
 - the information he seeks from the solicitor-client communication is not available from any other source; and
 - he is otherwise unable to raise a reasonable doubt.
- If the threshold has been satisfied, the judge should proceed to the innocence at stake test, which has two stages.
 - Stage #1: The accused seeking production of the solicitor-client communication has to demonstrate an evidentiary basis to conclude that a communication exists that could raise a reasonable doubt as to his guilt.
 - Stage #2: If such an evidentiary basis exists, the trial judge should examine the communication to determine whether, in fact, it is likely to raise a reasonable doubt as to the guilt of the accused.
- It is important to distinguish that the burden in the second stage of the innocence at stake test (likely to raise a reasonable doubt) is stricter than that in the first stage (could raise a reasonable doubt).
- If the innocence at stake test is satisfied, the judge should order disclosure of the communications that are likely to raise a reasonable doubt, in accordance with the guiding principles discussed *infra*.

[44] In *McClure*, a former teacher charged with sexually assaulting former students applied for access to the civil litigation file of one of the students who had sued him. The accused sought access to the file to determine the nature of the allegations the complainant had originally made to his solicitor and to assess his motive to fabricate or exaggerate the alleged sexual assault. This Court dismissed the application, holding that it failed at the first stage of the *McClure* test: the accused had

not shown that the litigation file could raise a reasonable doubt as to his guilt. The Court also noted that the accused could have raised the complainant's motive to fabricate by other means, such as by noting that the complainant had commenced a civil action.

[45] In *Brown*, an accused charged with murder applied for production of another individual's alleged confession of the murder to his lawyer. The other individual had allegedly told his girlfriend that he had confessed to his lawyer, and she then told the police. This Court dismissed the *McClure* application on the basis that it was premature. Before contemplating whether to infringe solicitor-client privilege, it was first necessary to determine whether the individual had waived his solicitor-client privilege by telling his girlfriend about his confession to his lawyer. The accused had also not shown that the privileged information was unavailable from another source (such as from the girlfriend's statement to the police) or necessary for the accused to raise a reasonable doubt. As a result, the accused had not shown that his innocence was at stake.

[46] I next address why, in my view, a lawyer can bring a *McClure* application to access their client's privileged communications for use in their own defence.

B. *Can a Lawyer Invoke the Innocence at Stake Exception to Solicitor-Client Privilege to Seek Access to Their Client's Privileged Communications for Use in Their Own Defence?*

[47] The Crown argues that the majority of the Court of Appeal erred in law by holding that Ms. Fox could not invoke the innocence at stake exception to seek access

to her client's privileged communications for use in her own defence. In the Crown's view, a lawyer can bring a *McClure* application in such a case, and the process for doing so can be adapted to account for a lawyer's ethical duties and duty of loyalty to their client. The Crown also argues that s. 189(6) of the *Criminal Code* does not preclude Ms. Fox from invoking the innocence at stake exception, because this provision merely preserves solicitor-client privilege in the context of an interception, without eliminating the common law exceptions such as innocence at stake.

[48] By contrast, Ms. Fox contends that the majority of the Court of Appeal correctly found that her right to a fair trial was infringed. In her view, a lawyer cannot bring a *McClure* application to seek access to their client's privileged communications without breaching their ethical duty of confidentiality and duty of loyalty to their client. She also claims that s. 189(6) of the *Criminal Code* prohibits her from obtaining access to her client's privileged communications without her client's consent. This leaves her unable to defend herself against the charge and deprives her of the right to a fair trial, contrary to ss. 7 and 11(d) of the *Charter*. As a result, Ms. Fox submits that the only appropriate and just remedy to protect her right to a fair trial was to exclude the non-privileged part of the call from evidence under s. 24(1) of the *Charter*.

[49] I agree with the Crown. In my view, a lawyer can invoke the innocence at stake exception to solicitor-client privilege when they seek to obtain access to their client's privileged communications for use in their own defence. As elaborated below, I reach this conclusion for several reasons. First, Ms. Fox's position rests on an

absolutist conception of solicitor-client privilege, the ethical duty of confidentiality, and the duty of loyalty that has been consistently rejected by courts and legal regulators. Although a lawyer's ethical and legal duties are high, they are not absolute. Second, a lawyer's ethical and legal duties cannot override their constitutional right to make full answer and defence to a criminal charge, a constitutional right held by any accused person. Third, adopting an absolutist conception of a lawyer's ethical and legal duties would inevitably mean treating lawyers unequally in the criminal justice system. Fourth, s. 189(6) of the *Criminal Code* does not prevent a lawyer from invoking the innocence at stake exception to solicitor-client privilege. Finally, the *McClure* test can be readily adapted to such a situation.

(1) Courts and Legal Regulators Have Rejected an Absolutist Conception of Solicitor-Client Privilege and a Lawyer's Ethical and Legal Duties

[50] Courts and legal regulators have consistently rejected an absolutist approach to solicitor-client privilege and a lawyer's ethical and legal duties to their client.

[51] For example, this Court has recognized that although a client's right to solicitor-client privilege is "near-absolute", it is not absolute, and it can yield to important countervailing societal interests, including public safety (*Smith*) and the right of the innocent not to be convicted of a criminal offence (*McClure*; *Brown*). Even before *McClure*, courts in Canada recognized narrow circumstances where a lawyer could rely on their own client's privileged communications to defend themselves

against a criminal charge if their innocence was at stake. A leading case involved Kenneth Murray, counsel for the infamous murderer Paul Bernardo, who was allowed to rely on his privileged communications with Mr. Bernardo to defend against a charge of obstruction of justice for concealing videotape evidence of Mr. Bernardo's crimes (*R. v. Murray* (2000), 48 O.R. (3d) 437 (S.C.J.), at paras. 17-18).

[52] Legal regulators have also consistently rejected an absolutist view of a lawyer's ethical duty of confidentiality. For example, the Law Society of Saskatchewan's *Code of Professional Conduct for Lawyers* stipulates that "[a] lawyer at all times must hold in strict confidence all information concerning the business and affairs of a client acquired in the course of the professional relationship and must not divulge any such information" (r. 3.3-1). This rule is subject to exceptions, including "[i]f it is alleged that a lawyer or the lawyer's associates or employees . . . have committed a criminal offence involving a client's affairs"; in such a case, "the lawyer may disclose confidential information in order to defend against the allegations, but must not disclose more information than is required" (r. 3.3-4).

[53] Legal regulators across the country have similarly recognized that a lawyer's duty of confidentiality to their client is not absolute and may yield under certain limited circumstances to allow the lawyer to defend themselves against a criminal charge involving a client's affairs (Law Society of Alberta, *Code of Conduct*, r. 3.3-4; Law Society of British Columbia, *Code of Professional Conduct for British Columbia*, r. 3.3-4; Law Society of Manitoba, *Code of Professional Conduct*, r. 3.3-4;

Law Society of Newfoundland and Labrador, *Code of Professional Conduct*, r. 3.3-4; Law Society of Ontario, *Rules of Professional Conduct*, r. 3.3-4; Law Society of Prince Edward Island, *Code of Professional Conduct*, r. 3.3-4; Law Society of New Brunswick, *Code of Professional Conduct*, r. 3.3-4; Nova Scotia Barristers' Society, *Code of Professional Conduct*, r. 3.3-4; Quebec's *Code of Professional Conduct of Lawyers*, CQLR, c. B-1, r. 3.1, s. 65; Law Society of the Northwest Territories, *Code of Professional Conduct*, r. 3.3-4; Law Society of Nunavut, *Code of Professional Conduct*, r. 3.3-4; Law Society of Yukon, *Code of Conduct*, r. 3.3-4; see also Federation of Law Societies of Canada, *Model Code of Professional Conduct*, April 2024 (online), r. 3.3-4; Dodek, at §§8.100-8.109; D. Layton and M. Proulx, *Ethics and Criminal Law* (2nd ed. 2015), at pp. 217-22; A. Woolley and A. Salyzyn, *Understanding Lawyers' Ethics in Canada* (3rd ed. 2023), at pp. 272-75; G. MacKenzie, *Lawyers & Ethics: Professional Responsibility and Discipline* (loose-leaf), at § 3:7; M. Mercer, "Professional Conduct Rules and Confidential Information versus Solicitor-Client Privilege: Lawyers' Disputes and the Use of Client Information" (2013), 92 *Can. Bar Rev.* 595).

[54] Although these rules of professional conduct provide exceptions to the ethical duty of confidentiality, they do not expressly provide exceptions to solicitor-client privilege and, in any event, they do not bind the courts (*Canadian National Railway Co. v. McKercher LLP*, 2013 SCC 39, [2013] 2 S.C.R. 649, at paras. 15-16; *R. v. Cunningham*, 2010 SCC 10, [2010] 1 S.C.R. 331, at paras. 35-38; Mercer, at pp. 597 and 608-9). Even so, this Court has accepted that "an expression of a professional

standard in a code of ethics relating to a matter before the court should be considered an important statement of public policy” because it expresses “the collective views of the profession as to the appropriate standards to which the profession should adhere” (*MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235, at pp. 1244 and 1246; *McKercher*, at para. 16; *Cunningham*, at para. 38). It is therefore relevant that legal regulators view a lawyer’s ethical duty of confidentiality as being high but not absolute, and as allowing a lawyer to defend themselves against a criminal charge involving a client’s affairs.

[55] It also bears noting that the narrow, recognized exceptions to solicitor-client privilege do not infringe a lawyer’s duty of loyalty to their client. The exceptions define the contours of a lawyer’s duty of loyalty without infringing it. As this Court has recognized, a lawyer’s duty of loyalty, which is intertwined with the fiduciary nature of the lawyer-client relationship, “is essential to the integrity of the administration of justice and it is of high public importance that public confidence in that integrity be maintained” (*R. v. Neil*, 2002 SCC 70, [2002] 3 S.C.R. 631, at para. 12; see also *Strother v. 3464920 Canada Inc.*, 2007 SCC 24, [2007] 2 S.C.R. 177, at paras. 34-35; *McKercher*, at paras. 19-47). At the same time, any recognized exception to solicitor-client privilege implicitly accepts that the duty of loyalty, while high, is not absolute. For example, a lawyer who relies on the public safety exception to solicitor-client privilege to prevent a clear, serious, and imminent danger of death or serious bodily harm to an identifiable individual or group cannot be said to infringe their duty of loyalty to their client. The duty of loyalty simply does not extend that far.

[56] The same can be said of the innocence at stake exception to solicitor-client privilege. As the dissenting judge of the Court of Appeal correctly stated, “a lawyer is not required to go to jail for their client” (para. 177). The duty of loyalty also does not extend that far.

(2) Solicitor-Client Privilege and a Lawyer’s Ethical and Legal Duties Cannot Override a Lawyer’s Constitutional Right to Make Full Answer and Defence to a Criminal Charge Against Them

[57] By rejecting an absolutist conception of solicitor-client privilege and a lawyer’s ethical and legal duties, courts and legal regulators have recognized that a lawyer’s duties cannot override their constitutional right to make full answer and defence to a criminal charge, a constitutional right held by any accused person. As stated in *McClure*, “[r]ules and privileges will yield to the *Charter* guarantee of a fair trial where they stand in the way of an innocent person establishing [their] innocence” (para. 40). This remains so when the innocent person is a lawyer. As reiterated in *Brown*, “Canadians’ abhorrence at the possibility of a faulty conviction tips the balance slightly in favour of innocence at stake over solicitor-client privilege” (para. 2). Similarly, a lawyer’s high ethical and legal obligations must yield to the extent necessary to safeguard their constitutional right to a fair trial.

(3) An Absolutist Conception of Solicitor-Client Privilege and a Lawyer’s Ethical and Legal Duties Would Treat Lawyers More Favourably in the Justice System

[58] An absolutist conception of solicitor-client privilege and a lawyer's ethical and legal duties would also have the unacceptable consequence of treating lawyers charged with crime more favourably than other criminal defendants. Exempting lawyers from the stringent innocence at stake test in *McClure* because of their supposed absolute obligations of confidentiality and loyalty would mean that lawyers could establish a breach of their right to a fair trial whenever they are denied access to privileged communications, even if those communications might not raise a reasonable doubt as to their guilt.

[59] That happened here. The trial judge and the majority of the Court of Appeal declined to apply the innocence at stake test. They excluded the non-privileged part of the call, without examining the privileged part and without being satisfied that the privileged communications would likely raise a reasonable doubt as to Ms. Fox's guilt. In their view, the mere existence of an inaccessible privileged communication justified granting a remedy under s. 24(1) of the *Charter*. As aptly noted by the intervener Attorney General of Ontario, this approach perversely "provides justice system participants with a more favourable remedy (exclusion of evidence under s. 24(1) of the *Charter* as opposed to disclosure and the ability to use privileged communications) based on a lower evidentiary offering" (I.F., at para. 9). I also share the Attorney General of Ontario's view that "justice system participants should not be permitted to prove less to get more than other criminal accused persons. Recognizing a more lenient test for accused lawyers would undermine public confidence in the administration of justice" (para. 10).

[60] In similar circumstances, this Court has directed that when justice system participants seek to rely on privileged communications in their own defence, they must abide by the same rules as others. In *R. v. Brassington*, 2018 SCC 37, [2018] 2 S.C.R. 616, this Court held that police officers charged with criminal offences must meet the usual stringent innocence at stake test to set aside informer privilege. The Court added that police officers cannot disclose information protected by informer privilege even to their defence lawyers unless they show that their innocence is at stake. Police officers accused of crimes are “entitled to expect that they will be treated no less fairly than others who are accused and given the full protection of the law. What they are not entitled to expect is that they will be treated better” (para. 52).

[61] The same approach applies to lawyers accused of crimes. As Professor Dodek has stated eloquently, “[l]awyers should not have to be martyrs but neither should they be treated as the prodigal sons or daughters of the justice system” (§8.104). An absolutist conception of solicitor-client privilege and a lawyer’s ethical and legal duties to their client should therefore be rejected to ensure that lawyers are treated equally and not preferentially in the criminal justice system.

(4) Section 189(6) of the *Criminal Code* Does Not Prevent a Lawyer From Invoking the Innocence at Stake Exception

[62] Section 189(6) of the *Criminal Code* also poses no obstacle to a lawyer invoking the innocence at stake exception to solicitor-client privilege. Recall that this provision provides as follows:

(6) Any information obtained by an interception that, but for the interception, would have been privileged remains privileged and inadmissible as evidence without the consent of the person enjoying the privilege.

[63] As the Alberta Court of Appeal has observed, this provision simply “preserves privilege where information is intercepted by an authorized wiretap” (*R. v. Cuthill*, 2018 ABCA 321, 368 C.C.C. (3d) 261, at para. 26). The provision ensures that “any privilege over a conversation is not vitiated when the conversation is intercepted under the provisions of the *Criminal Code*” (*R. v. Meer*, 2015 ABCA 141, 323 C.C.C. (3d) 98, at para. 75; see also *Lloyd v. The Queen*, [1981] 2 S.C.R. 645, at pp. 649-50, citing *R. v. Jean* (1979), 7 C.R. (3d) 338 (Alta. S.C. (App. Div.)), at p. 352, aff’d [1980] 1 S.C.R. 400).

[64] Section 189(6) of the *Criminal Code* does not purport to eliminate common law exceptions to any privilege, nor can it be interpreted to do so. As this Court has noted, “[a]bsent clear legislative intention to the contrary, a statute should not be interpreted as substantially changing the law, including the common law” (*R. v. D.L.W.*, 2016 SCC 22, [2016] 1 S.C.R. 402, at para. 21; *R. v. Basque*, 2023 SCC 18, at para. 49). No such clear legislative intention appears here. The provision simply preserves privilege during an interception. It does not address the common law exceptions, either expressly or by necessary implication.

[65] I therefore respectfully disagree with the trial judge’s view that this provision “bars [Ms.] Fox from betraying” her client’s solicitor-client privilege (para.

40). I also disagree with Ms. Fox’s bare assertion that “the plain language of s. 189(6) bars her from piercing [A.Y.]’s privilege without [A.Y.]’s consent” (R.F., at para. 82).

(5) The *McClure* Test Can Be Adapted to Apply to a Lawyer Seeking Access to Their Own Client’s Privileged Communications

[66] I see no reason in principle why the *McClure* test cannot be adapted to a situation where a lawyer seeks access to their client’s solicitor-client privileged communications to defend themselves against a criminal charge. Courts have wide discretion under their trial management power to address the timing and procedure for *McClure* applications (*R. v. Samaniego*, 2022 SCC 9, [2022] 1 S.C.R. 71, at paras. 19-26; see also *Brown*, at paras. 51-52, 73 and 87). That discretion should be exercised mindful of this Court’s general guidance in *McClure* and *Brown*.

[67] In my view, courts should consider three guiding principles at every stage of the *McClure* test:

- (i) Solicitor-client privilege should be safeguarded to the greatest degree reasonably possible and should be minimally impaired (*Brown*, at paras. 44, 77 and 96; *Lavallee*, at paras. 36-37);
- (ii) The privilege holder client should have a voice throughout the process, since the privilege belongs to the client, not the lawyer (*McClure*, at para. 37; *Lavallee*, at paras. 24 and 39); and

(iii) In fashioning procedures, the court should consider the extent to which the accused lawyer is already within the “circle of privilege” by being privy to the privileged communications (*R. v. Basi*, 2009 SCC 52, [2009] 3 S.C.R. 389, at para. 44). In rare cases, the accused lawyer may be in a solicitor-client relationship with the privilege holder client but may not be privy to the privileged communications, such as when the accused lawyer is part of a team of lawyers that provided the legal advice at issue.

(a) *The Threshold to Address the Two-Stage Innocence at Stake Test*

[68] *McClure* provides that before a court considers the two-stage innocence at stake test, the accused must first meet a preliminary threshold by establishing that: (a) the information sought from the solicitor-client communication is not available from any other source; and (b) the accused is otherwise unable to raise a reasonable doubt (*McClure*, at paras. 48-49; *Brown*, at para. 4).

[69] *McClure*’s threshold question ensures that the innocence at stake test is not engaged lightly. An intrusion on solicitor-client privilege should occur only when *necessary* for an accused to raise a reasonable doubt. It is not enough to show that the privileged communication is the simplest or most convenient way to adduce the information or that it allows the accused to mount a more complete defence. As this Court has directed, “the policy reasons favouring the protection of the confidentiality

of solicitor-client communications must prevail unless there is a genuine danger of wrongful conviction” (*McClure*, at para. 49; see also *Brown*, at paras. 3 and 29).

[70] The threshold question does not require review or disclosure of the privileged communication. This question focuses on extraneous matters such as the existence of alternative sources for the information, the strength or scope of the Crown’s case, and potential affirmative defences, all of which can be raised without referring to the content of the privileged communication. Further, even if a *McClure* application is dismissed, the defence has the right to renew the application later in the case if they believe that the accused’s innocence is at stake (*Brown*, at para. 54).

(b) *Stage One: The Accused Must Demonstrate an Evidentiary Basis to Conclude That a Privileged Communication Exists That Could Raise a Reasonable Doubt*

[71] At the first stage of the innocence at stake test, the accused must provide some evidentiary basis, and not just speculation, that there is a privileged communication that *could* raise a reasonable doubt as to their guilt. At this stage, the court is simply deciding whether to review the evidence. This stage ensures that there is some evidentiary basis for the request and prevents fishing expeditions and unnecessary intrusions into privileged communications (*McClure*, at paras. 52-53).

[72] The evidentiary burden at the first stage is flexible and can accommodate limitations on the accused’s knowledge. For example, in *McClure*, this Court recognized that because the accused had no prior access to the civil litigation file to

which he sought access, it would have been unfair to demand anything more precise than a description of a possible privileged communication (para. 54). At the same time, the evidentiary burden should account for the accused lawyer's familiarity with, and inability to disclose, the content of the privileged communication. As urged by the intervener Attorney General of Ontario, an accused lawyer who believes that a privileged communication could raise a reasonable doubt as to their guilt can simply attest to this, such as in an affidavit.

[73] This approach mirrors the practice adopted in similar contexts where a court will usually not go behind a lawyer's representation if this would intrude on solicitor-client privilege. For example, in *Cunningham*, this Court held that where a lawyer seeks to withdraw from representing a client for ethical reasons, the court "must accept counsel's answer at face value and not enquire further so as to avoid trenching on potential issues of solicitor-client privilege" (para. 48; see also *R. v. Short*, 2018 ONCA 1, 358 C.C.C. (3d) 337, at para. 35). Similarly, an accused lawyer's simple representation can form the evidentiary basis to find that the first stage of the innocence at stake test is met.

[74] It is also important to underscore that, at this stage, the accused lawyer cannot discuss the content of the privileged communication with anybody outside the circle of the privilege, including their own counsel (*Brassington*, at paras. 42 and 49-51). Recall that in *Brassington*, concerning informer privilege, this Court held that accused police officers attempting to meet their evidentiary burden at the first stage of

the innocence at stake test could not breach informer privilege by disclosing the privileged information to their own lawyers. Instead, an accused officer could “simply advise counsel of [their belief that evidence pertaining to a confidential informer would prove that officer’s innocence] without disclosing any details tending to identify the informer” (para. 50).

[75] The first stage of the *McClure* test should usually be conducted in open court. Once the accused has attested that the privileged communication could raise a reasonable doubt as to their guilt, the accused lawyer’s counsel or potentially *amicus curiae* can make submissions as to whether the first stage of the innocence at stake test has been satisfied. *Amicus curiae* may be necessary if, for example, the accused lawyer is self-represented and has difficulty representing themselves given the limitations of what they can disclose in open court. Submissions by counsel or *amicus curiae* would generally rely on the accused lawyer’s representation that privileged communications could raise a reasonable doubt as to their guilt, any non-privileged information in the accused’s possession, including from the Crown disclosure, and the Crown’s response. The trial judge would then evaluate the submissions in the context of the Crown’s case against the accused.

(c) *Stage Two: The Trial Judge Should Examine the Privileged Communication to Determine Whether It Is Likely to Raise a Reasonable Doubt*

[76] If, at the first stage of the innocence at stake test the court is satisfied that the privileged communication *could* raise a reasonable doubt, then at the second stage

the court orders disclosure of the privileged communication to the court and reviews it to determine whether it would *likely* raise a reasonable doubt. Persons outside the circle of privilege should generally not participate at this stage. The burden at the second stage (the communication is *likely* to raise a reasonable doubt) is higher than at the first stage (the communication *could* raise a reasonable doubt). Evidence that merely advances ancillary attacks on the Crown's case will likely not meet this burden (*McClure*, at paras. 57-60; *Brown*, at para. 4).

[77] In useful submissions, the interveners Attorney General of Ontario, Canadian Civil Liberties Association, and British Columbia Civil Liberties Association noted that courts have broad discretion to fashion procedures to ensure trial fairness while minimizing any intrusions into solicitor-client privilege. Such procedures can include:

- (1) Reviewing the privileged communication *in camera* and without the parties (*Canadian Broadcasting Corp. v. Named Person*, 2024 SCC 21, at paras. 47-49);
- (2) Asking the accused lawyer or the privilege holder to supply an affidavit to help interpret, explain, or provide context for the privileged communication (*Brown*, at paras. 64-65);

- (3) Inviting submissions from parties within the circle of privilege, including the accused lawyer (but not their counsel) and the privilege holder and their counsel (*Brassington*, at para. 42);
 - (4) Appointing *amicus curiae* to review the privileged communication and make submissions on behalf of the Crown, the defence, or the privilege holder (*Brassington*, at para. 38). The trial judge has broad discretion to appoint *amicus curiae* and to tailor their mandate to the circumstances (*R. v. Kahsai*, 2023 SCC 20, at para. 50; *Basi*, at para. 57); and
 - (5) Other measures the court considers appropriate.
- (d) *Production of the Privileged Communication After a Successful McClure Application*

[78] If the court concludes that the privileged material is likely to raise a reasonable doubt, then the court should order the privileged communication produced to the accused and their lawyer, but only to the extent necessary to allow the accused to raise a reasonable doubt as to their guilt (*Brown*, at para. 77). Care should be taken to remove irrelevant material and to protect the identities of third parties who may be named in the privileged material. The court should also exercise its discretion “to protect the confidentiality of the disclosed communications *vis-à-vis* the participants in the trial and the public” (para. 87; see also para. 77). For example, the trial judge may

consider whether to impose a protective order under s. 486(1) of the *Criminal Code*. In determining the extent of the disclosure, the court must be mindful of “[its] role . . . to balance full answer and defence and the fundamental principle of solicitor-client privilege” (S. C. Hill, D. M. Tanovich and L. P. Strezos, *McWilliams’ Canadian Criminal Evidence* (5th ed. (loose-leaf)), at § 13:16).

[79] The court should grant access to the privileged communication only to the accused lawyer whose innocence is at stake and their counsel (*Brown*, at paras. 78-84). The Crown cannot be provided with access to the privileged communication at this stage. As explained in *Brown*, “[t]he Crown cannot ‘piggy back’ onto this exceptional . . . disclosure of privileged material to which it would not have access in the ordinary case” (para. 84). The Crown should be provided with the privileged communication only to the extent that the accused relies on it at trial or during pre-trial negotiations (para. 85). These measures are essential to allow the accused to raise a reasonable doubt while ensuring minimal impairment of solicitor-client privilege.

[80] If any privileged communications are disclosed pursuant to a *McClure* application, the privilege holder is entitled to protection through a grant of use immunity and derivative use immunity (*Brown*, at paras. 96-104). As a result, “the privilege holder’s communications and any evidence derived therefrom cannot be used in a subsequent case against the privilege holder” (para. 100).

[81] Lastly, the intervener British Columbia Civil Liberties Association suggested that there may be cases where disclosing privileged communications under

the *McClure* test would be so prejudicial to public confidence in the administration of justice that the only appropriate remedy would be to refuse disclosure and stay the proceedings against the accused lawyer. Because lawyers will often know intimate or inculpatory details about their clients, disclosure of that information may cause the client serious harm and undermine public confidence in the solicitor-client relationship, and thus also in the integrity of the justice system. Since the trial judge would have already concluded that the evidence likely raises a reasonable doubt, in some circumstances a stay of proceedings may be appropriate (see, by analogy, *R. v. Babos*, 2014 SCC 16, [2014] 1 S.C.R. 309, at para. 32).

[82] However, the issue raised by the British Columbia Civil Liberties Association does not arise in this case because Ms. Fox did not bring a *McClure* application. As a result, the content of the privileged communication and any impact its disclosure may have on public confidence in the administration of justice are simply unknown. Nor did either party to the appeal make submissions on this point. In my view, whether to adopt such a modification of the *McClure* and *Brown* framework should be left for another day, when the issue arises on the facts and the Court has the benefit of full submissions.

(e) *Summary*

[83] Lawyers, like other individuals accused of committing a crime, have a constitutional right to make full answer and defence to a criminal charge. A lawyer charged with a criminal offence can invoke the innocence at stake exception to

solicitor-client privilege to seek access to their client's privileged communication for use in their own defence. The innocence at stake test can be modified as appropriate to allow the lawyer to make full answer and defence and to protect their right to a fair trial. At the first stage of the innocence at stake test, the lawyer can simply attest to the existence of a solicitor-client communication that could raise a reasonable doubt as to their guilt. The court can take that assertion at face value at this stage. At the second stage of the innocence at stake test, when deciding whether the lawyer has shown that the privileged communication is likely to raise a reasonable doubt as to their guilt, the court has broad discretion to fashion procedures to account for the reality that the accused lawyer will usually be within the circle of privilege. *Amicus curiae* can also be engaged to assist the court as appropriate.

(6) Application to This Case

[84] In my respectful view, the Saskatchewan Court of King's Bench and the majority of the Court of Appeal erred in holding that Ms. Fox could not invoke the innocence at stake exception to solicitor-client privilege. Ms. Fox had the right to bring a *McClure* application to seek access to her client's privileged communication for her to use in her own defence. Both courts also erred in ruling that Ms. Fox's right to a fair trial under ss. 7 and 11(d) of the *Charter* was infringed before she had even brought a *McClure* application. It was premature to conclude that Ms. Fox's right to a fair trial was infringed and then to exclude the evidence under s. 24(1) of the *Charter*.

[85] However, since the Crown concedes before this Court that the monitor breached s. 8 of the *Charter* by violating the terms of the wiretap authorization, it remains to consider whether the evidence should be excluded under s. 24(2) on that basis instead.

C. *Given the Crown's Concession That Section 8 of the Charter Was Infringed, Should the Evidence Be Excluded Under Section 24(2)?*

[86] As I will explain, in my view, the evidence obtained in a manner that breached s. 8 of the *Charter* should be excluded under s. 24(2).

[87] The trial judge found that the monitor continued to listen to Ms. Fox's phone call with her client, A.Y., for almost two minutes, even after she heard Ms. Fox say that she had not been "retained" yet by K.G., and that K.G. had contacted Ms. Fox as her "one call to a lawyer". She ruled that the monitor's conduct involved "mere inadvertence" and did not breach Ms. Fox's rights under s. 8 of the *Charter*. The Court of Appeal for Saskatchewan unanimously disagreed with the trial judge on this point and found that the monitor breached s. 8 of the *Charter*. Before this Court, the Crown now concedes that the trial judge made an error of law. The Crown accepts that the monitor breached paragraph 6b of the wiretap authorization, because the monitor had reasonable grounds to believe that a solicitor was a party to the communication. This breach of the authorization made the search unreasonable and infringed s. 8. I agree with the Crown's concession. Because the trial judge did not address s. 24(2), this Court

must consider that issue afresh, and determine whether the majority of the Court of Appeal erred in concluding that the evidence ought to be excluded.

(1) The Legal Framework Under Section 24(2) of the *Charter*

[88] Section 24(2) of the *Charter* provides that when “a court concludes that evidence was obtained in a manner” that infringed a *Charter* right, “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”.

[89] The purpose of s. 24(2) of the *Charter* is “to maintain the good repute of the administration of justice”, which “embraces maintaining the rule of law and upholding *Charter* rights in the justice system as a whole” (*R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353, at para. 67). The phrase “bring the administration of justice into disrepute” must be “understood in the long-term sense of maintaining the integrity of, and public confidence in, the justice system” (para. 68). The analysis under s. 24(2) starts from the premise that a *Charter* breach has already damaged the administration of justice and “seeks to ensure that evidence obtained through that breach does not do further damage to the repute of the justice system” (para. 69). The focus of s. 24(2) is societal, targeting systemic concerns rather than punishing the police or compensating the accused (para. 70).

[90] The analysis under s. 24(2) proceeds in two stages. First, the court considers a *threshold requirement*, which asks whether the evidence was “obtained in a manner” that infringed or denied a *Charter* right or freedom. The threshold requirement involves a generous and purposive approach to examining the entire chain of events involving the *Charter* breach and the impugned evidence and asks whether they were part of the same transaction or course of conduct. The connection between the *Charter* breach and the impugned evidence can be temporal, contextual, or causal, or a combination of all three. Although a causal connection is not required, the connection should not be remote or tenuous. Each case must be considered on its own merits; there is no rigid rule as to what sort of connection is too remote or tenuous (see *R. v. Mack*, 2014 SCC 58, [2014] 3 S.C.R. 3, at para. 38; *R. v. Tim*, 2022 SCC 12, [2022] 1 S.C.R. 234, at para. 78; *R. v. Beaver*, 2022 SCC 54, [2022] 3 S.C.R. 718, at para. 96).

[91] Second, if the threshold requirement is met, the court considers an *evaluative component*, which asks whether admitting the evidence would bring the administration of justice into disrepute. The evaluative component involves balancing three lines of inquiry: (1) the seriousness of the *Charter*-infringing state conduct; (2) the impact of the breach on the *Charter*-protected interests of the accused; and (3) society’s interest in the adjudication of the case on its merits (*Grant*, at para. 71; *Beaver*, at paras. 94 and 116; *Tim*, at para. 74). The balancing is a qualitative exercise and does not involve mathematical precision (*Grant*, at paras. 86 and 140; *R. v. Harrison*, 2009 SCC 34, [2009] 2 S.C.R. 494, at para. 36; *Beaver*, at para. 117).

(2) The Threshold Requirement

[92] There is no dispute before this Court that the evidence in question was “obtained in a manner” that infringed Ms. Fox’s rights under s. 8 of the *Charter*. The Court of Appeal was unanimous that because A.Y.’s telephone calls were automatically recorded, there was no causal connection between the monitor’s breach of the authorization and the obtaining of the impugned evidence. At the same time, because the breach and the obtaining of the evidence were simultaneous and part of the same context, there were temporal and contextual connections that were neither remote nor tenuous. As the majority ruled, “[t]he process of gathering the evidence was directly tainted by [the monitor]’s actions” (para. 110). Similarly, the dissenting judge said that “[f]rom a temporal perspective, the *Charter* breach was . . . coincidental with the obtaining of the evidence” (para. 260). From a contextual perspective, the monitor’s actions were “part and parcel of the same wiretapping exercise”, because she was “a member of the team that was acting under the [a]uthorization” and “[h]er participation was integral to the operation” (para. 260).

[93] I agree with the Court of Appeal. Taking the generous and purposive approach to the “obtained in a manner” requirement, the temporal and contextual connections between the breach and the obtaining of the evidence are sufficient to meet the threshold requirement under s. 24(2). As the dissenting judge noted persuasively, to insist strictly on a causal connection “would immunize all manner of breaches of an authorization where access to a recording depends on a later judicial authorization”

(para. 265). This would, in turn, “frustrate the regulatory purpose that stands behind s. 24(2) itself”: to ensure that the admission of the evidence would not bring the administration of justice into disrepute (para. 265).

(3) The Evaluative Component

(a) *The Seriousness of the Charter-Infringing State Conduct*

[94] The first line of inquiry under the evaluative component of s. 24(2) considers the seriousness of the *Charter*-infringing state conduct. It asks whether the state has engaged in conduct from which the court should dissociate itself. The concern of this inquiry is not to punish the police but rather to preserve public confidence in the rule of law and its processes. The court must situate the seriousness of the state’s *Charter*-infringing conduct on the spectrum of culpability. At the less serious end of the spectrum are infringements that are technical, inadvertent, or otherwise minor, or which reflect an understandable mistake. Admitting evidence obtained as a result of less serious *Charter* breaches only minimally impairs public confidence in the rule of law. At the more serious end of the spectrum are infringements that involve a wilful or reckless disregard of *Charter* rights, a major departure from *Charter* standards, or a systemic pattern of *Charter* breaches. However, even inadvertent conduct may be serious where it breaches *Charter* rights through significant negligence. To avoid bringing the administration of justice into disrepute, courts should dissociate themselves from state conduct that departs significantly from *Charter* standards or that

shows that state actors knew or should have known that their conduct infringed the *Charter* (*Grant*, at paras. 72-74; *Tim*, at para. 82; *Beaver*, at para. 120).

[95] In my view, the state conduct in this case is at the more serious end of the spectrum of culpability.

[96] I accept that appellate deference is owed to the trial judge's finding of fact that the monitor continued to listen to the call between Ms. Fox and her client through "mere inadvertence", in that she did not intend to breach solicitor-client privilege and did so accidentally. As the trial judge reasoned, the monitor was "in the Saskatoon office" and may not have known that Nychuk & Company is a law firm in Regina (para. 28). The trial judge inferred that the monitor might have believed the firm was "another professional organization or a business" (para. 28).

[97] Even so, inadvertent or passive conduct that precipitates a *Charter* breach can be very serious, particularly when a wiretap authorization is specifically worded to prevent such inadvertence. Moreover, the trial judge's finding of "mere inadvertence" was in relation to her conclusion that there was no s. 8 *Charter* breach.

[98] Although the majority of the Court of Appeal accepted that the monitor breached the wiretap authorization and solicitor-client privilege accidentally, it concluded that the s. 8 breach was "highly serious" and involved a "significant degree of negligence" (paras. 112-13). The dissenting judge similarly concluded that the breach was "serious", but said that it was "an isolated occurrence, limited to the actions

of one state actor” (para. 283). As I will explain, I agree with the majority that the breach in this case was very serious.

[99] The breach was undoubtedly serious because it infringed both a wiretap authorization and solicitor-client privilege. As the dissenting judge noted, “any violation of wiretap terms relating to the protection of solicitor and client privilege during a police investigation is inherently serious” (para. 270, quoting *R. v. Collins*, 2023 ONSC 1297, 525 C.R.R. (2d) 1, at para. 89). Because electronic surveillance poses an “insidious danger” to the right to privacy in a free society (*R. v. Duarte*, [1990] 1 S.C.R. 30, at pp. 43-45), state actors must make every effort to adhere scrupulously to a wiretap authorization. As this Court has recognized, “[e]lectronic surveillance is the greatest leveler of human privacy ever known” (p. 44, quoting *United States v. White*, 401 U.S. 745 (1971), at p. 756, per Douglas J., dissenting; see also J. A. Fontana and D. Keeshan, *The Law of Search and Seizure in Canada* (13th ed. 2024), at § 11.01). Moreover, this Court has warned that “even accidental infringements of [solicitor-client] privilege erode the public’s confidence in the fairness of the criminal justice system” (*Lavallee*, at para. 49). This is why “all efforts must be made to protect such confidences” (para. 49). Although the solicitor-client privilege belonged to Ms. Fox’s client, Ms. Fox’s right to privacy was also infringed when the state intruded into her private phone call with her client, in which she had a reasonable expectation of the utmost confidentiality. Because the combined breach of the wiretap authorization and solicitor-client privilege involves a violation of both *Charter* rights and other legal

constraints, this “push[es] the conduct farther along the spectrum towards seriousness” (Hill, Tanovich and Strezos, at § 19.35).

[100] At the same time, I agree with the dissenting judge in the Court of Appeal that “not every breach of a wiretap authorization is so serious that it merits the exclusion of evidence on that basis alone” (para. 270). There is no rule of automatic exclusion after breach of the term of a wiretap authorization relating to solicitor-client privilege.

[101] On the facts of this case, however, the monitor’s breach of the authorization, while accidental, involved unacceptable negligence and resulted in a very serious breach of the *Charter*. I say this for two main reasons.

[102] First, based on the monitor’s training and the specific undertakings she had given as part of her employment, and the specific words she heard Ms. Fox say, the monitor should have reasonably believed that she was listening to a call with a lawyer and should have stopped listening immediately. The authorization had standard terms and only 19 provisions in total, but only one was specifically directed to the monitor — the “Terms and Conditions in relation to solicitor-client privilege”, reproduced above. The monitor had signed a written confirmation that she had read the authorization, which was posted in the monitor room where she worked. Under the Saskatchewan Provincial Intercept Program, the monitor was “specifically trained” to stop listening and to mark the call as privileged if she reasonably believed that it involved a lawyer (A.R., vol. II, at p. 120; see also p. 146).

[103] However, the monitor continued listening for several minutes after she heard Ms. Fox say that she had not been “retained” yet and that K.G.’s recent call to her was K.G.’s “one call to a lawyer”. This failure to stop listening involved significant negligence. The monitor’s mandate and training called for heightened vigilance to protect solicitor-client privilege. As this Court noted in *Descôteaux*, “[o]ne does not enter a church in the same way as a lion’s den, or a warehouse in the same way as a lawyer’s office” (p. 889). Regrettably, the monitor did not heed this direction.

[104] I therefore agree with the majority of the Court of Appeal, that “[w]hen a state agent is engaged in a task as serious as monitoring private telephone conversations pursuant to a judicial authorization in a criminal investigation, with the onerous responsibility of being vigilant to not listen to communications involving lawyers, regardless of the content of those communications, ignoring those responsibilities will result in a serious infringement on a person’s s. 8 *Charter* rights” (para. 113). The monitor’s negligent intrusion into privileged communications compromises public confidence in the administration of justice.

[105] Importantly, evidence that the police officers themselves complied with the terms of the wiretap authorization does not mitigate the monitor’s breach. As police officers, they were simply acting lawfully in compliance with the wiretap authorization. Relatedly, it is irrelevant that the monitor was not a police officer. As a state actor engaged with the Saskatchewan Provincial Intercept Program, the monitor was granted the highest level of access to private conversations and must be held to the high

standard prescribed by the wiretap authorization. There is no thus principled reason to dilute the seriousness of the violation because the state actor was not a police officer.

[106] Second, the seriousness of the breach in this case was exacerbated by how the monitoring team responded when they learned that there was a potential intrusion into solicitor-client privilege. Although the two RCMP officers listening live immediately stopped listening, locked down the call, and labelled it as potentially protected by solicitor-client privilege, thereby preventing future access, the civilian monitor was not even told that she had trespassed on a potentially privileged communication. When the monitor was examined-in-chief at the *voir dire*, she testified that she had *never* “inadvertently listened to a portion of a call involving a lawyer” (A.R. vol. II, at p. 150). On cross-examination, the monitor acknowledged that at the time *nobody* specifically instructed her that she could not discuss the contents of the privileged call that she had unwittingly intruded upon (p. 154). As the majority of the Court of Appeal stated:

Curiously absent from any of [the monitor]’s testimony was any indication that an issue had been raised with her by any officials regarding the fact that she had monitored a phone call from a lawyer for several minutes, contrary to the terms of the [a]uthorization. This violation of the [a]uthorization was apparently such a non-event from the perspective of the monitors that [the monitor] did not recall a single thing about the telephone call in question. [para. 97]

[107] The majority added that there was no evidence that “this breach of the [a]uthorization triggered a reprimand or any ameliorative efforts on the part of [the Saskatchewan Provincial Intercept Program] in order to avoid its repetition, leading to

systemic concerns as well” (para. 113). The dissenting judge agreed that “[t]he apparent lack of concern demonstrated by [the monitor] and the overall monitoring team certainly suggests a degree of casualness to her approach to her tasks” (para. 274).

[108] How a party responds when they accidentally intrude on communications protected by solicitor-client privilege can be a critical factor for how a court views and responds to that intrusion. In *Celanese*, this Court disqualified a law firm from representing a client after the law firm inadvertently came into possession of privileged material of its adversary through the execution of an *Anton Piller* order, a judicially authorized private search warrant whose purpose is to preserve evidence. The Court stated that focusing on the “inadvertence” of the conduct that resulted in coming into possession of privileged communications can be “overly simplistic” because it conflates two distinct questions (para. 33). First, how did the privileged communications come into the possession of the party? Second, what did that party do when they recognized that the documents were privileged? This Court accepted that “[m]istakes will be made” in the execution of *Anton Piller* orders but disqualified the law firm from continuing to represent its client in the litigation partly because it did not do the “right thing” when it recognized that the seized material was privileged (paras. 56-57). On the facts of *Celanese*, the Court said that the “right thing” would have been to promptly advise the adversary of the extent to which the privileged material had been reviewed (para. 62).

[109] By analogy, in this case, the apparent failure of the police to even advise the monitor and the monitoring team that the monitor had potentially breached solicitor-client privilege, as well as their failure to take other internal remedial action, only elevate the seriousness of the s. 8 breach. These factors suggest that the police did not take the monitor's breach seriously enough and, as the Court of Appeal majority said, raise "systemic concerns" (para. 113). This is so even though there was no evidence that the breach was widespread or recurring. I note that, like an absence of bad faith, an adequate response in this case would not necessarily have mitigated the seriousness of the breach. It would simply have helped rebut the argument that there was an ongoing systemic issue.

[110] As a result, I would find that the breach of s. 8 of the *Charter* in this case was very serious and involved negligent conduct from which the courts should dissociate themselves (*Grant*, at para. 72; *Harrison*, at para. 22; *Tim*, at para. 82; *Beaver*, at para. 120). This line of inquiry weighs strongly in favour of exclusion.

(b) *The Impact of the Breach on Ms. Fox's Charter-Protected Interests*

[111] The second line of inquiry under s. 24(2) considers the impact of the breach on the accused's *Charter*-protected interests. Under this line of inquiry, the court identifies the interests protected by the relevant *Charter* right and evaluates the extent to which the *Charter* breach "actually undermined the interests protected by the right" (*Grant*, at para. 76). As with the first line of inquiry, the court must situate the impact on a spectrum, ranging from impacts that are fleeting, technical, transient, or trivial, to

those that are profoundly intrusive or seriously compromise the interests underlying the rights infringed. The greater the impact on the accused's *Charter*-protected interests, the greater the risk that admission of the evidence would suggest that *Charter* rights are of little actual avail to citizens, breeding public cynicism and bringing the administration of justice into disrepute (see *Grant*, at paras. 76-77; *Tim*, at para. 90; *Beaver*, at para. 123).

[112] The majority of the Court of Appeal found that the impact on Ms. Fox's *Charter*-protected interests was "high" (para. 114), while the dissenting judge concluded that it was "not trivial, but . . . also not high" (para. 289). As I will explain, I conclude that the impact is best described as moderately intrusive.

[113] The relevant interests underlying s. 8 of the *Charter* are individual privacy and human dignity (*Grant*, at para. 78; *Tim*, at para. 91). The second line of inquiry in this case thus begins by considering the magnitude or intensity of Ms. Fox's reasonable expectation of privacy and whether the search demeaned her dignity (*R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34, at para. 91). Here, the monitor intruded upon Ms. Fox's private phone call, a medium of communication in which a person has a high expectation of privacy (*R. v. Ahmad*, 2020 SCC 11, [2020] 1 S.C.R. 577, at para. 36; *Duarte*, at pp. 44-46). In addition, Ms. Fox was speaking with a client in her capacity as a lawyer and would reasonably have expected that her communications would remain private. As this Court has emphasized, "the reasonable expectation of privacy in relation to communications subject to solicitor-client privilege is invariably high,

regardless of the context” (*Federation of Law Societies*, at para. 38). The breach thus substantially impacted Ms. Fox’s *Charter*-protected interests.

[114] The impact on the *Charter*-protected interests at stake must also be seen through a wider lens when solicitor-client privilege is involved. An intrusion on solicitor-client privilege has broader repercussions on the reputation of the administration of justice. As already noted, solicitor-client privilege “stretches beyond the parties and is integral to the workings of the legal system itself” (*McClure*, at para. 31). If clients cannot be assured of near-absolute confidentiality when communicating with their lawyers, the seeking and giving of legal advice will be compromised and access to justice will be undermined, threatening the integrity of the administration of justice (*Celanese*, at para. 34; *McClure*, at para. 33). As this Court has stressed, “[t]he obligation of confidentiality that springs from the right to solicitor-client privilege is necessary for the preservation of a lawyer-client relationship that is based on trust” (*Thompson*, at para. 17). That trust is eroded when the state trespasses onto the near-absolute confidentiality of a solicitor-client relationship, heightening the impact on the *Charter*-protected interests at stake.

[115] Having said this, I recognize that the impact on Ms. Fox’s *Charter*-protected interests in this case is attenuated somewhat because there was no causal connection between the *Charter* infringement and the discovery of the impugned evidence, which was discoverable in any event since the call was automatically recorded under the authorization (*Grant*, at para. 122; *Beaver*, at para. 125; *Cole*, at

para. 93; *R. v. Côté*, 2011 SCC 46, [2011] 3 S.C.R. 215, at paras. 70-74). As a result, the effect of the unauthorized monitoring on Ms. Fox's privacy interests was mitigated to some extent.

[116] Ms. Fox briefly contended before this Court that the evidence may not, in fact, have been otherwise discoverable. She asserted that paragraph 6b of the authorization should be interpreted as requiring the authorities to not only discontinue the live monitoring but also to terminate the automatic recording if the monitor reasonably believes that a lawyer is a party to the communication. She submitted that this made the majority's conclusion even stronger. However, Ms. Fox conceded that this argument was not raised in the courts below. As has been noted often, appellate courts are generally reluctant to consider new arguments when they do not have the benefit of the findings or analysis of the lower courts on the issue (*R. v. J.F.*, 2022 SCC 17, [2022] 1 S.C.R. 330, at para. 40; *R. v. Campbell*, 2024 SCC 42, at para. 143). In my view, addressing this issue could have consequences for other wiretap authorizations that use similar standard terms to those used in this case. Because I conclude that the evidence should be excluded without relying on this argument, I would decline to address it further.

[117] I conclude that the impact of the breach on Ms. Fox's s. 8 rights was high but that it was attenuated somewhat by the lack of causation between the breach and the discovery of the evidence. On balance, I would describe the impact of the breach

on Ms. Fox's *Charter*-protected interests as weighing moderately in favour of exclusion.

(c) *Society's Interest in the Adjudication of a Case on Its Merits*

[118] The third line of inquiry under s. 24(2) considers society's interest in the adjudication of a case on its merits. It asks whether the truth-seeking function of the criminal trial process would be better served by admitting or excluding the impugned evidence. Relevant factors include the reliability of the evidence, the importance of the evidence to the prosecution's case, and the seriousness of the offence (*Grant*, at paras. 79-84; *Côté*, at para. 47; *Beaver*, at para. 129). Reliable evidence that is critical to the Crown's case will generally pull towards inclusion (*Grant*, at paras. 80-81; *Tim*, at para. 96). At the same time, this Court has rejected an approach that weighs one factor above the others as reflecting a "limited view of public confidence" (*R. v. Paterson*, 2017 SCC 15, [2017] 1 S.C.R. 202, at para. 55). As noted in *Grant*, the seriousness of the impugned conduct may "cut both ways": the public has a strong interest in ensuring that serious charges are adjudicated on the merits of the case, but it also has a vital interest in maintaining a justice system that is "above reproach, particularly where the penal stakes for the accused are high" (para. 84).

[119] The majority of the Court of Appeal accepted that the evidence in question is highly reliable and essential to the Crown's case for the serious offence of a lawyer allegedly attempting to obstruct justice. At the same time, the majority viewed the evidence as being "not particularly strong with regard to the proof of the offence for

which Ms. Fox has been charged” (para. 115). The dissenting judge agreed with the majority regarding the reliability of the evidence, its importance to the prosecution’s case, and the seriousness of the offence, but did not address the strength of the evidence as a factor under s. 24(2).

[120] In my view, this line of inquiry pulls strongly towards admission of the impugned evidence. The evidence is reliable, consisting of a recording and verbatim transcript of a phone call. It is critical evidence for the prosecution and forms the bulk of the Crown’s case. The offence alleged — attempted obstruction of justice by a lawyer — is undeniably serious. Society has a strong interest in the adjudication of this case on its merits.

[121] At the same time, I respectfully disagree with the majority of the Court of Appeal that the strength of the evidence is a relevant consideration under s. 24(2) of the *Charter*. The purpose of s. 24(2) is to determine the long-term, societal impact of admitting evidence obtained as a result of a *Charter* violation on the reputé of the justice system. As the Crown correctly notes, s. 24(2) “does not invite a standalone assessment of the ultimate strength of the evidence for proving the charge. Such opinion should not have a part to play in s. 24(2) because it has little to do with the effects of a *Charter* violation” (A.F., at para. 136). Instead, it is for the trier of fact to determine the strength of the evidence in the context of the trial.

[122] The reliability of the evidence differs from its strength; only the former is relevant under s. 24(2). Reliability is concerned with accuracy (*R. v. G.F.*, 2021 SCC

20, [2021] 1 S.C.R. 801, at para. 82, citing *R. v. H.C.*, 2009 ONCA 56, 244 O.A.C. 288, at para. 41). Evidence may be reliable, yet may not be strong evidence in proving the case against the accused. As noted by Professor Steven Penney and Justices Vincenzo Rondonelli and James Stribopoulos, “[i]n assessing reliability, courts do not weigh the overall strength of the evidence” (*Criminal Procedure in Canada* (3rd ed. 2022), at ¶10.166). Reliability is properly considered under s. 24(2), because evidence obtained in a manner that reduces its reliability or accuracy undermines the truth-seeking function of the criminal trial process and the long-term reputé of the justice system. In *Grant*, the Court noted that a *Charter* breach may undermine the reliability of the evidence obtained and thus weighs in favour of exclusion of the evidence under s. 24(2):

[The] public interest in truth-finding remains a relevant consideration under the s. 24(2) analysis. The reliability of the evidence is an important factor in this line of inquiry. If a breach (such as one that effectively compels the suspect to talk) undermines the reliability of the evidence, this points in the direction of the exclusion of the evidence. The admission of unreliable evidence serves neither the accused’s interest in a fair trial nor the public interest in uncovering the truth. Conversely, exclusion of relevant and reliable evidence may undermine the truth-seeking function of the justice system and render the trial unfair from the public perspective, thus bringing the administration of justice into disrepute. [Emphasis added; para. 81.]

[123] The importance of the evidence to the Crown’s case is tied to its reliability. If the evidence is of questionable reliability, its admission is more likely to bring the administration of justice into disrepute if it forms the entirety of the Crown’s case against the accused. On the other hand, when the evidence is highly reliable and its

exclusion would “effectively gu[t] the prosecution” because it is central to the Crown’s case, exclusion may more negatively impact the repute of the administration of justice (*Grant*, at para. 83).

[124] I therefore conclude that the majority of the Court of Appeal erred in considering the strength of the evidence in the third line of inquiry under s. 24(2).

(d) *The Final Balancing*

[125] The final step in the s. 24(2) analysis involves balancing the three lines of inquiry to determine whether admitting the impugned evidence would bring the administration of justice into disrepute (*Grant*, at para. 85; *Tim*, at para. 98; *Beaver*, at para. 133). The balancing is qualitative and does not admit of mathematical precision (*Grant*, at paras. 86 and 140; *Tim*, at para. 98; *Harrison*, at para. 36). The focus of the balancing is the long-term integrity of, and public confidence in, the administration of justice. The balancing is prospective: it seeks to ensure that evidence obtained through a *Charter* breach does not cause further damage to the justice system. The balancing is also societal: the goal is not to punish the police but rather to address systemic concerns regarding the broad impact of admitting the evidence on the long-term repute of the justice system (*Grant*, at paras. 69-70; *Tim*, at para. 98; *Beaver*, at para. 133).

[126] No single line of inquiry can overwhelm the weighing exercise under s. 24(2) (*Cole*, at para. 95; *Côté*, at para. 48; *Harrison*, at para. 40). Nor does the final balancing involve asking whether the majority of the relevant lines of inquiry favour

exclusion in a particular case (*Harrison*, at para. 36). Instead, “it is the *cumulative* weight of the first two lines of inquiry that trial judges must consider and balance against the third line of inquiry” (*R. v. Lafrance*, 2022 SCC 32, [2022] 2 S.C.R. 393, at para. 90 (emphasis in original); *Beaver*, at para. 134). “[W]hen the two first lines, taken together, make a strong case for exclusion”, the third line of inquiry “will seldom tip the scale in favour of admissibility” (*Lafrance*, at para. 90).

[127] In my respectful view, balancing the three lines of inquiry, the first two lines of inquiry cumulatively make a strong case for exclusion that outweighs society’s interest in the adjudication of a case on its merits.

[128] The monitor committed a serious breach of the *Charter* by negligently ignoring the clear terms of the wiretap authorization and trespassing on the fundamental right to solicitor-client privilege — a right that has constitutional dimensions and is foundational to the justice system in Canada. The monitor eavesdropped on a lawyer’s phone call with her client for several minutes, even though it should have been obvious to her that she should have stopped listening. The seriousness of this breach was then exacerbated by the failure of the police or the civilian monitoring team to take appropriate remedial action. The breach was treated with a casualness that did not match the occasion and the near-absolute protection of solicitor-client privilege that this Court has repeatedly insisted upon. These factors strongly pull towards exclusion of the evidence.

[129] The impact on Ms. Fox's *Charter*-protected interests was moderately intrusive. Although the *Charter* breach was not causally connected to the obtaining of the evidence, Ms. Fox had a high expectation of privacy in her private phone call with her client. Any intrusion into the lawyer-client relationship, as occurred here, also has a potential chilling effect on the provision of legal advice and access to justice.

[130] In my view, taken together, the seriousness of the breach and the impact on Ms. Fox's *Charter*-protected interests outweigh the otherwise strong interest that society has in the adjudication of this case on its merits.

(4) Conclusion

[131] I conclude that the admission of the non-privileged part of the phone call between Ms. Fox and her client would bring the administration of justice into disrepute. Accordingly, I would exclude this evidence under s. 24(2) of the *Charter*.

VI. Disposition

[132] I would dismiss the appeal.

The reasons of Rowe and O'Bonsawin JJ. were delivered by

O'BONSAWIN J. —

I. Overview

[133] I have had the benefit of reading the reasons of my colleague, Jamal J., writing for the majority. I agree that a lawyer can invoke the innocence at stake exception to solicitor-client privilege when seeking to obtain access to their client's privileged communications for use in their own defence. I similarly agree that it was premature for the courts below to conclude that Ms. Fox's right to a fair trial was infringed before she had even brought an application pursuant to *R. v. McClure*, 2001 SCC 14, [2001] 1 S.C.R. 445. However, the majority would exclude the wiretap evidence under s. 24(2) of the *Canadian Charter of Rights and Freedoms*. I disagree and would admit the evidence.

[134] The seriousness and impact of the *Charter* breach in this case was attenuated by several factors, including a lack of causal relationship between the *Charter* breach and the subsequent review of the evidence. Further, considering the nature of the underlying charge, excluding the evidence risks critically undermining the public's confidence in the administration of justice. As I will explain, all lawyers have duties to the justice system. Given those duties, public confidence in the administration of justice is seriously threatened when lawyers are charged with obstructing the very same justice system they are duty-bound to protect. In such circumstances, society has a significant interest in having the underlying charge adjudicated on its merits. For those reasons, I find that the justice system would be

brought into disrepute by the exclusion of the impugned evidence. I would therefore allow the Crown’s appeal and order a new trial.

II. Section 24(2) Analysis

[135] The state infringed Ms. Fox’s privacy rights under s. 8 of the *Charter* when the civilian monitor on the wiretap listened to the telephone call in violation of the wiretap authorization. The question therefore becomes whether the evidence ought to be excluded under s. 24(2) of the *Charter*. The analysis under s. 24(2) is focused on maintaining the long-term integrity and public confidence in the administration of justice (*R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353, at para. 68; *R. v. McColman*, 2023 SCC 8, at para. 54). Section 24(2) first requires the applicant to meet the threshold of whether the impugned evidence was “obtained in a manner” that infringed their *Charter* rights, before turning to consider whether the administration of justice would be brought into disrepute by admitting the evidence (*R. v. Beaver*, 2022 SCC 54, [2022] 3 S.C.R. 718, at para. 94; *R. v. Strachan*, [1988] 2 S.C.R. 980, at p. 1000).

[136] As this Court explained in *Grant*, the three avenues of inquiry that must be considered in deciding whether the admission of evidence would bring the administration of justice into disrepute are: (1) the seriousness of the *Charter*-infringing state conduct; (2) the impact of the breach on the *Charter*-protected interest; and (3) society’s interest in the adjudication of the case on its merits (para. 71). These lines of inquiry must then be weighed together by the trial judge, having regard to all the circumstances (*R. v. Harrison*, 2009 SCC 34, [2009] 2 S.C.R. 494, at para. 36). This

weighing is not aimed at punishing the police in any individual case, but focused on the systemic and long-term interests of the justice system (*Grant*, at para. 68; *McColman*, at para. 54). Keeping those principles in mind, I now turn to their application in this case.

A. *Threshold Question: Obtained in a Right-Infringing Manner*

[137] Before a court decides whether to exclude evidence, an applicant must first establish that the evidence was “obtained in a manner that infringed” their *Charter* rights, before demonstrating that the admission of the evidence would bring the administration of justice into disrepute based on the three *Grant* avenues of inquiry, as discussed above (*R. v. Wittwer*, 2008 SCC 33, [2008] 2 S.C.R. 235, at para. 19; *Beaver*, at para. 94).

[138] The controlling question at the threshold level is whether the evidence has been tainted by the *Charter* breach. This requires courts to review the “entire chain of events” involving the *Charter* breach to review whether a sufficient nexus between the breach and the evidence can be made out (*Strachan*, at pp. 1005-6; *R. v. Mack*, 2014 SCC 58, [2014] 3 S.C.R. 3, at para. 38). While a causal connection between the breach and the obtaining of the evidence will likely satisfy this threshold question, it is not absolutely required (*R. v. Therens*, [1985] 1 S.C.R. 613, at p. 649; *R. v. Goldhart*, [1996] 2 S.C.R. 463, at para. 40). Rather, the required connection can be made out by temporal and contextual factors (*Wittwer*, at para. 21; *Goldhart*, at para. 40).

[139] In this case, as the majority and dissenting opinions at the Court of Appeal for Saskatchewan agreed, there was no causal connection between the civilian monitor’s *Charter* breach and the way the evidence was later obtained (2024 SKCA 26, 434 C.C.C. (3d) 289, at paras. 110 and 253). There are, however, several temporal and contextual factors which satisfy this threshold question even without that causal connection. Those factors include the following points: the breach of the wiretap authorization occurred contemporaneously with the recording of the evidence; the civilian monitor had administrative responsibilities in transcribing and processing the wiretap calls; and the breach of the wiretap authorization was part of the same investigative undertaking that recorded the impugned phone call. While those temporal and contextual factors satisfy the “obtained in a manner” precondition, causation remains relevant in determining whether the admission of evidence would bring the administration of justice into disrepute, specifically in considering the impact of the breach on Ms. Fox’s *Charter*-protected interests (*Grant*, at para. 122; *R. v. Mian*, 2014 SCC 54, [2014] 2 S.C.R. 689, at para. 87).

B. *Whether the Admission of the Evidence Will Bring the Administration of Justice Into Disrepute*

(1) The Seriousness of the *Charter*-Infringing Conduct

[140] The first line of inquiry refers to the gravity of the state misconduct and the degree to which courts must disassociate themselves from such conduct (*Grant*, at paras. 72-73; *Harrison*, at para. 22). As this Court explained in *R. v. Paterson*, 2017

SCC 15, [2017] 1 S.C.R. 202, a court must situate the gravity of the state misconduct on a scale of culpability (para. 43). A court situates that misconduct by considering whether the circumstances of the case exacerbate or mitigate the seriousness of the *Charter*-infringing conduct (*Grant*, at para. 75; *McColman*, at para. 58). The admission of evidence obtained through minor or inadvertent violations sits at the less serious end of the scale, while admitting evidence that is the product of wilful or flagrant disregard for *Charter* rights “will inevitably have a negative effect on the public confidence in the rule of law” (*Grant*, at para. 74; *Paterson*, at para. 43).

[141] My colleague points to the manner in which the police responded to the breach in this case as evidence that the conduct was serious (paras. 106-9). While I agree that the handling of solicitor-client communications post-breach can bear on the seriousness of the infringing conduct, I come to a different conclusion. In this case, the two RCMP officers who listened to the call live immediately locked down the call and labelled it as privileged. While the civilian monitor listened to the audio recording in a manner that breached Ms. Fox’s s. 8 rights, she made no record or transcript of the call. In addition, a senior monitor subsequently locked down the recording, requiring additional credentials and a password to listen to the audio (see A.R., vol. II, tab 17, at pp. 127-28).

[142] The systems in place to protect the underlying privacy interests in this case demonstrate that there was no pattern of institutional or systemic misconduct that would operate as a factor aggravating the seriousness of the breach (*Harrison*, at para.

25; *Grant*, at para. 75). While the absence of institutional or systemic misconduct does not operate as a mitigating factor (*Harrison*, at para. 25), the absence of such systemic problems informs the court when placing the *Charter*-infringing conduct on the culpability scale (*R. v. Tim*, 2022 SCC 12, [2022] 1 S.C.R. 234, at paras. 88-89). Indeed, such institutional or systemic misconduct would be more serious than an isolated incident such as this (*R. v. G.T.D.*, 2017 ABCA 274, 57 Alta. L.R. (6th) 213, at paras. 82 and 85, per Veldhuis J.A., dissenting, *aff'd* 2018 SCC 7, [2018] 1 S.C.R. 220, at para. 3; *R. v. Ismail*, 2024 ONCA 945, at para. 16; *R. v. Vaillancourt*, 2019 ABCA 317, 379 C.C.C. (3d) 151, at para. 49). The civilian monitor’s conduct was inadvertent; it was not a wilful or flagrant disregard of *Charter*-protected rights, and, as the dissenting judge in the Court of Appeal observed (at para. 280), there is no evidence to support a finding that it was part of a broader systemic problem.

[143] *Celanese Canada Inc. v. Murray Demolition Corp.*, 2006 SCC 36, [2006] 2 S.C.R. 189, discussed by my colleague (at paras. 108 and seq.), is an example of how the post-breach conduct of a party that has breached solicitor-client privilege may affect the consequences that should be imposed to protect the administration of justice. In that case, the law firm that breached solicitor-client privilege in the execution of an *Anton Piller* order failed entirely to notify the other side that they had obtained privileged material, and allowed several lawyers, clerks, and law students to access the documents before doing anything to rectify the situation. My colleague analogizes the present case to *Celanese*, using both as examples of where the party in breach did not do the “right thing” upon discovering their error. However, in my view, the conduct in *Celanese* was

of an entirely different character. Notably, in *Celanese*, the law firm that breached solicitor-client privilege had no clear system in place to detect and identify privileged materials in the course of executing the *Anton Piller* order (paras. 6 and 41). Furthermore, even after documents were segregated as being potentially privileged, they were accessed because the lawyers from the breaching firm took a careless and excessively adversarial approach to the process (para. 54), copying and distributing materials from a sealed and marked container without consulting the other side (para. 11).

[144] Here, by contrast, the breach of solicitor-client privilege was the result of inadvertence, and it occurred against the backdrop of a set of preventative measures put in place to minimize the intrusion upon privacy rights. These measures include training provided to civilian monitors, the undertakings to which they agree as part of their employment, and the acknowledgement they are required to sign of having reviewed the wiretap authorization. The breach here was the exception, and, unlike in *Celanese*, there is no evidence that the audio recording itself (which as noted was not generated as a result of the civilian monitor's actions) was inappropriately accessed or used. Such systemic efforts to respect *Charter* rights and prevent the intrusion upon privacy rights attenuate the seriousness of the *Charter*-infringing conduct in this case.

[145] Finally, the *Charter* breach in this case was caused by a single employee's "mere inadvertence", as the trial judge found (see 2022 SKKB 235, at para. 29), rather than a bad faith breach. While I agree with my colleague that even inadvertent breaches

may sometimes be serious (*R. v. Zacharias*, 2023 SCC 30, at para. 122), a finding that state misconduct only amounted to inadvertence is a factor which typically reduces the seriousness of the breach (*Tim*, at paras. 83-84; *R. v. Chapman*, 2020 SKCA 11, 386 C.C.C. (3d) 24, at para. 101). Further, the trial judge’s conclusion on inadvertence is not diminished by the fact that this finding was made as part of the s. 8 analysis. The trial judge was canvassing the nature of the state misconduct in this case, including considering that the civilian monitor could not say why she listened to the call (see para. 27). Given those facts, and the broader systemic efforts made by the Crown to minimize the risk to privacy rights in this case, it was open to the trial judge to conclude that the monitor’s misconduct arose only to the level of “mere inadvertence”.

[146] Further, this Court should not substitute its own view of state misconduct for the trial judge’s finding, barring a clear error (*R. v. White*, 2015 ONCA 508, 127 O.R. (3d) 32, at para. 63; *Ismail*, at para. 15). As explained by Fairburn J.A., as she then was, in *R. v. Buchanan*, 2020 ONCA 245, 150 O.R. (3d) 209, the “placement of the police conduct on the spectrum requires an exercise of discretion that the trial judge is uniquely positioned to undertake” (para. 50). I find there is no such justification for interfering with the trial judge’s conclusion on state misconduct in this case and would defer to that conclusion.

[147] While I agree that the breach is serious, it was isolated in nature and significant efforts were made to protect the underlying privacy interests in this case.

There was nothing wilful or flagrant about the breach, and the seriousness of the state conduct cannot be characterized as particularly egregious.

(2) The Impact on Ms. Fox’s Charter-Protected Interests

[148] The second line of inquiry focuses on the seriousness of the impact of the *Charter* breach on Ms. Fox’s *Charter*-protected interests (*Grant*, at para. 76). The impact of the *Charter* breach in this matter, while serious, was diminished by the lack of causation in this case. As discussed above, there is no causal link between the civilian monitor’s actions and the recording of the impugned evidence. The existence and subsequent recording of the impugned evidence did not depend on the *Charter* breach and had no relationship to the monitor’s actions. Instead, the recording was discoverable and later accessed through *Charter*-compliant means.

[149] The lack of causal relationship between the breach and the obtaining of the evidence mitigates the impact of the breach in this case (*Beaver*, at para. 125). The Court in *Grant* maintained that in determining the actual impact of the breach on the protected interests of the accused, courts should assess the strength of the causal connection between the *Charter* infringement and the resultant evidence (para. 122). As explained by Justice David M. Paciocco, Palma Paciocco and Lee Stuesser in *The Law of Evidence* (8th ed. 2020), while causation may not be strictly required to satisfy the threshold inquiry, the lack of causation will still operate as a pro-inclusionary consideration at the evaluative stage of the s. 24(2) analysis (p. 507). This is exemplified by this Court’s holding in *Strachan*, where Dickson C.J. admitted drug

evidence partly on the basis that the *Charter* breach had nothing to do with the later discovery of the evidence (p. 1007). The Court held similarly in *Mian* (applying *Grant*), agreeing that the lack of a causal connection between a *Charter* breach and the obtaining of non-bodily evidence was an appropriate consideration in deciding to admit the evidence under s. 24(2) (para. 87).

[150] The lack of causal connection in this case similarly attenuates the impact of the *Charter* breach. The existence of the recording in this case did not depend upon the actions of the civilian monitor. Further, the subsequent steps taken by the Crown to obtain a judicial review of the recording was not instigated or otherwise affected by the *Charter* breach. Given that the evidence in this case was later obtained through *Charter*-compliant means, and there is no evidence to suggest that the s. 8 *Charter* breach prompted the later discovery of the wiretap, the impact of the *Charter* breach, while serious, does not pull strongly toward exclusion of the evidence.

(3) Society's Interest in Having the Charge Adjudicated on its Merits

[151] The third line of inquiry focuses on society's interest in ensuring that its justice system is above reproach (*Grant*, at para. 84; *McColman*, at para. 70). Confidence in lawyers and the solicitor-client relationship is a cornerstone of maintaining such an irreproachable justice system (*Smith v. Jones*, [1999] 1 S.C.R. 455, at para. 45, citing *Anderson v. Bank of British Columbia* (1876), 2 Ch. D. 644 (C.A.), at p. 649; *R. v. Cunningham*, 2010 SCC 10, [2010] 1 S.C.R. 331, at para. 26). This is

partially because, as this Court observed in *McClure*, the legal system is complex and lawyers serve a unique and vital function within it (para. 33).

[152] There are several different components to a lawyer’s vital role within the justice system. While lawyers owe duties such as loyalty and competence to their clients, lawyers also owe concurring duties of integrity and honesty to the court and the public at large as “officers of the court” (the Hon. J. Dewitt-Van Oosten, “Ethical obligations to the court, as officers of the court”, 2022 CanLIIDocs 4780 (online), at pp. 3-5; Law Society of Saskatchewan, *Code of Professional Conduct for Lawyers*, Preface; Law Society of Alberta, *Code of Conduct*, r. 5.1; Law Society of Ontario, *Rules of Professional Conduct*, r. 5.1-1). The administration of justice demands that lawyers respect *both* their duties as officers of the court and their duties to their clients.

[153] As this Court has explained, the solicitor-client relationship facilitates free and candid communication between a lawyer and their client, which enables the lawyer to protect the rights of their client (*McClure*, at para. 33; *Cunningham*, at para. 26). The solicitor-client relationship is especially critical in the criminal law context, where an accused person relies on their lawyer to advance their constitutional rights and defend against the possible loss of personal liberty. More specifically, the solicitor-client relationship requires that a defence lawyer marshal any evidence and defences *not known to be false or fraudulent* in order to defend their client’s interests and rights (G. MacKenzie, *Lawyers & Ethics: Professional Responsibility and Discipline* (looseleaf), at § 25:1; see also *R. v. Li* (1993), 36 B.C.A.C. 181, at para. 66; *R. v. T. (S.G.)*, 2011

SKCA 4, 265 C.C.C. (3d) 550, at para. 60; *R. v. Legato* (2002), 172 C.C.C. (3d) 415 (Que. C.A.), at paras. 83-88). Said simply, a lawyer has a duty to advocate on their client’s behalf, but this duty is not absolute and is subject to constraints. While defence counsel is still duty-bound to test the Crown’s case within an adversarial setting, the law does not allow counsel to act dishonestly or fraudulently in advocating for their client’s interest (D. Layton and M. Proulx, *Ethics and Criminal Law* (2nd ed. 2015), at p. 26). This is because, while counsel has a duty to “fearlessly . . . raise every issue . . . which [they] thin[k] will help [their] client’s case”, this duty must be balanced alongside a lawyer’s duties as an officer of the court (*Rondel v. Worsley*, [1967] 3 All E.R. 993 (H.L.), at p. 998).

[154] As noted above, lawyers share a professional duty to the administration of justice, even outside the context of specific solicitor-client relationships (see A. Flavelle Martin, “The Lawyer’s Professional Duty to Encourage Respect for — and to Improve — the Administration of Justice: Lessons from Failures by Attorneys General” (2022-23), 54 *Ottawa L. Rev.* 247, at pp. 257-58). This is a general responsibility resulting from, in part, the need to ensure lawyers do not unacceptably subvert the truth-seeking function of the criminal justice system (Layton and Proulx, at pp. 26-27). The failure to uphold this responsibility risks inviting the public perception that lawyers may undermine the truth-seeking function of the criminal justice system in order to obtain an unjust advantage for their client. Such a public perception would impermissibly damage the reputation of the administration of justice.

[155] As part of this broad duty to the administration of justice, then, lawyers such as Ms. Fox maintain specific duties of honesty, candour, and fairness meant to foster and maintain public trust in the justice system (Canadian Bar Association, *Code of Professional Conduct* (2009), c. IX, at p. 61; *Code of Professional Conduct of Lawyers*, CQLR, c. B-1, r. 3.1, art. 111; Law Society of Upper Canada, *Rules of Professional Conduct*, c. 3 and r. 5.6-1; *Rules of Professional Conduct* (Law Society of Ontario), r. 5.1-2; *Code of Conduct* (Law Society of Alberta), r. 2.1 and commentary; Nova Scotia Barristers’ Society, *Code of Professional Conduct*, r. 2.1). While the breach of such ethical obligations is ultimately a matter for the law societies, obstruction of justice charges against lawyers threaten public trust and confidence that are essential to the administration of justice. Given that vital role lawyers play in the justice system, society has a significant interest in making sure charges which accuse lawyers of obstructing that same justice system are adjudicated on their merits.

[156] Further, as this Court instructed in *Grant*, the reliability of the evidence is also an important factor at this stage of the analysis (paras. 81 and 83; see also *Harrison*, at paras. 33-34). There is no reason to doubt the veracity and reliability of the wiretap evidence, nor is there any suggestion that the *Charter* breach undermined the evidence’s reliability. In this case, the exclusion of highly relevant and reliable evidence would undermine the court’s truth-seeking function (*Grant*, at para. 81). Similarly, excluding the evidence “effectively guts the prosecution” and would negatively impact the reputation of the administration of justice (para. 83).

[157] For these reasons, I find that society has a significant interest in the adjudication of the charge on its merits.

(4) Final Balancing and Conclusion

[158] Given the strength of society's interest under the third avenue of inquiry, and the diminished seriousness and impact of the *Charter* breach, I am satisfied that the admission of the evidence would not bring the administration of justice into disrepute. I would admit the evidence.

III. Disposition

[159] I would allow the appeal on the basis that the evidence obtained from the wiretap should not have been excluded under s. 24(2) of the *Charter*, and would order a new trial.

APPENDIX

Transcript of the Non-Privileged Part of the Phone Call Between Ms. Fox and Her Client, A.Y. (reproduced in A.R., vol. I, at pp. 217-19)

[A.Y.]: Hello.

FOX: Hi, is this [A.]?

[A.Y.]: Yup.

FOX: Hey [A.], Sharon Fox here from Nychuk and Company, how are you doing?

[A.Y.]: It's who, sorry?

FOX: Can you step out, this is kinda important, can you step out into a quiet place for a second? It's Sharon Fox call, calling from Nychuk and Company.

[A.Y.]: It's who? Here, hold on.

FOX: [A.], are you there?

[A.Y.]: Who is this?

FOX: Sharon Fox from Nychuk and Company.

[A.Y.]: Oh hey Sharon, what's up?

FOX: Hi, yeah [K.] just got arrested, [K.G.].

[A.Y.]: Okay, yeah.

FOX: 'Kay. Um, they've arrested her for trafficking and possession for the purpose of trafficking.

[A.Y.]: Okay.

FOX: She has been under surveillance.

[A.Y.]: Ah huh.

FOX: Um you should know what that means.

[A.Y.]: Okay.

FOX: 'Kay, so she's been to wherever she's been to.

[A.Y.]: Okay.

FOX: And they likely, the police will likely be, if they don't got search warrants yet they will probably be working on one in the next two or three hours.

[A.Y.]: For, okay. For her place?

FOX: 'Kay? No her place is clean.

[A.Y.]: Okay, so where will they be going?

FOX: You tell me, you know that

[A.Y.]: Who, who's

FOX: not me.

[A.Y.]: called you?

FOX: [K.] called me.

[A.Y.]: She did?

FOX: Yup. She just got pulled over driving,

[A.Y.]: Yup.

FOX: she's got, she's got nothing on her.

[A.Y.]: Yup.

FOX: Nothing in her house, her cars clean.

[A.Y.]: So how did they arrest her for trafficking?

- FOX: Because they've been surveilling her and she's gone to a place where there has been product located.
- [A.Y.]: Okay.
- FOX: So I suspect based on their surveillance of her they will be, if they haven't already, they will be drafting a search warrant for wherever places she's been frequenting.
- [A.Y.]: Okay.
- FOX: Do you understand?
- [A.Y.]: Yup. Thank you Sharon. Is this your cell
- FOX: 'Kay.
- [A.Y.]: number Sharon?
- FOX: Yes it is.
- [A.Y.]: Okay so are you, are you acting for her?
- FOX: No I'm not yet, I have to be retained first. She just called me, so I was her one call to a lawyer, she called me and asked me to pass the message along.
- [A.Y.]: How did ah, how did she get a hold of you? How did she get your number?
- FOX: Ah I don't know, ah well the Estevan Police

Appeal dismissed, ROWE and O'BONSAWIN JJ. dissenting.

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