The Exclusionary Rule in Canada: Trends and Future Directions

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Abstract

The purpose of the research work outlined in this thesis is to determine what impact the new test for exclusion developed in *Grant* and *Harrison* has had on exclusionary trends in Canada, to assess this new three-factor approach and to provide recommendations for improvement. To this end, I conducted an empirical survey of section 24(2) cases rendered in 2012 across Canada. Based on the results of this survey, I describe the current trends for exclusion in relation to the three lines of inquiry and the *Charter* right at issue. I also examine the application of the test to varying types of evidence. The survey found a high rate of exclusion in the 73% range.

The survey results show that developing trends do not match the predictions made by the SCC in *Grant* about how exclusion would operate in relation to different types of evidence. For example, there was a higher than expected rate of exclusion for breath sample results. Moreover, there was a low exclusion rate for guns as compared to the high exclusion rate for other types of non-bodily physical evidence. The rate of exclusion for section 10(b) breaches was lower than expected given the importance of the *Charter* interests that section 10(b) protects.

The Grant rationale and the discretionary approach to exclusion are, in my view, generally satisfactory. However the test could be improved. As regards the first *Grant* factor, there was considerable variation in the assessment of the seriousness of the violation given the fact-specific nature of the inquiry. For greater consistency and

transparency, the test, in future, should not incorporate the good faith doctrine. Police conduct should be assessed on the basis on a scale of intentionality ranging from negligent to deliberate conduct, rather than the current process of labeling police conduct as good or bad faith. Moreover, the doctrine of discoverability should be abandoned. The focus should be placed on the events that actually occurred rather than on whether police could have obtained the evidence by legal means.

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Part I

Chapter 1 Introduction

The Supreme Court of Canada's decision in *R. v. Grant*[1] and its companion case of *R. v. Harrison*[2] resulted in the development of a new test for the exclusion of evidence under section 24(2) of the *Charter of Rights and Freedoms*[3] abandoning the prior framework for exclusion under *R. v. Collins*[4] and *R. v. Stillman.*[5] The new approach in *Grant* and *Harrison* marks an important development to the exclusionary rule in Canada. The practical impact of this new test on exclusionary trends in Canada is the focus of this thesis.

In Part I of this thesis, I discuss the background and purpose of my research. I also describe the research methodology used for the empirical survey of section 24(2) cases I conducted. Finally, I explain the current legal position on section 24(2) in Canada.

Part II identifies and describes current trends for exclusion that have emerged in Canada since the revised framework for section 24(2) analysis was adopted. I examine the application of the *Grant* test to specific kinds of evidence. Moreover, I assess whether the

[1] *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353 [*Grant*].
[2] *R. v. Harrison*, 2009 SCC 34, [2009] 2 S.C.R. 494 [*Harrison*].
[3] *Canadian Charter of Rights and Freedoms*, s. 24(2), Part I of the *Constitution Act*, *1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].
[4] *R. v. Collins*, [1987] 1 S.C.R. 265 [*Collins*].
[5] *R. v. Stillman*, [1997] 1 S.C.R. 607 [*Stillman*].

predictions made by the SCC come true in the data collected and whether courts are properly following the test set out in *Grant*.

Part III of this thesis assesses the *Grant* approach to exclusion. The strengths and weaknesses of the current legal approach to section 24(2) are examined. I evaluate the results of the *Grant* test and the impact of the new framework on exclusionary trends in Canada. Part III also examines the current rationale for exclusion and the flexibility of the *Grant* test. Finally, I present recommendations for the future development to the approach to exclusion in relation to the doctrines of good faith and discoverability.

i. Background

In 2011 Mike Madden published an empirical study on section 24(2) that classified and analyzed the trends of 100 cases in 2010 dealing with exclusion of evidence since *Grant* and *Harrison*.[6] Madden found that the overall exclusion rate for evidence obtained in violation of the *Charter* was 70% for all Canadian jurisdictions, although Québec decisions were not included in the survey.[7] Thierry Nadon undertook a similar survey in Québec and found that the exclusion rate in Québec was 64%.[8] The data presented by both Madden and Nadon demonstrated a strong tendency towards exclusion of evidence for *Charter* violations in the wake of *Grant* and *Harrison*.

[6] Mike Madden, "Empirical Data on Section 24(2) under *R. v. Grant*" (2011) 78 C.R. (6th) 278.
[7] *Ibid*. at 280.
[8] Thierry Nadon, "Le paragraphe 24(2) de la Charte au Québec depuis *Grant* : si la tendance se maintient!" (2011) 86 C.R. (6th) 33 at 42.

The empirical survey described in this thesis builds on the body of empirical work currently available on section 24(2). The survey analyzes trends for exclusion following three and a half years of Canadian courts applying the test in *Grant*.

ii. Purpose of Research

The purpose of my research is to conduct a critical evaluation of the impact of *Grant* and *Harrison* on the remedy of exclusion of evidence under section 24(2), to assess and evaluate current trends for exclusion and to make recommendations for future development of the law. My research has, in part, mirrored the studies conducted by Madden and Nadon by cataloging and analyzing all court decisions released in 2012 where *Charter* violations were found. The survey portion of this thesis tracks exclusion rates for 2012 and compares this data to the previous two surveys conducted by Madden and Nadon.

This thesis examines several areas of section 24(2) jurisprudence not covered in Madden and Nadon's studies. These include areas that required a more thorough examination to better evaluate developing trends for exclusion. In particular, I examine in greater detail the three branches of the *Grant* test as interpreted by the courts in 2012. I achieve this by categorizing and analyzing the sub-factors under each branch of the test. I also examine how courts are interpreting the meaning of good faith and how often good faith is relied upon as a mitigating factor under the first branch. In addition, I examine whether appellate courts are according deference to section 24(2) decisions made by trial judges.

iii. Research Methodology

The sample consists of decisions at all levels rendered across Canada from January 1 to December 31, 2012 where Charter violations were found. All cases reviewed are those in which one or more *Charter* violations were found and where the court consequently conducted an analysis of section 24(2) leading to the decision to exclude or admit the impugned evidence. This sample includes 98 trial and 33 appeal court cases for common law jurisdictions across Canada. This data pool was drawn from cases collected by Carswell for the *Criminal Reports* from January 1 to December 31, 2012, as well as cases published during the same period in *Canadian Criminal Cases*. The editor-in-chief of the *Criminal Reports* selected all section 24(2) rulings from the Carswell collection system. For Québec cases, I searched the CanLII database for all cases citing *Grant*. For Québec jurisprudence, 11 trial court cases and eight appeal court cases were reviewed.

As part of the process for analyzing the cases, detailed notes were compiled for each case that included the following: i) the case name, citation and court level; ii) the *Charter* right breached and detailed information of the violation; iii) the type of evidence that was ultimately excluded or admitted; and iv) the categorization by the court of each *Grant* factor. Specific criteria considered by the court under each branch of the *Grant* test were categorized (for example, under the third branch: whether the evidence was reliable or not, the degree of importance of the evidence to the Crown's case and the level of seriousness of the offence).

Several limitations to the survey should be noted. A degree of qualitative interpretation and discretion was used in classifying data under Tables 5 – 7 ("Exclusion by *Grant* Factor"). Trial courts are not always explicit in their classification of factors. Terms used by courts to describe each factor were collected and are discussed in this thesis. In many cases, the court did not consider all of the relevant criteria under each line of inquiry or each of the three branches of the test.

Tables 1, 2, 4, 8 were produced using quantitative research methods involving a simple counting of criteria. As for Table 3 ("Deference at Appellate Level"), judgment was used to determine whether the court deferred or not to the trial court's analysis on section 24(2). In most cases, the appeal court made this explicit.

The data for Québec cases is included in separate tables following the tables for all other jurisdictions. The Québec data was sorted according to the following set of criteria: i) exclusion by level of court, ii) exclusion by *Charter* right breached, and iii) exclusion by type of evidence. Québec cases were analyzed by a more limited set of criteria because of time constraints involved in completion of this thesis.

Chapter 2 Current Status of the Law on section 24(2)

Section 24 of the *Charter* states:

> 24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

> (2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.[9]

Section 24(2) provides for the exclusion of evidence obtained by unconstitutional means where the admission of the evidence in the proceedings would bring the administration of justice into disrepute. In 2009, the SCC outlined a revised test for exclusion of evidence reflecting a significant overhaul of past jurisprudence. The previously used test for section 24(2) under *Collins* and *Stillman* was criticized on the basis that it created inflexible categories for exclusion contrary to the language of section 24(2) that requires consideration of "all the circumstances".[10]

As explained in *Grant*, the majority of the SCC in *Stillman* held that unlawfully obtained evidence should be classified into two categories: conscriptive (i.e. self-incriminatory) and non-conscriptive.[11] If the evidence was conscripted, its admission would impact on trial fairness. Compelling an accused to assist the prosecution in making its case was presumed to lead to an unfair trial.[12] As a result of the classification in *Stillman*, conscripted evidence was subject to almost automatic exclusion regardless of how it was obtained. If the evidence was discoverable independent of the breach, this would lessen the impact on trial fairness.

[9] *Charter*, *supra* note 3.
[10] *Grant*, *supra* note 1 at para. 65.
[11] *Ibid*. at 63.
[12] *Ibid*. at 64.

Grant and *Harrison*, as well as *R. v. Coté*,[13] led to the development of a new approach to exclusion under section 24(2). The new test abolished the distinction between conscripted and non-conscripted evidence. There is now no overarching bright line rule to guide decision-makers. All types of evidence are considered under the same three lines of inquiry. These three factors are: the seriousness of the violation of *Charter* rights; the impact on the *Charter*-protected interests of the accused; and society's interest in adjudication of the case on its merits. Each factor must be balanced to determine whether, having regard to all the circumstances, admission of the evidence would bring the administration into disrepute.

The purpose of section 24(2) is to maintain the integrity of the justice system and preserve public confidence in the rule of law.[14] It is not aimed at deterring *Charter* breaches, nor is it a punishment for police misconduct. Nevertheless, the Court in *Grant* recognized that deterrence might be a "happy consequence"[15] of exclusion.

The analysis considers the long-term impact that admission will have on the repute of the justice system. It is an objective assessment that considers whether "a reasonable person, informed of all relevant circumstances and the values underlying the *Charter*, would conclude that the admission of the evidence would bring the administration of justice into

[13] *R. v. Coté*, 2011 SCC 46, [2011] 3 S.C.R. [*Coté*].
[14] *Grant*, *supra* note 1 at para. 68.
[15] *Ibid*. at para. 73.

disrepute".[16] The purpose of exclusion is also prospective. It prevents further damage being done to the repute of the justice system.[17]

i. The *Grant* Factors

a. First *Grant* Factor

Under the first line of inquiry, a court must assess where the violation falls on a spectrum of seriousness.[18] At one end of the spectrum breaches may be minor or inadvertent. At the opposite end, breaches can be deemed wilful or committed in reckless disregard of *Charter* rights.[19] The more serious the violation the greater the need for a court to distance itself from the state misconduct.[20] Exclusion of evidence is necessary to dissociate the judiciary from the state misconduct.

The first branch of the test involves assessing the police officer's blameworthiness. This is determined with reference to the officer's state of mind. Deliberate action on the part of police increases the seriousness of the breach. Similarly, where the officer "knew (or should have known) that his or her conduct was not *Charter*-compliant"[21] there is a greater need for dissociation.

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[16] *Ibid*. at para. 68.
[17] *Ibid*. at para. 69.
[18] *Ibid*. at para. 74.
[19] *Ibid*. at para. 70.
[20] *Ibid*. at para. 72.
[21] *Harrison*, *supra* note 2 at para. 22.

On the other hand, extenuating circumstances or good faith may mitigate the seriousness of a violation.[22] However, ignorance of *Charter* standards and wilful blindness are not mitigating. As the SCC in *Harrison* noted, police are "rightly expected to know what the law is".[23] However, where the law is not clear this can attenuate the breach. For instance, in *Grant*, the fact that police were "operating in circumstances of considerable legal uncertainty"[24] made the sections 9 and 10(b) breaches understandable, and tipped the balance in favour of admission.[25] Misleading testimony by police in court is properly considered under the first *Grant* factor and aggravates the seriousness of a breach.[26]

In cases where a breach forms part of a pattern of misconduct or reflects a systemic problem, this increases its seriousness.[27] However, the absence of systemic concerns is not a mitigating factor.[28] In *Coté*, the Court found that "the question of exclusion must not be approached in a compartmentalized fashion".[29] Systematic police misconduct may taint the whole of an investigation. In *Coté*, the illegal searches that led to the warrants being issued tainted the entire search process.[30]

[22] *Grant*, *supra* note 1 at para. 75.
[23] *Ibid*. at para. 133.
[24] *Ibid*. at para. 140.
[25] *Ibid*. at para. 133.
[26] *Harrison*, *supra* note 2 at para. 26.
[27] *Grant*, *supra* note 1 at para. 75.
[28] *Harrison*, *supra* note 2 at para. 25.
[29] *Coté*, *supra* note 13 at para. 79.
[30] *Ibid*. at para. 81.

b. Second *Grant* Factor

Under the second branch, the court evaluates the impact of the breach on the accused's *Charter*-protected interests on a spectrum ranging from "fleeting and technical to profoundly intrusive".[31] This entails identifying the interests engaged by the *Charter* right breached and determining the extent of the impact on the accused's interests. For instance, in the context of a section 8 breach, the infringement of an accused's privacy interests will be more or less elevated depending on the reasonable expectation of privacy attached to the location of the unlawful search.[32] The greater the impact of the breach on an accused's *Charter* rights, the more likely admission of the evidence would bring the administration of justice into disrepute.

Coté confirmed that discoverability continues to be a relevant factor in the section 24(2) analysis.[33] Its effect is considered under the first and second branches where relevant. However, the Court cautioned that "[w]hile discoverability may still play a useful role in the section 24(2) analysis, it is not determinative".[34] Evidence that is discoverable does not invariably lead to admission. It is assessed having regard to all of the circumstances.[35]

[31] *Grant*, *supra* note 1 at para. 76.
[32] *Ibid*. at para. 78.
[33] *Coté*, *supra* note 13 at para. 69.
[34] *Ibid*. at para. 70.
[35] *Ibid*. at para. 74.

c. Third *Grant* Factor

The third *Grant* factor requires an analysis of "whether the truth-seeking function of the criminal trial process would be better served by admission of the evidence or by its exclusion".[36] Society's interest in adjudication of the case on its merits depends on the reliability of the evidence, its importance to the Crown's case and, to a certain extent, the seriousness of the offence. Clearly, admitting unreliable evidence would not serve the truth-seeking function of the trial process. On the other hand, exclusion of relevant and reliable evidence may undermine society's interest in adjudication of the case on its merits if it would "gut the prosecution".[37] Considerations under the third branch, as with those under the first and second branches, should not override all other considerations.[38]

The seriousness of the offence remains a consideration under the third line of analysis, however it can "cut both ways".[39] As the Court in *Grant* stated, "while the public has a heightened interest in seeing a determination on the merits where the offence charged is serious, it also has a vital interest in having a justice system that is above reproach, particularly where the penal stakes for the accused are high".[40] In *Harrison*, the Court affirmed that the *Charter* applies to everyone regardless of the seriousness of the crime charged[41] and that this factor must not take on "disproportionate significance".[42]

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[36] *Grant supra* note 1 at para. 79.
[37] *Ibid*. at para. 83.
[38] *Coté*, *supra* note 13 at para. 48; *Harrison*, *supra* note 2 at para. 40.
[39] *Grant*, *supra* note 1 at para. 84.
[40] *Ibid*. at para. 84.
[41] *Harrison*, *supra* note 2 at para. 40.
[42] *Ibid*. at 34.

ii. Types of Evidence

In *Grant*, the SCC anticipated that patterns for exclusion would develop over time with respect to different kinds of evidence. It was assumed that the development of such patterns would assist trial judges in deciding future section 24(2) applications and this would, as a result, achieve a measure of certainty in applications for exclusion.[43]

The way that exclusion was anticipated to operate in relation to specific types of evidence is outlined below.

a. Statements

The SCC held that the analysis under the three branches would "support the presumptive general, although not automatic, exclusion of statements obtained in breach of the *Charter*"[44] because of the particular concern for proper police conduct in obtaining statements, the fundamental rights involved and the potential unreliability of unlawfully obtained statements. A breach of section 10(b) undermines an accused's right to make an informed choice whether to speak to authorities as well as the protection against self-incrimination. Given the centrality of these rights, this generally favours exclusion of statements.[45] However, exclusion may not be appropriate for technical breaches, when

[43] *Grant*, *supra* note 1 at para. 86.
[44] *Ibid*. at para. 92.
[45] *Ibid*. at para. 95.

the statement was made spontaneously following a breach or if it can be shown that the accused would have made the statement regardless of the breach.[46]

b. Bodily Evidence

Under the *Stillman* approach, bodily evidence was classified as conscriptive and generally held to be inadmissible because of its impact on trial fairness.[47] Criticized in *Grant*, this test replaced the flexible inquiry required by section 24(2) – which asks whether admission would bring the administration into disrepute having regard to all the circumstances – with a categorical approach.[48] The conscription test did not account for varying degrees of seriousness of misconduct and its impact. As explained in *Grant*, a demeaning strip search is much more intrusive than taking a hair sample from an accused's head.[49]

The logic behind the conscription test led to bodily evidence being equated with statements for the purposes of exclusion.[50] Both were conscripted from an accused and therefore impacted on trial fairness. However, treating these two types of evidence in the same way ignored relevant differences between the two. The impact on an accused's autonomy interests is greater in obtaining an unlawful statement as compared to taking a

[46] *Ibid*. at para. 96.
[47] *Ibid*. at para. 100.
[48] *Ibid*. at para. 102.
[49] *Ibid*. at para. 103.
[50] *Ibid*. at para. 104.

bodily sample.[51] Moreover, the reliability of bodily evidence is not generally in question as it is for compelled statements.[52]

Bodily evidence will generally be excluded where the breach is deliberate and the impact on an accused's privacy, bodily integrity and dignity is high, regardless of the relevance and reliability of the evidence.[53] For less serious intrusions, bodily evidence may be admitted. The Court in *Grant* held that this "will often be the case with breath sample evidence, whose method of collection is relatively non- intrusive".[54]

Grant expressed concern that breath sample evidence on impaired driving charges has "often suffered the fate of automatic exclusion"[55] even for cases of minor breaches. This was viewed as an anomalous outcome. A more serious violation of section 8 for an illegal drug seizure could lead to admission because of the non-conscripted nature of the evidence.

c. Non-Bodily Physical Evidence

Non-bodily physical evidence is treated the same as other types of evidence. In cases of section 8 violations, the analysis will depend on the degree of intrusion of an accused's reasonable expectation of privacy, although other interests including human dignity may also be impacted. A *Charter* breach involving the accused's dwelling house will

[51] *Ibid*. at para. 105.
[52] *Ibid*. at para. 110.
[53] *Ibid*. at para. 111.
[54] *Ibid*.
[55] *Ibid*. at para. 106.

generally be more serious than an illegal search of his or her vehicle because of the privacy interest that one can reasonably expect at those locations.

Although a personal dwelling generally attracts a higher expectation of privacy than a vehicle, in *Harrison*, the Court made it clear that "being stopped and subjected to a search by police without justification impacts on a motorist's rightful expectation of privacy and liberty in a way that is much more than trivial".[56] The degree of intrusion on an individual's reasonable expectation of privacy is a fact specific inquiry having regard to all of the circumstances of the case.

d. Derivative Evidence

Under *Collins* and *Stillman*, exclusion of derivative evidence was based on whether the evidence was independently discoverable (i.e. whether the evidence would have been obtained but for an inadmissible statement). Conscriptive evidence that was non-discoverable was excluded by virtue of its impact on trial fairness.[57]

The conscription-discoverability doctrine was abandoned in *Grant*, in part because the inquiry was speculative.[58] However, discoverability is now relevant at the second stage of the *Grant* test in assessing the impact of the breach on the accused's *Charter* rights. The Court stated, "[t]he more likely it is that the evidence would have been obtained even

[56] *Harrison*, *supra* note 2 at para. 56.
[57] *Grant*, *supra* note 1 at para. 119.
[58] *Ibid*. at para. 120.

without the statement, the lesser the impact of the breach on the accused's underlying interest against self-incrimination".[59] In cases where discoverability is speculative, it will have no impact on the analysis.

iii. Standard of Review

Appellate courts must show deference to trial judges on section 24(2) determinations where the proper factors have been considered.[60] *Coté* clearly reaffirmed this standard of review.[61] The SCC stated that "[w]here a trial judge has considered the proper factors and has not made any unreasonable finding, his or her determination is owed considerable deference on appellate review".[62] *Coté* held that the Court of Appeal should not have interfered with the trial judge's findings of fact absent any clear and determinative error. By re-characterizing the evidence of the police conduct as unintentional, the Court of Appeal overstepped its authority.[63] The trial judge is positioned to assess first-hand the credibility of the officers testifying in court.[64] The Court of Appeal also erred in placing greater emphasis on the seriousness of the offence when the trial judge had properly considered this factor as part of the analysis.[65]

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[59] *Ibid*. at para. 122.
[60] *Ibid*. at para. 86.
[61] *Coté*, *supra* note 13 at para. 44.
[62] *Ibid*.
[63] *Ibid*. at para. 51.
[64] *Ibid*. at para. 52.
[65] *Ibid*. at para. 54.

Part II Empirical Survey

Chapter 3 Exclusion by Jurisdiction, Level of Court and Deference on Appeal

Table 1 – Exclusion by Jurisdiction

Table 1(a) – Trial Level Exclusion

Jurisdiction	Number of Cases	Number Excluded	% Excluded
Alberta	9	4	44%
British Columbia	15	12	80%
Manitoba	3	1	33%
New Brunswick	0	--	--
Newfoundland	6	6	100%
Northwest Territories	0	--	--
Nova Scotia	5	5	100%
Nunavut	0	--	--
Ontario	49	35	71%
Prince Edward Island	1	0	0%
Saskatchewan	10	9	90%
Yukon	0	--	--

Total	**98**	**72**	**73%**

The data from Table 1(a) demonstrates varied exclusion rates across Canadian provinces and territories. Newfoundland and Nova Scotia excluded in 100% of trial court cases, while Prince Edward Island (P.E.I.), Manitoba and Alberta excluded the least. The sample size at the trial court level is small in some jurisdictions (for example, only one 24(2) decision was found for P.E.I.) rendering it impossible to make any generalizations as to exclusion trends in those jurisdictions.

Table 1(a) also shows that case law on section 24(2) is emerging primarily from the province of Ontario. Half of trial court cases in 2012 (49 of 98 cases) were decided in Ontario, which suggests that Ontario courts are responsible for shaping section 24(2) jurisprudence to a large extent. The next jurisdiction considering the highest number of cases is British Columbia with 15 cases. There is clearly a wide gap between jurisdictions as to the number of section 24(2) decisions being made.

Table 1(b) – Appellate Level Exclusion

Jurisdiction	**Number of Cases**	**Number Excluded**	**% Excluded**
Alberta	6	1	17%
British Columbia	4	1	25%
Manitoba	5	4	80%
New Brunswick	0	--	--

Newfoundland	0	--	--
Northwest Territories	1	0	0%
Nova Scotia	0	--	--
Nunavut	0	--	--
Ontario	10	5	50%
Prince Edward Island	0	--	--
Saskatchewan	5	3	60%
Yukon	0	--	--
Supreme Court of Canada	2	0	0%
Total	**33**	**14**	**42%**

The data from Table 1(b) shows that exclusion rates at the appeal court level are significantly lower than rates at trial courts. Given the deferential standard of review at the appeal level, one cannot make any firm conclusions about lower exclusion rates at appellate courts. Additionally, the fact that the Crown makes a selection as to which decisions to appeal factors into appellate level exclusion rates.

Table 2 – Exclusion by Level of Court

Level of Court	Number of Cases	Number Excluded	% Excluded
Trial Court	98	72	73%
Summary Conviction Appeal Court	12	7	58%
Provincial/Territorial Court of Appeal	19	7	37%
Supreme Court of Canada	2	0	0%
Total	**131**	**86**	**66%**

In comparison to Madden's survey in 2010, there is, overall, relatively little change in exclusion rates. Madden's study found a 75% exclusion rate at trials courts, while the data presented in this survey shows a negligible 2% difference. At the appeal stage, with all levels of appeal courts combined, exclusion under Madden's survey was 44%. The data in the current survey shows a 42% exclusion rate.

Madden's survey was conducted at a time of transition some 15 months following *Grant*. The sample for the present survey was taken three and a half years following courts applying *Grant*. Significantly, the overall exclusion rates in this survey are almost identical to those of Madden's. The consistency in exclusion rates indicates that high

exclusion in the immediate aftermath of *Grant* was not an anomaly and continues to be the norm.

Table 2(a) – Exclusion by Level of Court: Québec

Level of Court	**Number of Cases**	**Number Excluded**	**% Excluded**
Municipal Court	3	3	100%
Court of Québec	8	7	88%
Superior Court (First Instance)	0	--	--
Superior Court (Appeal)	4	1	25%
Court of Appeal	4	1	25%
Total	**19**	**12**	**63%**

Of the 11 trial court cases reviewed for Québec, the evidence was excluded in all but one case. Table 2(a) shows that Québec appeal courts excluded evidence in only 25% of cases. This low rate is consistent with the data in other Canadian jurisdictions. As noted in Chapter 1, in Nadon's survey of Québec cases, Nadon found an overall exclusion rate of 64%. The overall exclusion rate in the present survey differs by a slight 1%.

Table 3 – Deference at Appellate Level[66]

Where the Appellate Court…	**Number of Cases (out of 33 total)**	**% of Cases**
Deferred to the Trial Judge's Decision on section 24(2)	16	48%
Did Not Defer to the Trial Judge's section 24(2) Analysis	10	30%

The cases included in Table 3 are appeal court cases in which the court either gave deference to the decision of the lower court on its analysis of section 24(2) or decided not to. The issue of deference in this context refers to whether or not the appellate court yielded to the judgment of the lower court on its application of section 24(2). The remainder of appellate cases in this survey did not deal with the issue of deference and are not included in the table. For instance, some appellate decisions overturned the trial judge's finding of no *Charter* breach and consequently made its own assessment on section 24(2). The question of deference was therefore not relevant.

In almost half of cases reviewed, the appeal court deferred to the trial judge's assessment under section 24(2). While this does not demonstrate the highest level of deference to

[66] The data for this table does not include Québec cases.

trial courts, the numbers do show that appeal courts defer to trial judges more often than not. In only 30% of cases the appellate court rejected the trial judge's assessment on section 24(2). This includes cases in which the appeal court did not defer to the trial judge's analysis but did come, in the final analysis, to the same conclusion on whether or not to exclude the evidence.

As noted in Part I, *Grant* and *Coté* emphasized that considerable deference is owed to the trial judge's section 24(2) determination. As long as the trial judge has considered the correct factors and has not made any unreasonable findings, deference is owed on appeal.[67] As the Saskatchewan Court of Queen's Bench stated in *R. v. Watchel*, "[t]his is because a trial judge hears the evidence, and is in a better position to weigh the credibility of witnesses and determine their effect on all the issues, including that raised by section 24(2)".[68]

In 16 cases (42 % of cases), the appeal court affirmed the trial judge's decision on section 24(2). In several cases, the appeal court gave deference to the trial judge's decision regarding the seriousness of the breach and its weight in the *Grant* analysis.[69] For instance, in *R. v. McCammon*,[70] the Manitoba Court of Queen's Bench affirmed the trial judge's decision to place more weight on the seriousness of the breach than on the other factors.[71] The court citing *Buhay* stated, "the role of deference is especially important

[67] *Coté*, *supra* note 13 at para. 44.
[68] *R. v. Watchell*, 2012 SKQB 273, 2012 CarswellSask 481 at para. 51.
[69] See *R. v. Mack*, 2012 ABCA 42, 2012 CarswellAlta 255; *R. v. Ismail*, 2012 ABCA 178, 2012 CarswellAlta 1000; *R. v. Grondin*, 2012 SKQB 182, 2012 CarswellSask 313.
[70] *R. v. McCammon*, 2012 MBQB 154, [2012] 93 C.R. (6th) 291.
[71] *Ibid.* at para. 50.

with respect to the trial judge's assessment of the seriousness of the breach, which depends on an assessment of the evidence in the case".[72]

The weight given to the seriousness of the offence was challenged on appeal in two cases. In *R. v. Bacon*,[73] the British Columbia Court of Appeal held that "the judge should not have given weight to the nature of the charges against the appellant".[74] The trial judge cited case law pre-dating *Grant* which held that the exclusion of guns would, in general, more negatively impact the administration of justice than their admission.[75] The Court of Appeal stated that the seriousness of the offence does not carry the same weight as it had pre-*Grant*. In the final analysis, however, the trial judge's decision to admit the firearms evidence was upheld because removing consideration of this factor would not have led to a different result.[76]

Conversely, in *R. v. Campbell*,[77] the Ontario Court of Appeal affirmed the trial judge's decision stating that the trial judge did not overemphasize the seriousness of firearms offences in finding there was a greater public interest in prosecuting gun offences than drug offences.[78] The trial judge supported this point with two pre-*Grant* cases[79] that noted the increasing prevalence of gun offences in Canada and the heightened need to protect

[72] *Ibid.*
[73] *R. v. Bacon*, 2012 BCCA 323, [2012] 286 C.C.C. (3d) 132.
[74] *Ibid.* at para. 39
[75] *Ibid.* at para. 38, citing *R. v. Mpamugo*, [2009] O.J. No. 953 (S.C.) at para. 48.
[76] *Ibid.* at para. 42.
[77] *R. v. Campbell*, 2012 ONCA 394, 2012 CarswellOnt 7254 [*Campbell*].
[78] *Ibid.* at para. 18.
[79] *R. v. Clayton*, 2007 SCC 32, [2007] 2 S.C.R. 725; *R. v. Danvers*, [2005] 199 C.C.C. (3d) 490 (Ont. C.A.) [*Danvers*].

society from "criminals armed with deadly handguns".[80] The Court of Appeal found no error in the trial judge's reliance on this authority to support his view that there was a greater public interest in the prosecution of gun offences.

In 10 cases (30% of total cases), the appellate court did not defer to the trial court's section 24(2) determination. In *R. v. Willoughby*,[81] the Ontario Superior Court overturned the trial judge's decision to admit evidence based on an unreasonable finding related to the seriousness of the police conduct. It was not reasonable for the trial judge to determine that the seriousness of the *Charter* violation was minimal given the "scathing findings" [82] he made against the police. The trial judge found the officer's explanation for trespassing on the property not credible and determined that the officer was on a "fishing expedition".[83] Based on these findings, the reasonable conclusion was that the police misconduct was on the serious end of the spectrum.

In *R. v. B. (T.W.)*,[84] the Manitoba Court of Appeal overturned the trial judge's section 24(2) decision to exclude the evidence based on several unreasonable findings and ordered a new trial. First, her conclusion "that the police conduct was skewed because of a personal relationship between a police officer and the accused's mother" [85] was not founded in evidence. The trial judge erred in finding that this relationship elevated the seriousness of the breach. Also, the Court of Appeal found, unlike the trial judge, that

[80] *Campbell*, *supra* note 77 at para. 18, citing *Danvers*, *ibid*. at para. 77.
[81] *R. v. Willoughby*, 2012 ONSC 3139, 2012 CarswellOnt 8509.
[82] *Ibid.* at para. 14.
[83] *Ibid.*
[84] *R. v. B. (T.W.)*, 2012 MBCA 7, [2012] 92 C.R. (6th) 64.
[85] *Ibid.* at para. 39.

police had reasonable grounds to obtain a search warrant had they believed they needed one.[86] Finally, the trial judge's analysis was flawed on the second branch of *Grant*, as her view that there was high expectation of privacy in the venting system of the accused's bedroom was not founded in evidence.[87] The fact that police only searched the ductwork and no other part of the accused's bedroom minimized the impact on the accused's *Charter*-protected rights.

In summary, the survey results show that a considerable amount of deference was given to trial court decisions: appellate intervention on section 24(2) occurred in only 30% of cases. It is clear, therefore, that in the majority of cases appellate courts will not interfere with section 24(2) rulings. This relatively high level of deference accords with the principles set out in *Grant* and *Coté*. As trial courts are positioned to assess the evidence first-hand, they are best placed to determine how the evidence impacts on the three lines of inquiry under *Grant*. However, given conflicting appeal court judgments as to the weight that should be accorded to the seriousness of the offence, clarification by the SCC on this point would perhaps yield more consistency in lower court rulings.

Chapter 4 Exclusion by *Charter* Right Breached

Chapter 4 deals with rates of exclusion of evidence in relation to the *Charter* right breached. The number of times courts excluded evidence for any particular *Charter* right

[86] *Ibid.* at para. 40.
[87] *Ibid.* at para. 41.

were counted and compiled in Table 4 below. The data for Québec cases is included in a separate table following discussion of exclusion rates in common law provinces.

In Tables 4 – 8,[88] only data from trial court cases is included. Data related to appeal court cases was not included in these tables since their decisions did not always answer the question of whether or not the evidence was excluded. For example, in some cases, the appeal court rejected the trial judge's decision and sent the case back to trial to decide on the matter of exclusion. As it was not possible to include all appeal court cases, the decision to only include trial level decisions seemed appropriate.

Table 4 – Exclusion by *Charter* Right Breached

When One of the Rights Breached Involved…	**Number of Cases**	**Number Excluded**	**% Excluded**
Section 7	4	3	75%
Section 8	80	59	74%
Section 9	43	36	84%
Section 10(a)	16	12	75%
Section 10(b)	36	24	67%

[88] Tables 5 – 8 are shown and discussed in subsequent chapters of this thesis.

The data from Table 4 shows that breaches related to section 9 resulted in the highest rate of exclusion (84%), while section 10(b) breaches resulted in the lowest rate (67%). Of the four cases finding section 7 violations, in all but one case the evidence was excluded. Breaches of section 8 and 10(a) rights resulted in exclusion in almost equal measure, in 74% and 75% of all cases, respectively.

Of the pool of 98 trial court judgments, a violation of section 8 was found in 80 cases. This represents almost double the number of cases finding a breach of section 9, the *Charter* right that was breached the second highest number of times. Among the cases surveyed, section 8 breaches were, clearly, far more prevalent than breaches of any other *Charter* right.

Exclusion for section 8 violations stemmed from warrantless searches of the accused's vehicle or residence as well as searches with a warrant found to be deficient. *R. v. Lao*[89] involved a breach of section 8 based on a telewarrant that could not have been issued. The court found that the Information to Obtain (ITO) was carelessly drafted, materially misleading and factually inaccurate. It contained unsubstantiated statements and invalid inferences resulting from a careless investigation. Moreover, recourse to the telewarrant procedure was not justified since there was no evidence of urgency and that the officer could not attend the Justice of the Peace's office in person. An officer who was not the affiant interfered with the application process by telephoning the Justice of the Peace. The conversation caused the Justice to issue the warrant, but no notes of the conversation were recorded. This was a serious interference that undermined the integrity and

[89] *R. v. Lao*, 2012 ONCJ 225, 2012 CarswellOnt 4750.

independence of the warrant application process. Excluding evidence consisting of a marijuana grow-operation, the court held that permitting these police practices to go forward would bring the administration of justice into disrepute.

In *R. v. Law*,[90] the court found that the entry and search of the accused's residence during an impaired driving investigation violated section 8 as there was no warrant or any exigent circumstances justifying entry. The warrantless search of the accused's home was a serious breach, particularly since the accused had refused entry to police. The violation was held to be deliberate and wilful. The officer could not have been unaware that entering a private residence without authority or permission was serious. The court excluded both the officer's observations of the accused inside the residence as well as the breath test results.

R. v. Lee[91] is the single case where evidence was not excluded following a section 7 *Charter* breach. The British Columbia Supreme Court decided to admit the marijuana grow operation evidence, despite finding a section 7 breach based on a police dog's attack on the accused. The impact on the accused's *Charter*-protected rights was held to be serious as it resulted in painful injuries and broken skin in several places. However, under the first line of inquiry, the court found that the police action that led to the dog bites was not particularly serious. The dog's behaviour was unexpected since he had never before acted aggressively.[92] Further, the officer did not act deliberately or

[90] *R. v. Law*, 2012 MBQB 321, 2012 CarswellMan 715.
[91] *R. v. Lee*, 2012 BCSC 504, 2012 CarswellBC 977.
[92] *Ibid.* at para. 81

recklessly. The dog attack was due, instead, to the officer's carelessness in not realizing the dog was nearby to the accused. [93]

As noted above, in the three other cases finding section 7 violations, the court excluded the evidence. This is not surprising given that the violations leading to section 7 breaches were generally based on serious police misconduct. For example, in *R. v. Helary*,[94] five police officers entered a private residence at night without a warrant or reasonable grounds, arrested the accused, searched his cell phone and occupied the residence for three hours while waiting for a warrant to arrive.

A lower exclusion rate for section 10(b) breaches is unexpected because of the emphasis the SCC in *Grant* placed on the essential purpose of section 10(b), that is, "the detainee's ability to choose whether to cooperate with the investigation by giving a statement".[95] Moreover, the SCC stated that the section 24(2) analysis as outlined in *Grant* would support a general presumption of exclusion of statements obtained in violation of the *Charter*.[96] In the context of an unlawfully obtained statement, the right most often violated is the section 10(b) right to counsel. As section 10(b) protects fundamental rights including an individual's liberty and autonomy interests, the SCC held that a violation of these rights would tend to weigh in favour of exclusion. [97] Although exclusion for section 10(b) is still relatively high insofar as evidence was excluded more often than not, it is surprising that breaches of section 10(b) yielded the very lowest rate.

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[93] *Ibid*. at para. 76
[94] *R. v. Helary*, 2012 SKPC 15, 2012 CarswellSask 51 [*Helary*].
[95] *Grant*, *supra* note 1 at para. 28.
[96] *Ibid.* at para. 92.
[97] *Ibid.* at para. 95.

Exclusion for violations of section 10(b) stemmed from breaches of both the informational and implementation components of police duties under section 10(b). *R. v. Jarvis*[98] involved breaches of the accused's sections 8, 9, 10(a) and 10(b) rights in the course of a vehicle stop. Police unlawfully detained the accused, deployed a sniffer dog and conducted an illegal search of the full interior of the accused's rental vehicle. As to the section 10(b) breaches, the court held that the accused was given shortened and incomplete section 10(b) advice upon investigative detention. Police neglected to mention the accused's right to access counsel without delay and the availability of Legal Aid. Moreover, police breached the accused's section 10(b) rights in relation to implementation duties. Police did not provide access to counsel when the accused stated, at the time of detention and again upon arrest, that he wished to speak with counsel. Although providing access to counsel on a public highway posed problems, an officer on scene could have transported the accused to the detachment located 15 minutes away to speak with counsel.

The court found that the section 10(b) informational breach was on the less serious end of the scale. A few minutes following investigative detention, the accused was arrested and, at that point, fully advised of his section 10(b) *Charter* rights. The implementation breach was deemed more serious as the accused's right to counsel was suspended for an hour. During this time police searched the full interior of the rental vehicle. On the other hand, the section 10 violations were not linked to the discovery of the evidence. There was no causal connection to the illegal search and seizure of the evidence, thereby mitigating the

[98] *R. v. Jarvis*, 2012 ABQB 602, 2012 CarswellAlta 1669 [*Jarvis*].

section 10 breaches. Moreover, police did not attempt to elicit evidence from the accused during the suspension of his right to counsel. Despite multiple breaches of the accused's *Charter* rights, the court ultimately declined to exclude the drug evidence.

In *R. v. Grewal*,[99] the section 10(b) breach related to the implementation component of the accused's section 10(b) right in an impaired driving investigation. The accused's ability to understand his right to counsel and legal advice provided in English was impacted by difficulties in language comprehension. The court found no deliberate or flagrant disregard of the accused's *Charter* rights. The officers genuinely believed they fulfilled their section 10(b) duties by providing the accused with access to legal advice. However, police misunderstood their obligation to ensure that the accused had access to comprehensible legal advice. The breach was placed at the lower to middle end of the spectrum. The court stated that the breach was technical and that the officers acted in good faith. The officers believed the accused understood what was said in discussions with police. The accused also never asked for assistance in his native language. There was no evidence that duty counsel raised concerns with police about the accused's language comprehension. This led to admissibility of the breath sample results.

High exclusion for section 9 breaches reflects, perhaps, a particular concern for certain police practices. For instance, in several cases, as described below, there was concern about the unjustified use of police power to detain individuals for investigation.

[99] *R. v. Grewal*, 2012 ONCJ 771, 2012 CarswellOnt 16474.

In at least eight cases, the court found that police did not have reasonable grounds to suspect the accused was involved in an ongoing criminal offence, exceeding the limits for investigative detention set out in *R. v. Mann*.[100] Of those eight cases, evidence was excluded in all but one case. In *Jarvis*,[101] the court found that the breach was on the less serious end of the scale because the officer subjectively believed that he had reasonable grounds to detain the accused and to deploy a sniffer dog. There were some suspicious indicators though not sufficient to amount to a reasonable suspicion.[102] This led to admission of the evidence.

In the other seven cases identified, section 9 breaches based on an unlawful investigative detention led to exclusion of the evidence. For example, in *R. v. Stewart*,[103] the lack of a reasonable suspicion for investigative detention resulted in the court finding a serious disregard for the accused's rights. The court noted the concern for the potential for abuse in investigative stops, which is "inherent in their low visibility exercise of discretionary power"[104] and the need for courts to take seriously the violation of rights in the context of such stops. Although the court did not directly address the issue of racial profiling, under its analysis of the first *Grant* factor, the court referred to the individual being stopped as a "young black man"[105] injecting some consideration of the race of the accused into the analysis.

[100] *R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 59 [*Mann*].
[101] *Jarvis*, *supra* note 98.
[102] *Ibid.* at para. 64.
[103] *R. v. Stewart*, 2012 CarswellOnt 10004 (Ont. C.J.).
[104] *Ibid.* at para. 50.
[105] *Ibid.* at para. 47.

In *R. v. Assiu*,[106] the section 9 *Charter* violation stemmed from police not acting within the limits of police authority while engaged in neighborhood patrolling. The accused was randomly stopped while standing at the corner near a grocery store. The officer simply did not recognize the accused from the neighborhood. In her section 24(2) analysis, the trial judge noted that the individual stopped was a young man from a visible minority but, again, did not engage in an analysis of racial profiling. The trial judge stated that she was "struck by the nature of the violations… because it is easy to see how readily they could occur during the numerous encounters between the police and those they serve and protect".[107] The court commented that many *Charter* breaches "may go unidentified and unredressed because they did not turn up relevant evidence leading to a criminal charge".[108]

There were also several section 9 cases where arrest was not justified but some lesser form of detention may have been. Courts expressed concern that the power of arrest was being used without consideration for the use of police powers short of arrest. For example, in *R. v. Brown*,[109] the Ontario Court of Appeal found a section 9 violation in the course of a pedestrian stop where the accused was arrested and the officer lacked objectively reasonable grounds to arrest. The officer did not consider the possibility of exercising police powers short of actual arrest. The court stated,

> It is apparent that Officer Manafo sees arrest as the best tool when investigating crime. He arrested in this case, as he apparently routinely does, without considering other options because in his mind, if it turns out there are no grounds for the arrest, the individual will be released. To Officer Manafo, there is no harm

[106] *R. v. Assiu*, 2012 ONCJ 327, 2012 CarswellOnt 6930 [*Assiu*].
[107] *Ibid.* at para. 39
[108] *Ibid.*, citing *Grant*, *supra* note 1 at para. 75.
[109] *R. v. Brown*, 2012 ONCA 225, [2012] 286 C.C.C. (3d) 481.

> in an arrest if it is brief. The officer does not appear to understand that arrest is a serious intrusion on the personal autonomy of the person arrested.[110]

The court found that the violation was serious because of the officer's cavalier attitude towards his arrest powers. He arrested the accused without considering whether a lesser degree of interference with the accused's liberty was appropriate.[111]

In *R. v. Paintednose*,[112] the court found that police, having received information that someone in a group of individuals had a machete, were entitled to investigate and make inquiries but should not have singled out the accused for investigative detention. The officer lacked reasonable suspicion and was acting on a hunch.[113] Moreover, the officer's actions were not limited to an investigation detention: the officer took control of the accused, restrained and handcuffed him. The court found this amounted to a *de facto* arrest, which was a serious breach of the accused's *Charter* rights. This led to exclusion of the machete evidence.

In *R. v. Vulic*,[114] the court held that even though the officer had a reasonable suspicion to investigate the accused, the manner of detention was unlawful. The officer handcuffed the accused's hands behind his back and conducted a search of personal items on his person. The court held that the officer used his power to detain to carry out a *de facto* arrest. This level of interference was impermissible under *Mann* absent some facts

[110] *Ibid.* at para. 25.
[111] *Ibid.* at para. 26.
[112] *R. v. Paintednose*, 2012 SKPC 164, 2012 CarswellSask 700.
[113] *Ibid.* at para. 21.
[114] *R. v. Vulic*, 2012 SKQB 221, 2012 CarswellSask 384.

justifying handcuffing the accused.[115] Interference with the accused's liberty to this extent surpassed the limits of a lawful investigative detention. This was found to be a major *Charter* breach leading to exclusion of drug evidence.

In a few cases, a section 9 violation involving an unlawful detention was combined with an illegal search conducted incident to investigative detention. For example, in *R. v. Earle*,[116] the court found that police had no articulable cause to stop a taxi on the side of the highway. The investigative detention of the passenger was based on "gut feeling" and speculation. The court found that the officer's search of the accused's purse and suitcase violated section 8 as the search was not necessary to protect officer safety or prevent destruction of evidence. The court excluded the evidence, which consisted of 24 pounds of marijuana and 213 grams of hashish.

R. v. Meyers[117] involved a traffic stop for speeding and a subsequent search of the accused's vehicle incident to investigative detention. Upon stopping the accused, the officer detected a strong odour of fresh marijuana. The court found the search incident to investigative detention to be unreasonable. Its purpose was to discover evidence, rather than to ensure officer or public safety. Searching for evidence was not permitted as part of investigative detention, therefore, the search violated section 8. Moreover, there were no urgent circumstances that allowed the officer to search the vehicle without a warrant. The court held that the breach of the accused's *Charter* rights was wilful or reckless and excluded the drug evidence.

[115] *Ibid.* at para. 22.
[116] *R. v. Earle*, 2012 NSPC 27, 2012 CarswellNS 222.
[117] *R. v. Meyers*, 2012 BCPC 50, [2012] 284 C.C.C. (3d) 248.

Table 4(a) – Exclusion by *Charter* Right Breached: Québec

When one of the Rights Breached Involved…	Number of Cases	Number Excluded	% Excluded
Section 7	0	--	--
Section 8	6	6	100%
Section 9	5	5	100%
Section 10(a)	2	1	50%
Section 10(b)	5	4	80%
Section 15(1)	1	1	100%

The single case in Québec that did not exclude evidence following a breach was a case in which an accused's sections 10(a) and 10(b) rights were violated.

Among cases for all provinces, Québec was the only jurisdiction to exclude evidence based on a finding of racial discrimination. The Québec Municipal Court in *Longueuil (Ville) c. Debellefeuille*[118] held that there was a breach of the accused's sections 9 and 15(1) rights where the officer's stop of the accused in his vehicle was the result of racial profiling.

[118] *Longueuil (Ville) c. Debellefeuille*, 2012 CanLII 55224 (QC CM).

As noted, no other case in this survey squarely addressed the issue of racial profiling. However, in *R. v. Trott*,[119] the British Columbia Provincial Court found that the officer was regularly engaged in a practice of "proactive policing", [120] which was troubling. This involved stopping individuals, without reasonable suspicion, inquiring about their criminal backgrounds and then conducting police records checks to verify that the information given was accurate.[121] In deciding whether a detention had occurred, the court took into account the particular characteristics of the accused that may have led him to believe he was not free to walk away. This included the accused's youth, Aboriginal status and low level of sophistication. The trial judge expressed concern for the many more individuals who are stopped by police, without reasonable suspicion, but who do not end up being charged criminally. The court noted that random police stops are sometimes based on characteristics such as youth and choice of clothing. In deciding whether a remedy should be granted for the breach, the trial judge considered "the impact of a generalized "profiling" practice on the community at large".[122] This random stop by police had to be denounced to ensure it did not "become a routine aspect of normal police conduct".[123]

Chapter 5 Exclusion by *Grant* Factor: First Factor

Chapter 5 deals with the courts' interpretation of the first *Grant* factor relating to the seriousness of the *Charter*-infringing state conduct. The rate of exclusion under the first

[119] *R. v. Trott*, 2012 BCPC 174, 2012 CarswellBC 1638.
[120] *Ibid.* at para. 55.
[121] *Ibid.* at para. 56.
[122] *Ibid.* at para. 58.
[123] *Ibid.* at para. 59.

line of inquiry is analyzed vis-à-vis the seriousness of the *Charter* breach, the level of knowledge by police of the violation and systemic issues/patterns of violations. The data for each of these sub-factors was counted and compiled in Table 5. The results are discussed in detail below.

Table 5 – First *Grant* Factor

Table 5(a) – Degree of Seriousness of *Charter* Breach

Degree of Seriousness	**Number of Cases**	**Number Excluded**	**% Excluded**
Major Breach	65	62	95%
Mid-Range Breach	17	8	47%
Minor Breach	15	1	7%

Table 5(b) – (Good Faith) Level of Knowledge by Police of *Charter* Breach

Level of Knowledge	**Number of Cases**	**Number Excluded**	**% Excluded**
Knowing and Blatant Violation	36	34	94%
Negligent in Not Realizing Breach	25	22	88%

Understandable Mistake/Inadvertent or Technical Breach/Good Faith	26	6	23%

Table 5(b) shows, unsurprisingly, that the higher the level of knowledge, the more likely the evidence is to be excluded. In some cases, courts did not comment on the officer's level of knowledge. For this reason, the total number of cases included in this table does not correspond to the total number of cases canvassed in the survey overall.

As noted in Chapter 1, judgment was used to classify each factor given the varying language used by courts in assessing the level of knowledge of the officer. If the officer's conduct was said to be deliberate, flagrant, wilful or reckless, this was treated as synonymous to a knowing and blatant violation falling at the highest end of the spectrum.

Statements by courts that the police "either knew or ought to have known", or were "either aware or should have been aware" that their actions violated the *Charter* mirror language used in *Harrison*. The SCC stated that courts must dissociate themselves from misconduct where "police knew (or should have known) that their conduct was not *Charter*-compliant".[124] Cases using similar language were classified at the top of the scale where it was clear that police action was deliberate. Where police were acting negligently or carelessly, this was classified in the second category.

[124] *Harrison*, *supra* note 2 at para. 22.

The second category included cases where the officer was careless, negligent or was found to be acting in neither good nor bad faith. The third category included cases where the officer was found to be acting in good faith, where the officer had an honest belief that he or she was acting lawfully, where the officer did not knowingly breach the accused's rights, where the breach was fleeting, technical, or unintentional, or where the officer's conduct was not deliberate.

In several cases, the level of knowledge attributed to the officer did not coincide with the degree of seriousness of the breach. For instance, some breaches were found to be serious violations warranting exclusion of the evidence even though the level of knowledge was at the lowest end of the continuum. For instance, in *R. v. Dignum*[125] the court found the officer was acting in good faith even though he did not articulate reasonable suspicion for a roadside breath sample demand. Excluding the breath sample evidence, the trial judge decided that the arrest without reasonable grounds was a serious breach.

A wide range of police actions was classified as being carried out in good faith. For instance, in *R. v. Auger*[126] a strip search held to be unlawful because the officer lacked reasons for the search, did not keep a proper record of it and did not get approval from a supervisor, was found to be in good faith since the officer believed she was acting lawfully.[127]

[125] *R. v. Dignum*, 2012 ONCJ 668, 2012 CarswellOnt 13261.
[126] *R. v. Auger*, 2012 ABPC 100, 2012 CarswellAlta 2236 [*Auger*].
[127] *Ibid*. at para. 513.

In other cases, the breach was inadvertent and minor which led to a finding of good faith. For instance, in *R. v. Kolevski*,[128] the breach related to a violation of the implementation component of section 10(b). The accused was not provided with a list of lawyers or the phone book when he told police he did not have a lawyer. Instead, police put the accused in telephone communication with duty counsel. It was unclear whether this was in fact his counsel of choice. Finding this to be an inadvertent breach, the court held the officer acted in good faith.[129] He had attempted to be respectful of the accused's rights and ensured that the accused received immediate access to counsel.

In *R. v. Darrach*,[130] police breached the accused's section 8 right since the warrant issued for the accused's arrest had not been endorsed in the province where he was arrested. The court held that the breach was fleeting and technical since the arresting officer believed a valid warrant was in force when he made the arrest. The arrest had been made in good faith. [131] This was considered to be an inadvertent violation rather than deliberate.

In several cases, the absence of bad faith appeared to be treated as synonymous with the presence of good faith. This approach is open to criticism. As the Saskatchewan Court of Appeal stated in *R. v. Shinkewski*,[132] "an absence of bad faith does not presumptively lead to a finding that the police acted in good faith".[133]

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[128] *R. v. Kolevski*, 2012 ONCJ 609, 2012 CarswellOnt 12349.
[129] *Ibid.* at para. 34.
[130] *R. v. Darrach*, 2012 PESC 16, 2012 CarswellPEI 19.
[131] *Ibid.* at para. 49.
[132] *R. v. Shinkewski*, 2012 SKCA 63, [2012] 289 C.C.C. (3d) 145 [*Shinkewski*]. (This case was not included in the survey as the Court of Appeal overruled the lower court's finding of a *Charter* breach. It discussed s. 24(2) in the event it had found a breach).
[133] *Ibid.* at para. 31.

In *R. v. Munro*,[134] the court found that the officer's decision to detain the accuseds in a parking lot without having done any investigation was arbitrary. In addition to the section 9 *Charter* breach, the officer breached the accuseds' sections 8 and 10 rights in searching the accuseds' vehicle and cell phones and also failing to advise the accuseds' of their section 10 rights. Despite these multiple breaches, the court held the officer had not acted in bad faith.[135] The officer had overreacted when further investigation was necessary. The trial judge appeared to equate a lack of bad faith with a finding of good faith. For instance, the court stated that the officer "believed, in good faith, that a drug deal was going down"[136] and further stated that the officer demonstrated "over-enthusiastic conduct, rather than bad faith".[137] This led to admission of the evidence.

In *R. v. Davis*,[138] the trial judge similarly linked the absence of bad faith with the presence of good faith. *Davis* involved an unlawful warrantless entry into the accused's residence. The court held that the police actions, in entering the residence during a man track "were actions conducted in good faith, acting on a hunch".[139] Once inside the residence police did not act negligently nor did they intentionally disregard the accused's *Charter* rights. The court found "there was no evidence of bad faith during the time period that police were in the residence awaiting the search warrant".[140] Though the breach was considered to be serious, the court did not attribute a high level of knowledge to the officers, finding there was no deliberate or reckless disregard for the accused's

[134] *R. v. Munro*, 2012 ONSC 43, 2012 CarswellOnt 483.
[135] *Ibid.* at para. 82.
[136] *Ibid.*
[137] *Ibid.* at para. 89.
[138] *R. v. Davis*, 2012 ABPC 125, 2012 CarswellAlta 866.
[139] *Ibid.* at para. 31.
[140] *Ibid.* at para. 32.

Charter rights. This led the court to conclude that "[p]olice appear throughout to be acting in good faith".[141]

The SCC decided to admit cocaine evidence in *R. v. Aucoin*[142] despite finding that the officer's decision to place the accused in the rear of his cruiser, and conduct a pat-down search of him prior to, was unreasonable. The Court was satisfied that the officer had acted in good faith. He showed no intention to misuse his powers and did not ignore the accused's rights, which mitigated the seriousness of the breach.[143] Importantly, the pat-down search was conducted for safety reasons. The officer was not searching for evidence nor was he following any routine protocol. Had this been the case, the Court held that the officer's actions would have been considered more serious and exclusion would have been probable.[144]

Table 5(c) – Exclusion for Systemic Issues and Patterns of Violations

When Breach involved…	**Number of Cases**	**Number Excluded**	**% Excluded**
Systemic Issues	3	2	67%
Pattern of Violations/Misconduct	11	11	100%

[141] *Ibid.*
[142] *R. v. Aucoin*, 2012 SCC 66, [2012] S.C.J. No. 66.
[143] *Ibid.* at para. 49.
[144] *Ibid.* at para. 47-8.

The data in Table 5(c) shows that trial judges are not identifying a large number of cases where systemic issues or patterns of violations are at play. In cases where a pattern of violations was found, this led to exclusion in all cases. Out of 11 cases finding a pattern of violations, three of these relate to breaches in *R. v. Newman*, a matter in which three separate judgments were issued dealing with admissibility of various pieces of evidence.

In *R. v. Newman*,[145] the court found breaches of the accused's sections 7, 8, 9, 10(a) and 10(b) *Charter* rights when police investigated him for the murder of his estranged wife. Police did not advise the accused of his right to counsel until after they had secured incriminating evidence from him during an interview. Although the accused had asserted his right to silence, police continued to question him and failed to advise him that he was free to leave, as he was not under arrest. The search warrants for the accused's vehicle and residence were found to be invalid as the ITO relied on the illegally obtained statement. Further, the police, without grounds, denied the accused access to his car and home while awaiting the warrants.

In *Newman*, the court, in finding the breaches to be very serious, both individually and considered together, held that this constituted "a systemic, deliberate and planned disregard by the police of Mr. Newman's rights designed to obtain incriminatory evidence from him".[146] The actions of police were judged to have been undertaken with a deliberate intention to systematically breach the accused's rights. It was appropriate to

[145] *R. v. Newman*, 2012 NLTD(G) 61, 2012 CarswellNfld 445 [*Newman*].
[146] *Ibid.* at para. 24.

consider the "cumulative effect"[147] of the breaches in the section 24(2) exclusion analysis. Indeed, the court refused to treat the breaches separately and held, instead, that they formed one single transaction.[148] The court further held that the self-serving and disingenuous testimony of two officers was aggravating, per the SCC's ruling in *Harrison*.

The prior conduct of one of the officers in *Newman* was also found to be a relevant factor under the first branch of *Grant*. The court referred to a previous case where the officer had been harshly criticized by the judge for persistent questioning of an accused who had requested counsel and asserted his right to remain silent. The officer's prior conduct could be considered when balancing the factors under *Grant*. [149]

As noted above, the court excluded evidence in all cases where it found a pattern of misconduct. In *R. v. Liew*,[150] the Ontario Superior Court excluded crucial evidence in a controlled delivery case involving thirty kilograms of cocaine. The breaches of the accused's rights under sections 8 and 10(b) formed part of a pattern of misconduct that demonstrated "either a serious lack of training, or a cavalier attitude towards the *Charter*-protected rights of accused persons, or both".[151] Police failed to advise the accused of his section 10(b) right to counsel without delay, failed to ensure that the accused understood his rights before interviewing him and failed to refrain from eliciting evidence from him until the accused had spoken with counsel. The breaches were considered to be very

[147] *Ibid.*
[148] *R. v. Newman*, 2012 NLTD(G) 30, 2012 CarswellNfld 442 at para. 38 [*Newman2*].
[149] *Ibid.* at para. 49.
[150] *R. v. Liew*, 2012 ONSC 2990, 2012 CarswellOnt 6932 [*Liew*].
[151] *Ibid.* at para. 66.

serious. The RCMP officers had not considered how to implement the accused's right to counsel knowing that the accused was of Asian descent, they did not arrange for interpreter services and no officer had the 1-800 number for Legal Aid in his notebook. One officer was unfamiliar with the terms "informational" and "implementational" as components of section 10(b) duties, which evidenced "at the very least, a serious lack of training".[152] Police repeated these same mistakes when dealing with a second accused in the case one month later. This concerned the trial judge as "[t]here was apparently no recognition that mistakes had been made and no effort made to do better".[153]

Moreover, the police unlawfully searched the accused's cell phone incident to arrest and made a record of the entire call history without a warrant. The ensuing search of the accused's residence was found to be unlawful because the ITO relied on evidence from the cell phone search. These multiple breaches led to exclusion of the accused's statements and all evidence derived from the cell phone and the execution of the search warrant.

Systemic issues were found to be present in three cases surveyed. *R. v. Botten*[154] is a case that dealt with breaches of a systemic nature. The court found that the detention and arrest of the accused, protesting peacefully at the G20 Summit in Toronto, was a violation of her section 9 *Charter* right. The trial judge stated that the decision of the police to arrest an entire crowd of protestors was an abuse of police power and unjustified.[155] This

[152] *Ibid.* at para. 47.
[153] *Ibid.* at para. 46.
[154] *R. v. Botten*, 2012 CarswellOnt 13335 (Ont. S.C.J.).
[155] *Ibid.* at para. 56.

decision was further aggravated by the fact that an officer who was off-site made the call to arrest all protesters and that there was no indication of violence or weapons at the scene.

Following arrest, the accused in *Botten* was subjected to abject conditions of detention. The court found that " [s]he was put in an overcrowded and cold pen, with no opportunity to get dry or comfortable in any way. If people wanted to sit or sleep most of them had to sit or lie on a cold, wet, concrete floor".[156] Excluding the evidence, the trial judge expressed the concern that this type of abuse must not be disregarded or else "we run the risk of it repeating itself; the more it happens the more the fabric of what makes us a democracy will be torn away".[157]

As noted in Chapter 2, the SCC in *Harrison* stated that the absence of systemic concerns should not be considered a mitigating factor. [158] However, in at least one case surveyed, the court found that the absence of any pattern of abuse tempered the seriousness of the *Charter* breaches. In *R. v. Sonne*,[159] the Ontario Superior Court declined to exclude evidence of chemicals and related equipment that was essential to the Crown's case on four charges of possession of explosive substances. The court found breaches of the accused's sections 8, 9, 10(a) and 10(b) rights on multiple days by several different officers. In admitting the evidence, the court concluded, "there were numerous *Charter* breaches that were serious, but that is tempered by the fact that I did not find any bad

[156] *Ibid.* at para. 58.
[157] *Ibid.*
[158] *Harrison*, *supra* note 2 at para. 25.
[159] *R. v. Sonne*, 2012 ONSC 1755, 2012 CarswellOnt 4674.

faith on the part of the officers, nor was there any systemic failure nor any institutional pattern of abuse of *Charter* rights".[160] The violations were, instead, the result of errors in judgment or carelessness by individual officers involved in the investigation.

Chapter 6 Exclusion by *Grant* Factor: Second Factor

Chapter 6 deals with the courts' interpretation of the second *Grant* factor relating to the impact of the breach on the accused's *Charter*-protected interests. The rate of exclusion under the second line of inquiry is classified according to the degree of impact of the breach. Rates of exclusion for discoverable and non-discoverable evidence are also analyzed as the issue of discoverability of the evidence pertains to the second *Grant* factor. The results appear in Table 6 and are discussed in detail below.

Table 6 – Second *Grant* Factor

Table 6(a) – Impact on the Accused's *Charter*-Protected Interests

Impact on the Accused's *Charter*-Protected Interests	**Number of Cases**	**Number Excluded**	**% Excluded**
Serious (Profoundly intrusive)	54	48	89%

[160] *Ibid.* at para. 94.

Moderate	21	14	67%
Minimal (Fleeting and Technical)	17	4	24%

Table 6(a) shows that the greater the impact of the violation on the accused's rights, the more likely the evidence is to be excluded. Where the impact was considered to have a serious impact on the accused's *Charter* rights, evidence was excluded in 89% of cases. Where the impact was minimal, evidence was excluded in 24% of cases.

Cases where the court said the impact was significant or serious were classified at the top of the scale. Cases where the court said the impact was insignificant, minimal or transient were categorized at the lowest end. Cases where the court stated the impact was significant but that there was a reduced expectation of privacy due to the location of the search (for example, a search of an accused's vehicle rather than his or her dwelling house) were classified as moderate.

Some trends were evident from the cases surveyed. For instance, an unlawful search of a private residence was generally placed at the high end of the scale due to the high expectation of privacy in an individual's dwelling. However, the impact differed among cases involving residences because of the fact-specific nature of the section 24(2) inquiry.

For example, in *R. v. Atkinson*,[161] the breach involved an officer's illegal observations of shoes upon entry into the accused's residence. The Ontario Court of Appeal held that, although the breach involved the accused's residence, a domain that attracts a high expectation of privacy, the impact of the breach was minimal.[162] The breach occurred in the verandah, not the principal living area. The shoes were also visible from the doorway and in plain sight. Therefore, the incursion into the accused's home was not great. Moreover, the observation of feces adhering to the shoes did not reveal intimate information about the accused's personal choices and lifestyle.[163] This lessened the impact on the accused's privacy interests. The evidence was ultimately deemed admissible.

In cases involving a search of a motor vehicle, the impact was generally considered to be less than in a private residence as an individual usually has less expectation of privacy. Also, driving is a highly regulated activity in which motorists can expect to be stopped by police for highway safety reasons.[164] Nevertheless, courts found there was a significant impact in some cases surveyed involving motor vehicles despite the lesser degree of privacy expected.

For instance, the case of *R. v. Hunt*[165] involved a vehicle stop by police based on a hunch and without reasonable suspicion. The court found that the accused's detention did not involve intrusive action nor was it considerably long. While the court recognized that a

[161] *R. v. Atkinson*, 2012 ONCA 380, [2012] 287 C.C.C. (3d) 544.
[162] *Ibid.* at para. 86.
[163] *Ibid.* at para. 89.
[164] *R. v. Ladouceur*, [1990] 1 S.C.R. 1257.
[165] *R. v. Hunt*, 2012 CarswellNfld 315 (N.L. Prov. Ct.).

vehicle stop is not as intrusive as a search of a private residence, the arbitrary detention of a motorist was neither trivial nor acceptable. The court cited *Harrison* stating that "being stopped and subjected to a search without justification impacts on the motorist's rightful expectation of liberty and privacy in a way that is much more than trivial".[166] The court concluded that to admit evidence obtained during the random vehicle stop would negatively impact the long-term repute of the administration of justice.

Electronic devices generally attracted a high expectation of privacy. This led most courts to find a high impact on the accused's privacy interest in cases of illegal searches of an accused's cell phone or computer. For instance, in *Liew*,[167] the impact of an unlawful cell phone search on the accused's section 8 *Charter* right was found to be significant. The accused had a high expectation of privacy in relation to the personal contents of his phone.

Similarly, in *R. v. Rafferty*,[168] a warrantless search of the accused's laptop and Blackberry was found to have a very high impact on the accused's section 8 *Charter* right. In particular, the information contained in the accused's laptop attracted "an extremely high expectation of privacy".[169] The laptop search yielded information pertaining to the accused's Internet browsing history, showing intimate details of the accused's personality and interest in particular subjects. The laptop also contained downloaded movies and

[166] *Ibid.* at para. 42.
[167] *Liew*, *supra* note 150.
[168] *R. v. Rafferty*, 2012 ONSC 703, 2012 CarswellOnt 5986.
[169] *Ibid.* at para. 134.

communication records. The fact that the laptop was password-protected demonstrated an intention to keep the contents of the computer private.

The impact was less significant with respect to the accused's Blackberry as it did not contain the same level of personal information as the laptop did. However, information about telephone calls and text messages sent and received attracted a high expectation of privacy as well.[170] Despite "extremely serious charges"[171] against the accused, the court excluded both the laptop and Blackberry evidence.

In cases of pedestrian stops by police on public sidewalks, this led some courts to find a high impact on the accused's *Charter*-protected rights. For example, in *Assiu*,[172] the accused was "minding his own business on a public street"[173] when he was stopped by police engaged in neighborhood patrol. Police tried to ascertain his identity and grabbed the accused's arm to search for a tattoo. The court found the encounter to be demeaning. While police did not physically restrain the accused, their actions restricted the freedom that he and the public enjoy when travelling on public streets.[174] Finding that the impact of the sections 8 and 9 breaches was serious, the court stated that admission of the evidence would erode the rights enjoyed by those who travel on public streets which would, thereby, bring the administration of justice into disrepute.

[170] *Ibid.* at para. 136.
[171] *Ibid.* at para. 163.
[172] *Assiu*, *supra* note 106.
[173] *Ibid.* at para. 40.
[174] *Ibid.* at para. 41.

Unlawful strip searches were generally classified as having a high impact. For example, in *Auger*,[175] the court noted that strip searches are highly intrusive and greatly impact on the accused's privacy interests. In *Auger*, the second *Grant* factor favoured exclusion, but the evidence was ultimately admitted.

Table 6(b) – Discoverability of the Evidence

Where the Evidence Was…	**Number of Cases**	**Number Excluded**	**% Excluded**
Discoverable	8	3	38%
Not Discoverable or Discoverability Was Too Speculative	7	7	100%

The question of the discoverability of the evidence was addressed in 15 cases. Where the evidence was held to be not discoverable, or where the court said that discoverability was too speculative to clearly determine, the court excluded the evidence in all cases. In cases where evidence was found to be discoverable, evidence was excluded in 38% of cases.

The fact that discoverability was only considered in 15 of 98 trial court decisions is noteworthy because it shows a fairly low level of consideration being given to this factor. In *Coté*, the SCC clarified that discoverability remains relevant to the section 24(2)

[175] *Auger*, *supra* note 126.

analysis, but that it is not determinative.[176] The fact that the evidence was discoverable should also not lead, inevitably, to a finding of admissibility. Moreover, where the question of discoverability cannot be conclusively determined, it has no impact on the analysis. In the cases surveyed where discoverability was not mentioned, it is perhaps because this factor had no bearing on the analysis, for instance, in cases where the court would need to engage in speculation as to the potential chain of events. Therefore, the court could not, on this point, render conclusive findings.

In a few cases, the fact that the evidence was discoverable was a significant factor leading to admission. For example, in *R. v. Bacchus*[177] the court found that the discoverability of a gun and drugs tipped the scales towards admission. The fact that the evidence could have been discovered, incident to a lawful search incident to arrest, reduced the intrusiveness of the search and, therefore, lessened the impact of the breach. The court admitted the evidence despite characterizing the *Charter* violation as serious and finding there were recurring issues regarding police failure to update police records.

In *R. v. Cole*,[178] the SCC held that the lower courts erred in not considering the impact of the discoverability of computer evidence. The officer had reasonable grounds to obtain a warrant for the accused's work computer had he believed he needed one.[179] If the officer had complied with the requirement for a warrant, the evidence would, inevitably, have been discovered. The SCC commented that, while this could aggravate the seriousness of

[176] *Coté*, *supra* note 13 at para. 70.
[177] *R. v. Bacchus*, 2012 ONSC 5082, 2012 CarswellOnt 15830 [*Bacchus*].
[178] *R. v. Cole*, 2012 SCC 53, [2012] 290 C.C.C. (3d) 247 [*Cole*].
[179] *Ibid.* at para. 93.

the breach in some cases, in the circumstances of this case, the discoverability of the evidence mitigated the impact of the breach.[180] It attenuated the impact because the officer honestly, though mistakenly, believed he had respected the accused's *Charter*-protected rights. Significantly, the Court found that the law pertaining to an individual's right to privacy in a work computer was still unsettled at the time.[181]

Similarly, the court in *R. v. Baribeau*[182] found that the discoverability of a copy of the accused's hard drive attenuated the impact of the breach on the accused's rights. A computer repairman had brought a copy of the hard drive to police after finding evidence of child pornography on the accused's computer. Police then conducted a warrantless examination of the copied hard drive. The court found that the police conduct was comparable to *Cole* insofar as the officer did not knowingly breach the accused's rights. The officer was mistaken in his understanding of the law and his decision to examine the copied hard drive was made in good faith. The circumstances facing police on receiving the copied hard drive was a variation of the kinds of situations courts had addressed to that time. Further, the impact on the accused's rights was not significant because, based on the information provided by the repairman, police would have likely obtained a search warrant to examine the copied hard drive.

Discoverability also mitigated the impact of the breach in *R. v. Do*.[183] The impact of an unlawful arrest was held to be not significant because the marijuana grow-operation

[180] *Ibid.* at para. 89.
[181] *Ibid.* at para. 86.
[182] *R. v. Baribeau*, 2012 SKQB 542, 2012 CarswellSask 903.
[183] *R. v. Do*, 2012 BCSC 411, 2012 CarswellBC 763.

evidence would have necessarily been discovered following a lawful investigative detention of the accused. In responding to a possible house fire call, police were entitled to place the accused under investigative detention to investigate the suspected marijuana grow-operation. However, grounds to place the accused under arrest were not sufficient. Since the marijuana grow-operation was apparent immediately upon entry into the residence, the officer would have discovered the evidence had he merely investigatively detained the accused rather than arrested him. Despite finding serious breaches of the accused's sections 8 and 9 *Charter* rights, the court admitted the evidence because the inevitable discovery of the evidence weighed in favour of admission.

In other cases, the potential discoverability of the evidence did not mitigate the impact of the breach. In *Newman*,[184] for instance, the search warrant for the accused's vehicle relied on the accused's illegally obtained statement. The Crown argued that other evidence, not tainted by the *Charter* breaches, would have inevitably led police to obtain a search warrant for the vehicle. While not making any firm pronouncement on whether the evidence was, in fact, discoverable, the trial judge stated that discoverability played a "reduced role"[185] in the case. The court's predominant concern was that the evidence obtained by the search warrant was part of a larger pattern of disregard of rights. The court made parallels to *Coté* since there was a connection between earlier *Charter* breaches and evidence obtained through the warrant process.[186] Given this, the court found that the second *Grant* factor was, at best, neutral.

[184] *Newman2*, *supra* note 148.
[185] *Ibid.* at para. 79.
[186] *Ibid.* at para. 80, citing *Coté*, *supra* note 13 at para. 81.

In some cases, the fact that the evidence was not discoverable independent of the *Charter* breach was found to heighten the impact of the breach. For example, in *R. v. Timmons*,[187] police entered the accused's residence in response to a 911 call and conducted an extensive search of the residence, which was found to be unreasonable. Had the illegal search not occurred, the evidence would not have been found. That the search could not have occurred legally was found to aggravate the impact on the accused's rights and militated in favour of exclusion of the evidence.

In *R. v. Singer*,[188] the fact that the search could not have occurred legally aggravated the impact of the breach. The telewarrant issued for the accused's residence was held to be invalid because of omissions made in the application and since the standard of "impracticality" required for issuance of a telewarrant was not met. The court found that the improper intrusion into a private home was serious because of the high degree of privacy conferred to homeowners. In assessing the impact of the search, the court held that the impact was significant, in part because the search could not have occurred legally.[189]

Likewise, in *R. v. MacDonald*,[190] the Ontario Court of Appeal found that the non-discoverability of the evidence heightened the impact of the breach. In this case, an officer questioned the accused about a box in his vehicle suspected to contain illegal cigarettes, without advising the accused of his section 10(b) rights. Though the breach

[187] *R. v. Timmons*, 2012 NSSC 154, 2012 CarswellNS 317.
[188] *R. v. Singer*, 2012 NSSC 238, 2012 CarswellNS 455.
[189] *Ibid.* at para. 82.
[190] *R. v. MacDonald*, 2012 ONCA 495, [2012] 94 C.R. (6th) 355.

was not considered especially serious and the question posed by the officer was "minimally intrusive",[191] the court excluded the evidence because of the general rule supporting exclusion of statements taken in beach of the *Charter*. Also, the evidence would not have been discovered without the accused's incriminating statement to police.[192] No reasonable grounds to search the accused's vehicle existed without the statement. Therefore, the drugs and contraband cigarettes would not have been discovered absent the section 10(b) breach.

In some cases, the question of discoverability was found to be too speculative to clearly determine. For instance, in *R. v. Tombs*,[193] police did not have reasonable grounds to detain the accused for investigation and ask him to get out of his vehicle. Drug evidence was discovered in the front seat of the vehicle after the accused exited the driver's side. Based on hindsight, it was possible to speculate that police could have discovered the evidence on the front seat through a legitimate investigation of the passenger who was suspected to be breaching his conditional sentence order. However, the events did not unfold in this way, and so the scenario was only hypothetical. The discoverability of the evidence was therefore deemed speculative and held to be not determinative.

Chapter 7 Exclusion by *Grant* Factor: Third Factor

Chapter 7 deals with the courts' interpretation of the third *Grant* factor relating to society's interest in adjudication of the case on its merits. The rate of exclusion under the

[191] *Ibid.* at para. 35.
[192] *Ibid.* at para. 36.
[193] *R. v. Tombs*, 2012 BCSC 1826, 2012 CarswellBC 3766 [*Tombs*].

first line of inquiry is analyzed in terms of the reliability of the evidence, the importance of the evidence to the Crown's case and the seriousness of the offence. The data for each of these sub-factors is listed in Table 7 below.

In several cases, more than one type of evidence was at issue (for example, one case involved both an accused's statement and breath samples). In these cases, each piece of evidence was considered separately in Tables 7(a) and 7(b) that deal with whether or not the evidence was reliable and the importance of the evidence to the Crown's case.

As the data shows, not each of the factors dealt with in Tables 7(a), 7(b) and 7(c) were considered in every case. For this reason, the total number of cases under each criteria does not equal the total number of trial court cases considered in this survey overall. The particular criteria in any one case were only counted if the judge made specific reference to it. For instance, even though breath tests are inherently reliable as evidence, if the court made no mention of reliability in its decision, this specific factor was left out of Table 7(a) dealing with reliability. From the 98 trial court decisions canvassed, the reliability of the evidence was considered 76 times, the importance of the evidence 77 times and the seriousness of the offence 52 times.

Tables 7(a), 7(b) and 7(c) demonstrate that the first two factors were considered more often than the third. Indeed, the seriousness of the offence was only considered in roughly

half of all cases. This is perhaps not surprising given the SCC's finding in *Grant* that the seriousness of the offence can "cut both ways".[194]

Comments by the SCC suggest that courts would place undue emphasis on the third *Grant* factor. In *Coté*,[195] the SCC stated that "[n]o one consideration should be permitted to consistently trump other considerations. For instance, as this Court explained in *Harrison*, the seriousness of the offence and the reliability of the evidence should not be permitted to "overwhelm" the section 24(2) analysis…".[196] More recently, in *Cole*,[197] the SCC commented that "[n]ot unlike the considerations under the first and second inquiries, the considerations under this third inquiry must not be permitted to overwhelm the section 24(2) analysis…".[198] The case law surveyed showed varying degrees of emphasis placed on considerations under the third factor. In general, high exclusion rates (falling just below the overall exclusion rate of 73% at the trial level) for evidence found to be reliable, critical or both, demonstrates that these considerations are not trumping those under the first two branches. Moreover, relatively high exclusion for evidence of a serious charge suggests that courts do not view the seriousness of the alleged offence as overriding other considerations.

[194] *Grant*, *supra* note 1 at para. 84.
[195] *Coté*, *supra* note 13.
[196] *Ibid.* at para. 48.
[197] *Cole*, *supra* note 178.
[198] *Ibid.* at para. 95.

Table 7 – Third *Grant* Factor

Table 7(a) – Reliability of the Evidence

Where the Evidence Was…	**Number of Cases**	**Number Excluded**	**% Excluded**
Reliable	69	48	70%
Unreliable or Reliability Was Questionable	7	7	100%

Where the judge noted the evidence was unreliable or its reliability was questionable, this led to exclusion in all cases. In 70% of cases, despite a finding that the evidence was reliable it was nevertheless excluded, suggesting that reliability of the evidence is not a factor weighing strongly in favour of admission.

The case law showed fairly consistent findings on the factor of reliability. For example, drug evidence, gun evidence and breath test results obtained in breach of the *Charter* were generally considered to be reliable evidence. Conversely, in cases dealing with illegally obtained statements, reliability concerns sometimes led to exclusion of the evidence.

For instance, in *Liew*,[199] the court excluded videotaped statements of two accused obtained in violation of section 10(b) of the *Charter*. Reliability concerns arose in relation to the statements because it was unclear whether the accuseds, who were of Asian descent, had understood their right to counsel. Police had made no arrangement for interpreter services prior to interviewing them. The court found that the truth-seeking function of a trial was not served by admitting potentially unreliable evidence. The evidence was also not critical to the Crown's case, its only potential use being to impeach the accuseds. The court excluded the evidence despite finding a strong public interest in prosecuting charges which involved the importation of 30 kilograms of cocaine.

In *Newman*,[200] the court found that the accused's videotaped statement was involuntary. Reliability of the statement was at issue on section 24(2) analysis. A short while before their interview of the accused, police had told him that his estranged wife was dead and, moreover, that they suspected she had been murdered. The accused appeared confused and emotional during the videotaped statement. He was in an unfamiliar place without the benefit of legal counsel. The accused was only advised of his rights to counsel 30 minutes into police interview. Police also minimized the extent of the accused's jeopardy, which further undermined his section 10 *Charter* rights. The court found that the accused might have been more concerned with getting out of his quandary than with speaking the truth. This seriously undermined the reliability of the accused's statement. Even had the evidence been deemed reliable, the trial judge would still not have admitted the statement because of the gravity of the multiple *Charter* violations.

[199] *Liew*, *supra* note 150.
[200] *Newman*, *supra* note 145.

Similarly, in *R. v. Truong*,[201] the court excluded utterances made by the accused obtained in breach of section 10(b). There was significant potential for unreliability in the evidence the officer had gathered at the scene and during transport of the accused. The officer had questioned the accused after the accused had asserted his right to counsel and without the accused having yet spoken with counsel. The accused's answers to the questions were recorded in the officer's notebook and not by any electronic means. The officer had trouble testifying as to the context of the accused's statements as well as wording used. The potential unreliability of the statements diminished society's interest in having the evidence admitted in adjudicating the case on its merits.

As noted above, in cases where the evidence obtained in breach of the *Charter* was a breath test result, the evidence was generally held to be reliable. Reliable evidence was excluded at a rate of 70%. This suggests that even if evidence is found to be reliable, this factor will not be determinative of admissibility. The court may find that the reliability of the evidence favours admission, but nevertheless decide to exclude on the basis of considerations under the first and second lines of inquiry.

For instance, in *R. v. Jensen*,[202] the court excluded breath test results even though it found that the reliability of the evidence favoured admission. The court stated that "[u]ltimately it is the long term effect of regularly admitting breath tests obtained in a manner that is not only contrary to the *Criminal Code* but is also unconstitutional that tips the balance

[201] *R. v. Truong*, 2012 ONSC 2556, 2012 CarswellOnt 5111.
[202] *R. v. Jensen*, 2012 ONCJ 685, 2012 CarswellOnt 14033.

towards exclusion".[203] The court found that the violation was serious and the impact on the accused's *Charter* interests was significant insofar as it led to him being arrested, searched, handcuffed, driven to the police station and placed in a cell.

Likewise, in *R. v. Mehta*,[204] the breath test results were considered reliable evidence. The court held that two out of three *Grant* factors militated in favour of admission. The impact on the accused's *Charter* rights was minimal and the truth-seeking function of a trial was better served by admission of reliable evidence. The court concluded that, even though the majority of the *Grant* factors favoured admission, "the overriding purpose of section 24(2) is to maintain the good repute of the administration of justice… the seriousness of the *Charter* infringing conduct in this case is such that the court cannot be seen to condone the disregard of the law by those charged with its enforcement".[205] Considerations under the first line of inquiry outweighed the second and third *Grant* factors.

Table 7(b) – Importance of the Evidence to the Crown's Case

Importance of the Evidence	**Number of Cases**	**Number Excluded**	**% Excluded**
High	62	41	66%
Middling	13	11	85%
Low	2	2	100%

[203] *Ibid.* at para. 54.
[204] *R. v. Mehta*, 2012 ONCJ 732, 2012 CarswellOnt 14851 [*Mehta*].
[205] *Ibid.* at para. 21.

Table 7(b) demonstrates that the more important the evidence was to the Crown's case, the less likely it was to be excluded. In the majority of cases that dealt with this factor, the evidence was found to be important to the Crown's case. Critical evidence was excluded at a rate of 66%.

Generally, analysis of this factor led to straightforward results. In many cases, the evidence formed the entirety of the Crown's case and exclusion of the evidence would put an end to prosecution of the case. For instance, in cases involving driving while impaired or over the legal limit, the breath test result was generally found to be a critical piece of evidence. This was also the case where non-bodily physical evidence such as drugs and guns was at issue. In many cases, exclusion of this type of evidence would put an end to prosecution of the case.

Where exclusion of reliable evidence "guts the prosecution",[206] courts generally found that there would be a negative impact on the truth-seeking function of a trial. For example, in *R. v. Shinkewski*,[207] in its discussion of the marijuana evidence, the Saskatchewan Court of Appeal stated, "the suppression of this highly-reliable and critical evidence is *prima facie* contrary to societal interests in truth-seeking and in having the criminal allegations against Mr. Shinkewski adjudicated on their merits".[208]

However, as the results show, the fact that the evidence was critical did not lead to a high rate of admission. As mentioned, in 66% of cases, evidence found to be central to the

[206] *Grant*, *supra* note 1 at para. 83.
[207] *Shinkewski*, supra note 132.
[208] *Ibid.* at para. 37.

Crown's case was excluded. The rate of exclusion was 85% where the evidence was found to be important, but the Crown's case would not necessarily fail without the excluded evidence.

In a minority of cases, courts were not able to easily establish the importance of the evidence to the Crown's case. In *R. v. Sonne*,[209] the Crown's case on possession of explosive substances was circumstantial. While the evidence consisting of VISA records was not critical, the evidence showed that the accused purchased chemicals at the time he did. It was hard to tell what impact exclusion would have on the case.[210] The court admitted the evidence obtained in breach of the accused's section 8 *Charter* right, even though the Crown's case would not necessarily fail without it.

In *Rafferty*,[211] the court found that the evidence was not central to the Crown's case. On the third inquiry, the court stated that the evidence would have an extreme prejudicial effect on the jury. The movie found on the accused's laptop was potentially inflammatory as the jury might view it as a re-enactment of the alleged crime. Because of the "marginal and questionable"[212] value of the evidence, exclusion would not negatively impact the truth-seeking function of a trial. The points that the Crown wanted to prove could be made through other evidence not tainted by the *Charter* breaches. The third *Grant* factor militated in favour of exclusion of the evidence.

[209] *R. v. Sonne*, 2012 ONSC 140, 2012 CarswellOnt 3106.
[210] *Ibid.* at para. 36.
[211] *Rafferty*, *supra* note 168.
[212] *Ibid.* at para. 162.

Table 7(c) – Seriousness of the Offence

Seriousness of Offence	Number of Cases	Number Excluded	% Excluded
Serious	45	30	67%
Middling	7	6	86%
Not Serious	0	--	--

The data in Table 7(c) suggests that the seriousness of the offence is not a factor overriding other considerations. In 67% of cases, the trial judge excluded the evidence despite classifying the offence as serious. In no case did the court explicitly state the offence was not serious. Cases classified as middling included those in which the court said the offence was not the most serious of offences.

There was variation as to the weight trial judge's accorded to the seriousness of the offence. Some trial judges emphasized the seriousness of the offence, while others made no mention of it. Other judges commented on the significance of this factor in the analysis but were quick to point out that the seriousness of the offence is not determinative citing the SCC's statements in *Grant* that "it has the potential to cut both ways".[213] Courts also cited the SCC's statement in *Harrison* that the third line of inquiry must not be permitted to overwhelm the section 24(2) analysis as this would deprive individuals charged with serious offences of *Charter* protection:

[213] *Grant*, *supra* note 1 at para. 84.

> [A]llowing the seriousness of the offence and the reliability of the evidence to overwhelm the s. 24(2) analysis "would deprive those charged with serious crimes of the protection of the individual freedoms afforded to all Canadians under the *Charter* and, in effect, declare that in the administration of the criminal law 'the ends justify the means'" (para. 150). *Charter* protections must be construed so as to apply to everyone, even those alleged to have committed the most serious criminal offences.[214]

In *R. v. Do*,[215] the trial judge openly stated that he was "not prepared in this case to make an assessment of the relative seriousness of the offences charged or take account of that assessment as a consideration favouring admission or exclusion of the evidence".[216] The evidence, consisting of a marijuana grow-operation and documentary evidence such as a receipt from a hydroponic garden supply store, was admitted. Similarly, in *R. v. Mooswa*,[217] the court stated, "[t]he seriousness of the offence is not particularly relevant… the relevant societal interests "cut both ways" on this issue. Serious crimes require not only aggressive prosecution but also vigilant compliance with procedural standards".[218] The trial judge noted that while cocaine trafficking "is a serious offence, such a fact is not particularly compelling in the context of this inquiry…".[219]

In impaired driving cases, courts often dealt summarily with the third *Grant* factor. For example, in *R. v. Hrynkiw*,[220] the court simply stated, "[i]t is trite to say that it is in society's interest to have impaired driving cases adjudicated on their merits… [t]he

[214] *Harrison*, supra note 2 at para. 40.
[215] *R. v. Do*, 2012 BCSC 411, 2012 CarswellBC 763.
[216] *Ibid.* at para. 50.
[217] *R. v. Mooswa*, 2012 SKQB 402, 2012 CarswellSask 673.
[218] *Ibid.* at para. 70.
[219] *Ibid.* at para. 71
[220] *R. v. Hrynkiw*, 2012 ONSC 349, 2012 CarswellOnt 685.

offence is serious in light of the damage that drinking and driving can cause in our society".[221] The evidence was found to be admissible because the breach of section 10(b) was not especially egregious and the fact that the accused spoke with counsel on one occasion mitigated the impact on the accused's right to counsel.

Cases alleging a gun offence invariably led to a finding that the offence was serious where seriousness of the offence was addressed. Evidence of a gun offence led to exclusion in some cases and admission in others.[222] Some courts emphasized the heightened public interest in adjudicating cases involving guns, while other courts stated there was a greater need to ensure *Charter* standards were met in cases involving serious charges. The more serious the offence, the higher the penal stakes were for the accused. In several cases, the court identified both sets of concerns in their analysis.

Gun evidence was admitted in *R. v. Clarke*.[223] On the third factor, the court stated, "[a]ny offence involving guns is a very serious matter. This is particularly so where both guns and drugs are involved. In combination, drugs and guns can be particularly lethal. The seriousness of the offence cannot be understated".[224] Similarly, in *Campbell*,[225] the Ontario Court of Appeal upheld the trial judge's decision to admit firearms evidence, but exclude drug evidence. The trial judge had not overstated the seriousness of gun offences.[226] There was no error in the trial judge's determination that there was a greater

[221] *Ibid.* at para. 16.
[222] See Chapter 8 for analysis of exclusion rates by type of evidence.
[223] *R. v. Clarke*, 2012 ONSC 1259, 2012 CarswellOnt 2565 [*Clarke*].
[224] *Ibid.* at para. 83.
[225] *Campbell*, *supra* note 77.
[226] *Ibid.* at para. 18.

public interest in adjudicating gun offences as compared to drug offences in this case. The increased societal interest in the prosecution of gun offences was supported by case law from the Ontario Court of Appeal that "stressed the need for society to be protected from criminals armed with deadly handguns".[227]

Similarly, in *Bacchus*,[228] the Ontario Superior Court noted the heightened public interest in the adjudication of gun charges because of "the proliferation of gun charges and offences committed with firearms in this area".[229] The court also noted that this factor should not be accorded "disproportionate significance" and that "the public also has an interest in a justice system that is beyond reproach, particularly where the penal consequences are high".[230] The court admitted evidence consisting of a gun and oxycodone, deciding that possession of a loaded gun was very serious, while possession of drugs was relatively minor. In contrast, in *R. v. Gallinger*,[231] the Ontario Court of Justice excluded firearm evidence despite finding "[t]here is a heightened public interest in trying firearms cases on their merits particularly given the increasing and very public gun problem in this province and in this region and the very real risk guns pose to public safety".[232]

Evidence was excluded due to considerations under the first and second branches in several firearms cases even though the court recognized that charges involving guns were

[227] *Ibid.*
[228] *Bacchus*, *supra* note 177.
[229] *Ibid.* at para. 170.
[230] *Ibid.*
[231] *R. v. Gallinger*, 2012 ONCJ 600, 2012 CarswellOnt 12306.
[232] *Ibid*. at para. 88.

serious. For instance, in *R. v. Persad*,[233] the court excluded evidence of a handgun and drugs. The charges relating to possession of a loaded handgun, the production of marijuana and trafficking in cocaine, were considered to be very serious. The court noted, "[t]he trafficking and sale of narcotics represents a serious societal problem that touches the lives of many citizens. The firearm and ammunition seized were clearly unlawful and represented a serious danger to the public".[234] The third factor favoured admission since the evidence was reliable and critical to the Crown's case on serious charges. However, the court stated that the factors under the third line of inquiry should not lead to admission where the court has concluded that the violations on the first and second branches are serious.

Similarly, in *R. v. Herdsman*[235] the court excluded evidence consisting of a gun, ammunition and an assortment of drugs, even though the truth-seeking function of a trial would be better served by admitting the evidence. The evidence was reliable and critical to the Crown's case. With regards to the gravity of the charges, the court noted the high penal stakes for the accused. The court emphasized the SCC's comments in *Grant* that "while the public has a heightened interest in seeing a determination on the merits where the offence charged is serious, it also has a vital interest in having a justice system that is above reproach, particularly where the penal stakes for the accused are high".[236]

[233] *R. v. Persad*, 2012 ONSC 3390, 2012 CarswellOnt 13607.
[234] *Ibid.* at para. 203.
[235] *R. v. Herdsman*, 2012 ONCJ 739, 2012 CarswellOnt 15043.
[236] *Ibid.* at para. 78, citing *Grant*, *supra* note 1 at para. 84.

In cases of drug charges, where the first two lines of inquiry favoured exclusion, considerations under the third factor favouring inclusion did not, on balance, lead to admission of the evidence. In *R. v. Helary*,[237] the court, in dealing with drug trafficking charges stated,

> Marijuana use and marijuana trafficking are significant problems in the La Ronge community. Sitting in Provincial Court, I routinely read pre-sentence reports that refer to the daily use of marijuana by young people. Too often, this use is associated with a lack of school attendance and involvement in property crimes committed to obtain funds for the purchase of marijuana. The community as a whole has a vested interest in seeing marijuana use and trafficking curtailed.[238]

Despite the societal interest in bringing drug traffickers to justice, the evidence was excluded because of the serious police misconduct and the significant impact on the accused's *Charter* rights. The court commented on the public reaction that could be expected in such circumstances: "citizens would be shocked and appalled if, barring very exceptional circumstances, courts were to allow police engaged in drug enforcement to enter private dwellings without a warrant, arrest the occupants and then hold them for several hours".[239]

Courts came to various conclusions regarding the seriousness of drug offences. In some cases, the type and quantity of the drug at issue determined the seriousness of the offence. In *R. v. Blake*,[240] the evidence consisted of 230 grams of cocaine, an amount of cocaine that could not "be disregarded as inconsequential".[241] Finding there was a clear public interest in prosecution of this type of charge, the court stated, "[i]llicit drugs and the

[237] *R. v. Helary*, *supra* note 94.
[238] *Ibid.* at para. 100.
[239] *Ibid.* at para. 101.
[240] *R. v. Blake*, 2012 ONSC 2703, 2012 CarswellOnt 6074.
[241] *Ibid.* at para. 111.

social blight and crime that stem from trafficking and addiction are all too prevalent reminders that drug crimes are serious. This threatens the well-being of many families, communities and institutions".[242] However, the evidence was ultimately excluded because the "[t]he reckless and deliberate actions of the police that underlie the violations tip[ped] the balance in favour of exclusion".[243]

In *R. v. Mori*,[244] the accused was charged with possession for the purpose of trafficking heroin, cocaine and methamphetamines. The amount and variety of drugs seized was significant. The court emphasized the societal interest in adjudicating these types of offences on their merits:

> The media is replete with stories about the plague of ever increasing varieties of highly addictive drugs flooding the streets. Incidents abound of the crime and social decay that result to families and entire communities where drug activity is prevalent. There is clearly a public interest in this type of crime being tried and punished.[245]

However, the trial judge, citing *Harrison*,[246] noted that the seriousness of the offence must not take on disproportionate significance. In the end, the reckless actions of police tipped the balance in favour of exclusion.

Drug evidence consisting of marijuana was generally considered to be less serious than cocaine and other drugs listed in Schedule I of the *Controlled Drugs and Substances*

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[242] *Ibid.*
[243] *Ibid.* at para. 116.
[244] *R. v. Mori*, 2012 ONSC 3433, 2012 CarswellOnt 7805.
[245] *Ibid.* at para. 88.
[246] *Ibid.* at para. 90, citing *Harrison*, supra note 2 at para. 34.

Act.[247] In *R. v. Nagy*,[248] the court decided to admit 470 grams of marijuana, even though, on the third line of inquiry, the court held, "the evidence is reliable and essential to the Crown's case, although marijuana is not the most serious of illegal substances".[249]

Courts, quite obviously, considered drug trafficking charges to be more serious than simple possession charges. *Tombs*[250] involved drug trafficking charges related to a dial-a-dope operation. There was a strong public interest in prosecution of the charges given the harmful effects caused by dial-a-dope operations on drug addicts and other vulnerable groups. The British Columbia Supreme Court stated that dial-a-dope operations have particularly damaging effects because "[t]hey make highly destructive drugs available in areas of the Province where access to them would otherwise be very difficult".[251] However, on balance, the court held that the long term-repute of the justice system favoured exclusion because of the pattern of *Charter* violations. The court stated,

> It is very difficult to see cogent evidence on such a case as this excluded, given the nature of the offence. But I find the balance on this test still favours exclusion. Including the evidence would more likely bring the administration of justice into disrepute than would its [exclusion].
>
> There is no point in having a *Charter of Rights* intended to protect individual privacy in such circumstances if the courts do not safeguard them when such an obvious breach of it occurs.[252]

[247] *Controlled Drugs and Substances Act*, S.C. 1996, c. 19, Schedule I.
[248] *R. v. Nagy*, 2012 ONCJ 618, 2012 CarswellOnt 12739.
[249] *Ibid.* at para. 52.
[250] *Tombs*, *supra* note 193.
[251] *Ibid.* at para. 114.
[252] *Ibid.* at paras. 115-16.

In *R. v. Sandhu*,[253] police seized 225 kilograms of cocaine from the trailer of the accused's truck in violation of his section 8 *Charter* right. On the third factor, the court held that the drug charge was very serious, particularly given the amount of cocaine alleged: "the quantity of drugs at issue here takes this case out of the ordinary trafficking case. The potential impact of the distribution of drugs of this quantity is staggering".[254] In admitting the evidence, the court stated that none of the three *Grant* factors strongly favoured exclusion.

The cases surveyed placed varying degrees of emphasis on the seriousness of the offence. In appeared that, in some cases, courts that were going to exclude evidence of a serious charge were at pains to make clear that it considered the offence to be serious and that this type of alleged crime had a negative impact in the community. Perhaps the court stressed the seriousness of the offence because it did not want to be seen as discounting the public interest in the prosecution of serious charges in cases where the evidence was excluded. In other cases, where courts ultimately admitted evidence relating to a serious charge, the court did not place great emphasis on the seriousness of the offence. Perhaps this was because the court did not want to be seen as placing excessive emphasis on the seriousness of the offence in cases where it would ultimately admit the evidence.

[253] *R. v. Sandhu*, 2012 ONSC 46, 2012 CarswellOnt 263.
[254] *Ibid.* at para. 90.

Chapter 8 Exclusion by Type of Evidence

Chapter 8 deals with rates of exclusion of evidence in relation to the type of evidence at issue. The number of times courts excluded each particular type of evidence, including statements by the accused, bodily evidence, non-bodily physical evidence and derivative evidence, were counted and compiled in Table 8 below. Where two or more types of evidence were at issue in a single case, each piece of evidence was counted separately. The data for Québec cases is included in a separate table following discussion of exclusion rates in common law provinces.

Table 8 – Exclusion by Type of Evidence

Type of Evidence	**Number of Cases**	**Number of Excluded**	**% Excluded**
Statements by the Accused	19	14	74%
Bodily Evidence	29	24	83%
Non-Bodily Physical Evidence	63	43	68%
Derivative Evidence	2	2	100%

In *Grant*, the SCC held there was a "presumptive general, although not automatic, exclusion of statements obtained in breach of the *Charter*",[255] in part explained by "the common law's historic tendency to treat statements of the accused differently from other evidence".[256] Table 8 shows that statements were excluded in 74% of cases.

While exclusion for this type of evidence is high, whether this reflects a presumption of exclusion for statements is open to debate. The rate of exclusion for bodily evidence is 83%. The higher rate of exclusion for bodily evidence is surprising given the distinction the SCC made between statements and breath sample evidence[257] and its comments on the greater likelihood of admission for breath samples.[258]

Only two decisions dealt with derivative evidence. Both judgments stemmed from a single set of charges in *Newman*.[259] In that case, the court issued three separate judgments dealing with many different pieces of evidence.

As noted above, statements were excluded in 74% of cases. In at least three cases, statements were found to be admissible following a minor section 10(b) violation. For example, in *R. v. McLeish*,[260] the court found that a technical breach occurred during the implementation stage of the police's section 10(b) duties. There was a technical defect as the officer had a positive obligation to elicit "a more definitive waiver"[261] from the

[255] *Grant*, *supra* note 1 at para. 92.
[256] *Ibid*. at para. 98.
[257] *Ibid*. at para. 105.
[258] *Ibid*. at para. 111.
[259] *Newman*, *supra* notes 145 and 148.
[260] *R. v. McLeish*, 2012 ONSC 5342, 2012 CarswellOnt 11584.
[261] *Ibid.* at para. 47.

accused. The accused had nodded his head when police cautioned him, which suggested that he wished to speak to a lawyer. Officers dealing with the accused later on had a positive duty to make further inquiries when the accused responded "not really" to the question of whether he wished to speak with a lawyer. The court found that the *Charter* breach was fleeting and on the low end of the scale of seriousness. Excluding the accused's interview on the basis of a technical defect would undermine public confidence in the rule of law.

In *R. v. Peterson*,[262] the court found a minor section 10(b) violation where police did not advise the accused of his right to counsel immediately following the accused's confession that he hit the deceased with a hammer. Taken by surprise, the officer asked the accused what he did next as a follow-up question. Prior to making the statement about hitting the deceased, the court found the accused had not been detained. The accused was not a suspect; police had merely asked him for help with their investigation. In admitting the statement, the trial judge stated that this was a "very minor breach"[263] on the part of the officer. The officer was taken by surprise by the accused's statement and was, therefore, acting spontaneously. The breach also "had virtually no impact"[264] on the accused's *Charter*-protected interests, since the statement produced no information important to the case.

[262] *R. v. Peterson*, 2012 MBQB 34, 2012 CarswellMan 120.
[263] *Ibid.* at para. 50.
[264] *Ibid.*

In *R. v. Berner*,[265] the British Columbia Court of Appeal, overturning the trial judge, found that the accused was detained while being questioned by an officer at the scene of a car accident. The accused was in a police vehicle awaiting medical attention when an officer took the opportunity to ask her how the accident had occurred. The interview was tape-recorded, but the accused was not advised of her section 10(b) rights. During police interview, the accused admitted to having had two glasses of wine that afternoon. The court held the breach was not serious since the officer acted in good faith. The officer's duties at the scene of an accident required her to ascertain the cause of the accident. The questions were general in nature and still part of preliminary investigation.

Moreover, the impact on the accused's *Charter* rights was not significant. The accused was provided with her right to counsel immediately after the breath sample was taken and the roadside device registered fail. On the third factor, the Court of Appeal noted that the statement provided grounds for the roadside demand. Exclusion of the statement would "exact too great a toll on the truth-seeking goal of the criminal trial".[266] The Court of Appeal did not discuss the seriousness of the offence. The accused had been convicted at trial on several counts, including impaired driving causing death and impaired driving causing bodily harm.

In cases where a violation of section 10(b) was deemed to be serious or where the evidence was found to be unreliable, this generally led to exclusion. In *R. v. Douglas*,[267] the court excluded statements made by the accused during the execution of a search

[265] *R. v. Berner*, 2012 BCCA 466, 2012 CarswellBC 3606.
[266] *Ibid.* at para. 71.
[267] *R. v. Douglas*, 2012 SKQB 250, 2012 CarswellSask 910.

warrant at the accused's residence. The court held that the accused was under investigative detention contrary to section 9 when an officer questioned the accused about his level of computer knowledge. The officer did not advise the accused of his section 10(b) rights prior to questioning him. The officer's decision to arbitrarily detain and deprive the accused of his right to counsel was made to assist with police investigation and enhance the prosecution's case. The court considered these to be deliberate breaches and, for this reason, serious.

The impact of the section 10(b) breach was at the "lower end of the scale because it did not entail an infringement on the dignity or personal integrity of the accused".[268] There was also no connection between the section 10(b) violation and the police's discovery of child pornography on the accused's computer. However, the accused's unlawfully obtained statement was possibly relevant to the "making available child pornography" charge since it dealt with the accused's level of computer sophistication. On the third factor, the court concluded that exclusion would not impede prosecution of the case since this was not the Crown's only evidence. The court did not discuss the reliability of the statement or the seriousness of the alleged offences.

In *R. v. Land*,[269] the court excluded the accused's statements to police that he had been drinking, hit the deceased over the head with a hammer and that he "just needed an excuse".[270] The accused's statements, made immediately following arrest, were found to be involuntary and obtained in breach of the accused's section 10(b) rights. The 20-

[268] *Ibid.* at para. 81.
[269] *R. v. Land*, 2012 ONSC 5372, 2012 CarswellOnt 16502.
[270] *Ibid.* at para. 36.

minute delay in advising the accused of his right to counsel constituted a violation of section 10(b). The breach was not at the most serious end of the spectrum. The officer showed "poor understanding of the requirement to advise detained persons of their right to counsel as soon as they are detained",[271] but there was no bad faith. It was unclear what the officer was dealing with when he initially detained the accused. The accused was emotionally labile and possibly had mental health issues. The officer was also multi-tasking: he had to collect items of evidence, obtain details about the potential victim, speak with witnesses and ensure that paramedics and police attended the residence of the deceased.

On the second factor, the court held that the accused's statements went to the crux of the issue of whether the accused had the required *mens rea* for second-degree murder. That the statements were made without the accused having been cautioned and advised of his right to counsel was a clear violation of the principle against self-incrimination. On the third inquiry, the statements were considered to be unreliable since the meaning of the statement was ambiguous and could not be determined out of context. For these reasons, the court concluded that the prejudicial effect of the evidence outweighed its probative value. The statements were also not the only evidence showing the accused's state of mind at the time of the assault. Therefore, the Crown's case on second-degree murder would not necessarily fail without the statement.

[271] *Ibid.* at para. 41.

Table 8(a) – Non-Bodily Physical Evidence

Non-Bodily Physical Evidence	Number of Cases	Number of Excluded	% Excluded
Guns	16	9	56%
Drugs	38	29	76%

As shown in Table 8, the overall rate of exclusion for non-bodily physical evidence was 68%. The rate of exclusion for non-bodily physical evidence was broken down further to show individual exclusion rates for drugs and guns. As compared to the 76% exclusion rate for drug evidence and the overall exclusion rate of 73% at the trial level, exclusion for firearms evidence is low. Gun evidence was excluded in only 56% of cases.

The SCC has stated that the seriousness of the offence "must not take on disproportionate significance".[272] Given these differences in exclusion rates, one must consider whether the perceived seriousness of the offence plays a greater role in exclusion decisions than is perhaps made explicit. Whether there is a greater concern for gun offences leading to lower exclusion rates seems to be a relevant query. However, one must also be aware of the limits related to this survey. There were a greater number of decisions involving drug evidence as compared to gun evidence, 38 compared to 16. Therefore, the different sizes of pools for gun and drug evidence may have impacted the exclusion rates that were generated.

[272] *Harrison, supra* note 2 at para. 34.

The survey results in Chapter 5, related to the seriousness of the *Charter* violation, show that the more serious the *Charter* breach, the more likely evidence was to be excluded. In cases where there was a major breach, evidence was excluded in 95% of cases. By comparison, evidence was excluded in 47% of cases for mid-range breaches and 7% for minor breaches. It is difficult to say whether the *Charter* breaches were simply less serious in firearms cases which, therefore, resulted in a lower exclusion rate for gun evidence or rather, whether consideration of the seriousness of the offence led to the low rate of exclusion. Perhaps both factors were, to some extent, at play. A future direction for research in this area could look at the interaction between factors.

Interestingly, in Madden's study, Madden also noted less exclusion for gun evidence, which was excluded at a rate of 50%.[273] Drug evidence, in contrast, was excluded at a rate of 77% in his survey.[274] Given that two studies have now been conducted following the *Grant* decision and that both have similar results on the exclusion of guns this, perhaps, signals a developing trend of less exclusion for firearms.

Exclusion of firearms evidence was considered in Chapter 7 as it related to the seriousness of the offence. Generally, where gun evidence was admitted, the seriousness of the *Charter* violation was not at the high end of the scale. For instance, as discussed in Chapter 7, gun evidence was admitted in *Bacchus*, *Campbell* and *Clarke*. In *Bacchus*,[275] the court found that the discoverability of the gun reduced the seriousness of the sections

[273] Madden, *supra* note 6 at 284, Table 9
[274] *Ibid*.
[275] *Bacchus*, *supra* note 177.

8 and 9 violations. In *Campbell*,[276] the Ontario Court of Appeal upheld the trial judge's decision to admit the firearm obtained in breach of section 8. The *Charter* violation was not at the most serious end of the spectrum as the officers did not act in bad faith.

In *Clarke*,[277] the firearm seizure was contrary to section 8 as the search warrant did not authorize the search of the accused's motor vehicle. The police conduct was at the less serious end of the spectrum, as the officers legitimately believed that the search was authorized based on case law from the Ontario Court of Appeal. Police acted in good faith in relying on case law authority to justify their actions. The first factor, therefore, pointed towards admission. The second inquiry favoured exclusion because the accused had a strong privacy interest in his vehicle, although not as high as in his residence. Society's interest in adjudication of the case on its merits favoured admission because the evidence was highly probative and gun offences were very serious. On balance, the evidence was found to be admissible.

In *R. v. Lawson*,[278] the court similarly admitted firearm evidence obtained in breach of section 8. The breach stemmed from an invalid search warrant. The redacted ITO was not sufficient to support a reasonable probability that the accused would be in possession of a handgun at the time of the search. The court found no serious misconduct and no deliberate or reckless disregard for *Charter* rights. Significantly, the accused had not alleged bad faith and there was no indication that police did not act with diligence and integrity.

[276] *Campbell*, *supra* note 77.
[277] *Clarke*, *supra* note 223.
[278] *R. v. Lawson*, 2012 ONSC 1309, 2012 CarswellOnt 6100.

In *R. v. Davis*,[279] the court also admitted firearms evidence obtained in violation of section 8. The police entered the accused's residence without a warrant and without any grounds to support entry. The court held that the police action did not constitute a deliberate abuse of power, willful disregard of *Charter* rights or recklessness. Police had instead acted in good faith. On the second factor, the entry into a private residence was serious given the high expectation of privacy in one's home. The third inquiry supported admission since exclusion of reliable, physical evidence would have a greater negative impact on the repute of the justice system than its inclusion.

The cases reviewed suggest that the court's determination on the seriousness of the violation can be determinative as to whether gun evidence is excluded or not. Cases where guns were admitted usually involved breaches at the low end of the scale. Serious violations generally led to exclusion of firearms evidence, despite concurrent findings that the third *Grant* factor militated in favour of admission.

The rate of exclusion for drugs in the current survey was found to be 76%, which is 3% higher than the overall exclusion rate at the trial level. It seems there is nothing particularly noteworthy about the exclusion rate for drug evidence as the survey results tracks almost exactly the average exclusion rate. On the whole, it seemed that courts were just as likely to exclude large quantities of drugs as to exclude smaller amounts. The seriousness of the state conduct appeared to be determinative in many cases. If the violation was at the highest end of the spectrum, exclusion was the likely outcome. In

[279] *R. v. Davis*, 2012 ABPC 125, 2012 CarswellAlta 866.

these cases, considerations under the second and third inquiries generally could not tip the balance in the opposite direction.

Table 8(b) – Bodily Evidence

Bodily Evidence	**Number of Cases**	**Number of Excluded**	**% Excluded**
Breath Tests	21	17	81%

Contrary to comments from the SCC that breath test evidence is more likely to be admitted given that the "method of collection is relatively non-intrusive",[280] trial courts excluded breath test evidence in 81% of cases. Remarkably, this is higher than the rate of exclusion for both statements and non-bodily physical evidence. In *Grant*, the SCC raised concerns that breath sample evidence under the conscription test for admissibility, "has often suffered the fate of automatic exclusion".[281] Given these comments, the high rate of exclusion of breath samples is striking. Indeed, one wonders whether the exclusion rate is too high in this context.

Some courts have emphasized the significant impact of events that unfold as a result of breath testing. For instance, in *R. v. Mitchell*,[282] the Manitoba Court of Appeal commented that although the administration of the roadside screening test did not seriously intrude upon the accused's privacy, bodily integrity and human dignity, it led to

[280] *Grant, supra* note 1 at para. 111.
[281] *Ibid*. at para. 106.
[282] *R. v. Mitchell*, 2012 MBQB 12, 2012 CarswellMan9.

his detention, arrest and breathalyzer testing at the police detachment. In deciding that the trial court wrongly admitted the evidence, the court stated, "a cascade of events that are an enormous intrusion upon a person's life can result from a breach of this nature".[283]

In *R. v. Thalen*,[284] the court excluded the breath sample following a breach of the accused's section 8 *Charter* right. On the second inquiry, the court found the interference with the accused's rights to be on the serious end of the spectrum. The court cited *R. v. Rochon*,[285] in explaining the degree of impact on the accused's *Charter*-protected interests:

> [C]ompelling a person to provide breath samples, on penalty of a criminal charge if he does not comply, seriously affects his liberty and right against self incrimination. The arrest of an individual on insufficient grounds permits the police officer to take him into custody, elicit breath samples, and thereby create incriminatory evidence that supports the laying, and proof of, a criminal charge against him. All in all, I would place the effect on the *Charter*-protected interests high on the scale.[286]

In other cases, the degree of impact in obtaining a breath sample was held to be minimal. In *Mehta*,[287] the court found breaches of the accused's sections 8, 9 and 10(b) rights, as the roadside breath demand was not made forthwith and the accused was not advised of his right to counsel during the 19-minute delay waiting for the screening device. The court found that obtaining the breath sample "was minimally intrusive both in terms of the procedures used and the information obtained thereby".[288] The section 9 *Charter*

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[283] *Ibid*. at para. 36, citing *R. v. Dumaine*, 2010 BCPC 310.
[284] *R. v. Thalen*, 2012 BCPC 196, 2012 CarswellBC 1798.
[285] *Ibid.* at para. 29, citing *R. v. Rochon*, 2010 BCPC 320 [*Rochon*].
[286] *Ibid.*, citing *Rochon* at para. 62.
[287] *Mehta*, *supra* note 204.
[288] *Ibid.* at para. 18.

breach was also relatively minor since the accused was permitted to sit in his vehicle during the brief waiting period. The court also noted that, although the accused was not advised of his section 10(b) rights, the accused had a cell phone and nothing barred him from using it to call a lawyer. The second line of inquiry favoured admission, but the court ultimately excluded the evidence because the court could not be seen to condone the officer's failure to comply with the legal requirements for making breath demands.

Table 8(c) – Exclusion by Type of Evidence: Québec

Type of Evidence	**Number of Cases**	**Number of Excluded**	**% Excluded**
Statements by the Accused	4	4	100%
Bodily Evidence	5	5	100%
Non-Bodily Physical Evidence	5	4	80%
Derivative Evidence	0	--	--

Part III Assessing the *Grant* Approach

Chapter 9 Rationale for Exclusion

i. Rationale Developed in *Grant*

Prior to *Grant*, trial fairness was an important rationale explaining the exclusion of improperly obtained evidence. Evidence that was conscripted from the accused was excluded to protect the accused's fair trial rights. Only when the evidence was non-conscriptive could a balancing of competing interests be undertaken. In revamping the section 24(2) test, the Court in *Grant* rejected trial fairness as a distinct stage of analysis and instead conceived it as an "overarching systemic goal".[289] The Court instead used language reflecting a "condonation theory"[290] and vindication rationale for exclusion.[291] The test assesses "whether the admission of the evidence would bring the administration into disrepute by sending a message to the public that the courts, as institutions responsible for the administration of justice, effectively condone state deviation from the rule of law by failing to dissociate themselves...".[292]

Condonation theory is present in the first line of inquiry where the concern is to dissociate courts from serious state misconduct: "admission may send the message the

[289] *Grant*, *supra* note 1 at para. 65.
[290] David M. Paciocco, "Section 24(2): Lottery or Law – The Appreciable Limits of Purposive Reasoning" (2011) 58 Crim. L.Q. 15 at 29 [Paciocco, "Lottery"].
[291] *Ibid*.
[292] *Grant*, *supra* note 1 at para. 72.

justice system condones serious state misconduct".[293] The second line of inquiry is focused on the vindication of *Charter* rights. The assessment looks at the impact of the breach to determine whether admission of the evidence would "signal to the public that *Charter* rights, however high-sounding, are of little actual avail to the citizen, breeding public cynicism and bringing the administration of justice into disrepute".[294] In sum, "[t]he main concern is to preserve public confidence in the rule of law and its processes".[295]

Under *Collins*, section 24(2) responded, in part, to the need to ensure the accused received a fair trial, a corrective rationale for excluding evidence.[296] Trial fairness is no longer recognized as guiding the exclusion analysis. Rather, the focus is societal and section 24(2) addresses systemic concerns.[297] *Grant* recognized that the old framework, focusing on the conscriptive character of evidence and the attendant effect on trial fairness, was "producing anomalous results".[298]

a. Critique

David Paciocco criticizes the use of condonation theory and a vindication rationale to explain the Canadian exclusionary rule. His view is that such theories "lack objective criteria"[299] and are essentially "expressions of values about what response is appropriate

[293] *Ibid*. at para. 71.
[294] *Ibid*. at para. 76.
[295] *Ibid.* at para. 73.
[296] Paciocco, "Lottery", *supra* note 290 at 31.
[297] *Grant*, *supra* note 1 at para. 70.
[298] *Ibid*. at para. 101.
[299] Paciocco, "Lottery", *supra* note 290 at 61.

or right, operating in a world where reasonable people can find massive room for disagreement...".[300] Paciocco asserts, therefore, that "[a] purposive approach to s. 24(2) can therefore offer no systematic answers. It is incapable of accommodating the rule of law with its central idea that decisions should be govern[ed] by law and not the politics of the decision-maker".[301]

Paciocco asserts that the desire to change exclusionary practices required a shift in rationale for exclusion.[302] The SCC rejected the fair trial theory for pragmatic reasons based on "a desire to rid the law of exclusionary practices that were judged to be unsatisfactory or undesirable.[303] Indeed, the decision to reject the fair trial theory is at odds with earlier SCC jurisprudence.[304] According to Paciocco, the underlying principles for exclusion are "fickle" and, for this reason, "provide marginal guidance in predicting the shape and constitution of s. 24(2)'s exclusionary remedy".[305]

Jonathan Dawe and Heather McArthur argue that a corrective justice rationale for exclusion is "entirely consistent with the *Grant* majority's wish to avoid "send[ing] the message that individual rights count for little".[306] Exclusion of evidence is the primary vehicle through which individuals who have suffered *Charter* breaches at the hands of

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[300] *Ibid*.
[301] *Ibid*.
[302] *Ibid*. at 31.
[303] *Ibid*. at 45-6.
[304] Paciocco points out that the rejection of the fair trial theory in *Grant* is inconsistent in the SCC's ruling in *R. v. Harrer*, [1995] 3 S.C.R. 562, 42 C.R. (4th) 269, which provides for exclusion of evidence in cases where evidence is obtained without violating the *Charter* and admission of the evidence would render the trial unfair. The reliance on a trial fairness rationale in *Harrer* conflicts with the ruling in *Grant*. Given the flaws identified in the trial fairness theory, revision of the *Harrer* decision is perhaps in order.
[305] Paciocco, "Lottery", *supra* note 290 at 60-1.
[306] Jonathan Dawe and Heather McArthur, "Charter Detention and the Exclusion of Evidence after *Grant*, *Harrison* and *Suberu*" (2010) 56 Crim. L.Q. 376 at 435.

police can obtain some remedy. Other remedial options for accused persons are limited and difficult to access.[307] Denying any remedy to claimants would discount individual *Charter* rights. The lack of effective remedies renders *Charter* rights unenforceable and, therefore, meaningless.[308]

b. Societal Focus

In my view, the societal focus taken in *Grant* seems justified if the purpose of exclusion is to ensure the administration of justice is not brought into disrepute. The remedy of exclusion allows courts to affirm *Charter* rights by sending principled messages in individual cases. Society as a whole loses when *Charter* protections are not maintained. There is, undeniably, a compensatory effect to the individual claimant in the mechanism of exclusion. But the underlying rationale, the repute of the justice system, is aligned with a broader societal recognition that exclusion is necessary to affirm *Charter* values. The remedial effect experienced by individual claimants is a by-product of the affirmation of *Charter* rights through exclusion. Moreover, the societal focus recognized in *Grant* does not seem be at odds with the text of section 24(2). Even if the remedy of exclusion requires an individual claimant to assert his or her *Charter* rights, this does not preclude the finding of a broader societal purpose.

[307] Don Stuart, *Charter Justice in Canadian Criminal Law*, 5th ed. (Toronto: Thomson Reuters, 2010) at 604.
[308] Dawe and McArthur, *supra* note 306 at 435.

ii. Deterrence Rationale

The Court in *Grant* found that the purpose of exclusion is not to punish the police or deter state misconduct. Even though exclusion may have the side effect of deterring such conduct, the Court made clear that deterrence is not section 24(2)'s intended purpose.[309] It is noteworthy that section 24(2) falls under the "enforcement" section of the *Charter*. It is logical to assume that rules aimed at enforcing *Charter* rights are linked to the aim of deterring state deviation from the rule of law. A deterrence rationale does, to some extent, seem to factor into section 24(2)'s mission. However, as noted, this rationale was rejected in *Grant*.

Deterrence was viewed as a remedial purpose for damages awards under the *Charter* in *Ward v. City of Vancouver*.[310] In *Ward*, the SCC found that damages may be awarded against the state for *Charter* breaches under s. 24(1) where appropriate and just. The assessment of whether damages are a just and appropriate remedy is based on whether damages would fulfill one or more of the objects of compensation, vindication and/or deterrence of future breaches.

Paciocco notes that there is no reason to think that damages awards would have any greater deterrent effect than the exclusion of probative evidence.[311] After all, it is the state, rather than the officer, who bears the burden of any damages award. Paciocco states "[i]t is difficult to believe... that modest damage awards available for Charter breaches

[309] *Grant*, *supra* note 1 at para. 73.
[310] *Ward v. City of Vancouver*, 2010 SCC 27, [2010] 2 S.C.R.
[311] Paciocco, "Lottery", *supra* note 290 at 49.

are more apt to inspire managers to act to discourage unconstitutional behavior than the loss of probative evidence would".[312]

It is significant to note, however, that *Ward* was a civil case dealing with remedies for *Charter* violations. The compensatory function that is recognized in the context of a civil action for remedies is not strictly applicable in the context of remedies in criminal trials. The rationale in *Grant* is clearly not the same as the rationale developed in the civil case of *Ward*. But given the different contexts, the two cases are not necessarily incompatible.

Paciocco further points out that "it is difficult to deny that deterrence thinking exerts indirect and subtle influence on how s. 24(2) operates".[313] For instance, the Court's finding in *Harrison* that systemic or institutional abuses aggravate the seriousness of *Charter* breaches "is difficult to understand other than as recognition that exclusion is expected to induce change in investigative practices".[314] Changes in investigative practices seem most obviously achieved through deterrence.

Professor Don Stuart notes that there is some "double speak"[315] in the Court saying that it wishes to avoid condoning police misconduct when "it seems really to be saying that it wishes to punish police and deter them from continuing to commit such breaches".[316] Although the Court rejected deterrence as a rationale for exclusion, it remarked that deterrence might be a positive side effect of exclusion. If probative evidence is lost

[312] *Ibid*. at 50.
[313] *Ibid*. at 51.
[314] *Ibid*.
[315] Stuart, *supra* note 307 at 603.
[316] *Ibid*.

through exclusion, it is not the police *per se* who are punished since, as Paciocco notes, "the real toll of exclusion is on society's interest in seeing criminal cases adjudicated on their merits, rather than on the police".[317]

a. American Approach to Exclusion

The purpose of section 24(2) differs from the American exclusionary rule whose express purpose is deterrence. The U.S. Supreme Court ruled that "[t]o trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system...".[318] The premise is that exclusion will have a general deterrent effect since police gain nothing from breaching *Charter* rights if evidence is excluded at trial.

b. Problems with Deterrence Rationale

In practice, there are compelling reasons to reject deterrence as a rationale for exclusion. If triggering exclusion requires showing empirical proof that police conduct will in fact be deterred, this creates very high, perhaps impossibly high, hurdles for *Charter* litigants.

It is also not obvious that exclusion of evidence will, in fact, deter police from committing future breaches. In dissent in *Grant*, Justice Deschamps pointed out that the question of whether the exclusionary rule is effective or not as a deterrent in the United

[317] Paciocco, "Lottery", *supra* note 290 at 51.
[318] Stuart, *supra* note 307 at 603, citing *U.S. v. Herring*, 129 S.Ct. 695 (U.S. Sup. Ct., 2009).

States has not been settled.[319] In Canada, the debate has likewise not been settled. Referring to commentary and case law, Justice Deschamps questioned whether deterrence effectively sanctions police, finding instead that "administrative or disciplinary measures may have a greater deterrent effect on the police".[320] It was also noted that exclusion might not be an effective deterrent since "it does not establish a clear and predictable rule requiring the exclusion of evidence".[321]

In my survey, in some cases, courts expressed the need to exclude to ensure that state misconduct did not become routine. Such statements appeared to reveal an underlying concern that courts wished to deter the possible occurrence of future breaches. Although *Grant* expressly established that deterrence was not the intended purpose of section 24(2), it seemed that deterring future misconduct by police was indeed the desired outcome in several cases.

In my view, even if exclusion encourages reform of police practice, this does not necessarily mean that a deterrence rationale should be attributed to section 24(2). Because of the difficulties of proof and the uncertainty regarding whether exclusion is the most effective means of deterring police, if exclusion does deter police, this should be considered to be, as the Court found in *Grant*, merely a beneficial side effect.

[319] *Grant*, *supra* note 1 at para. 212.
[320] *Ibid*.
[321] *Ibid*.

iii. Rejection of Corrective Justice Function

The aim of section 24(2), as stated in *Grant*, is not to provide compensation to the accused. Dawe and McArthur criticize the new test "for downplaying the significance of exclusion as a *remedy* for a *Charter* violation".[322] As Dawe and MacArthur point out, section 24 is expressly framed as a remedial provision, which suggests its intent is corrective. Notably, section 24(2) provides for exclusion of evidence "in proceedings under subsection (1)", which gives courts the power to award "such remedy as the court considers appropriate and just in the circumstances" for breaches of an individual's *Charter* rights. Dawe and MacArthur point out that rules on "standing" require that exclusion be asserted as a remedy by individuals who have suffered breaches of their own personal *Charter* rights. This restriction is inconsistent with the notion that exclusion does not exist to compensate for harm suffered by individual claimants.[323]

Paciocco similarly questions the logic of not recognizing a corrective justice function for section 24(2):

> [O]ur practices on standing and burden are more in keeping with a corrective, rights-based function for s. 24(2) than a forward-looking regulatory one... if an objective is to vindicate Charter rights generally and not in the individual case it makes no sense for the framers of s. 24(2) to have linked the operation of the remedy to an application by the party whose rights have been violated. Only corrective rationales can adequately explain the relationship between s. 24(2) and s. 24(1), along with the law's standing and application requirements.[324]

[322] Dawe and McArthur, *supra* note 306 at 434-5.
[323] *Ibid*. at 435.
[324] Paciocco, "Lottery", *supra* note 290 at 32-3.

Paciocco asserts that the choice to adopt a systemic, regulatory purpose in *Grant* rather than a compensatory rationale has made the prospect of exclusion less likely.[325] A higher exclusion rate is more likely achieved if individual claimants "have at least a qualified entitlement to have courts make good on the constitutional promises made to them by law".[326] For this reason, Paciocco argues that compensation theories for exclusion result in more aggressive exclusionary rules.

iv. High Exclusion Under *Grant* Regime

Both the results of the present study and Madden's 2010 survey do not support the conclusion that a regulatory, rather than compensatory, rationale results in less exclusion. As noted, in the present survey, the overall exclusion rate at the trial level was 73% under the *Grant* framework.

Affording courts the flexibility to balance competing interests has given them freer reign to assess the seriousness of the police conduct in relation to all types of violations. This is partly responsible, perhaps, for the high exclusion rate found. A rigid rule that requires exclusion primarily for certain types of evidence does not have such flexibility. From the case law surveyed, there appeared to be a strong emphasis placed on the wish to avoid condoning police conduct where police have violated established *Charter* principles.

[325] *Ibid*. at 33.
[326] *Ibid*.

Chapter 10 Discretionary Regime for Exclusion

i. Old Regime

As explained in Chapter 1, the prior regime for exclusion under *Collins* and *Stillman* created near-automatic exclusion for certain types of evidence. *Stillman* classified unlawfully obtained evidence into two categories: conscriptive and non-conscriptive. If the evidence was conscripted, it was generally excluded because of the perceived impact on trial fairness, regardless of the circumstances or seriousness of the breach. Compelling an accused to assist the prosecution in making its case was presumed to lead to an unfair trial. This thinking was applied beyond testimonial self-incrimination to circumstances where the accused was compelled to act in the creation of evidence, for instance, where breath sample evidence was obtained. Only if the evidence was non-conscriptive did the test mandate a balancing of competing factors.

This test was criticized for creating inflexible categories for exclusion contrary to the language of section 24(2) that requires consideration of "all the circumstances".[327] Stuart has criticized the categorization of evidence under *Stillman*, stating that the conscripted versus non-conscriptive dichotomy is "overly complex, arbitrary and rigid".[328]

[327] *Grant*, *supra* note 1 at para. 65.
[328] Stuart, *supra* note 307 at 597.

ii. Balancing Test Under *Grant*

In my opinion, the abolishment of the conscription test was a positive development as a rigid test for exclusion fails to account for the competing considerations that must be factored into the analysis of whether the administration of justice will be brought into disrepute by admission of the evidence. A balancing of considerations rather than a bright line rule is, however, less clear-cut in application. A balancing test results in greater judicial discretion.

The inquiry into exclusion of evidence should be a contextual, multi-factorial analysis. As *Grant* found, trial fairness is best conceived as a "a multifaceted and contextual concept"[329], and therefore inconsistent with the notion that admission of a certain category evidence will lead to an unfair trial irrespective of how it was obtained. The treatment of any particular type of evidence should not be dependent on its classification.

In my view, the point of departure in the analysis should be the circumstances surrounding how the evidence came to be obtained. This requires assessing the seriousness of the violation regardless of the type of evidence at issue. This must then be balanced against the countervailing consideration of society's interest in adjudication of the case on the merits. As *Harrison* explained, "[d]issociation of the justice system from police misconduct does not always trump the truth-seeking interests of the criminal justice system. Nor is the converse true".[330]

[329] *Grant*, *supra* note 1 at para. 65.
[330] *Harrison*, *supra* note 2 at para. 36.

There should, in my view, be a meaningful assessment of the societal interest in adjudication of the case, rather than a simple acknowledgement by the trial judge that society generally has an interest in seeing criminal allegations determined on their merits. The third inquiry asks "whether the vindication of the specific *Charter* violation through the exclusion of evidence exacts too great a toll on the truth-seeking goal of the criminal trial".[331] Exclusion of evidence itself may bring the administration of justice into disrepute as excluding "relevant and reliable evidence may undermine the truth-seeking function of the justice system and render the trial unfair from the public perspective".[332]

a. Qualitative Analysis

In *Harrison*, the Court asserted that the balancing exercise under section 24(2) is a qualitative analysis. It is not simply a matter of counting the number of factors weighing in favour of admission versus the number favouring exclusion:

> The balancing exercise mandated by s. 24(2) is a qualitative one, not capable of mathematical precision. It is not simply a question of whether the majority of the relevant factors favour exclusion in a particular case. The evidence on each line of inquiry must be weighed in the balance, to determine whether, having regard to all the circumstances, admission of the evidence would bring the administration of justice into disrepute.[333]

A balancing test relies on trial judges to exercise discretion in deciding whether to exclude evidence obtained in breach of the *Charter*. It is a determination that cannot be

[331] *Grant*, *supra* note 1 at para. 82.
[332] *Ibid*. at para. at 81.
[333] *Harrison*, *supra* note 2 at para. 36.

made with scientific accuracy since it is an analysis based on all the facts of the case. The language of section 24(2) says that the evidence "shall be excluded". However, a measure of discretion is necessarily exercised because, as Paciocco notes, there is "imprecision inherent in determining the impact of admission on the repute of the administration of justice".[334]

In my view, given that the exclusion decision involves balancing competing interests there will, necessarily, be a measure of inconsistency in decisions rendered. There is less predictability in outcomes as absolute certainty could only be achieved with a non-discretionary regime. There will be variation in outcomes since the factors taken into consideration during assessment are based on the particular facts of the individual case. The trial judge is positioned to make an assessment of the facts of the case and assess the credibility of the testifying officers. Deference should, therefore, be given to the trial court decision as long as the trial court has considered the factors outlined in *Grant* and *Harrison* and has not made any unreasonable findings. We trust judges to assess credibility, admissibility under normal principles of evidence laws, guilt or innocence, and to sentence proportionately. We should trust them to decide the seriousness of a *Charter* violation and the remedy.

[334] David M. Paciocco, *The Law of Evidence*, 6th ed. (Toronto: Irwin Law, 2011) at 373 [Paciocco, *Evidence*].

b. Flexibility

Dawe and McArthur argue that the flexibility of the *Grant* test will make outcomes of exclusion applications less predictable. This, in turn, yields greater disparity in results:

> By trading certainty and predictability for "flexibility", the court's new test will have the practical effect of making it more difficult for counsel on either side to predict the outcome of s. 24(2) applications... by placing even more discretionary power in the hands of trial judges and emphasizing appellate deference, the Supreme Court's new test is likely to increase the disparity of outcomes between similar cases. "Luck of the draw" at trial will become even more important.[335]

In my opinion, while a discretionary approach sacrifices total predictability, the alternative, an automatic regime for exclusion, does not provide a better solution. The section 24(2) analysis should not be conceived of as a black-and-white rule, as any such rule would not capture the competing interests at play. An automatic exclusionary rule that relies on categorization of the evidence would not meet the condition that exclusion be decided "having regard to all the circumstances" as required by section 24(2).

Also, whether or not the evidence was conscripted from the accused does not necessarily answer the question of whether the administration of justice system will be brought into disrepute in the long-term. In my view, systemic or institutional concerns related to police conduct should be an over-arching theme in this analysis. These concerns clearly tie into the goal of exclusion, which is "to preserve public confidence in the rule of law

[335] Dawe and McArthur, *supra* note 306 at 434.

and its processes".[336]

iii. Right Against Self-Incrimination

Professor Hamish Stewart raises concern that the *Grant* test for exclusion "raises the possibility that the right against self-incrimination may receive less protection than before".[337] The approach in *Collins* and *Stillman* placed particular emphasis on the self-incriminating quality of the evidence and this "gave special force to the argument for exclusion".[338] In Stewart's view, the emphasis on the principle of self-incrimination was justified because of the particular interests engaged in such breaches. Stewart states, for instance, that

> [A] warrantless search of a vehicle, though normally a very serious Charter violation, could conceivably be authorized by law in a way that a forced confession could not, and does not implicate the person in the way a forced confession does.[339]

The abandonment of the *Collins* and *Stillman* approach, with this view, weakens the protection against self-incrimination because all types of evidence are now subject to the same three lines of analysis. Stewart argues that "*Grant* unquestionably increases the likelihood of admission"[340] for breaches related to the right against self-incrimination.

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[336] *Grant*, *supra* note 1 at para. 73.
[337] Hamish Stewart, "The Grant Trilogy and the Right Against Self-incrimination" (2009) 66 C.R. (6th) 97.
[338] *Ibid*.
[339] *Ibid*.
[340] Hamish Stewart, "Section 24(2): Before and After *Grant*" (2011) 15 Can. Crim. L. Rev. 253 at 265.

iv. Survey Results

In practice, high admission rates for what was considered conscripted evidence under *Stillman* have not materialized. The results of the current survey show high exclusion rates for bodily evidence and statements, excluded in 83% and 74% of cases respectively. The lowest rate of exclusion relates to non-bodily physical evidence, excluded in 68% of cases. One would have expected to see greater exclusion of non-bodily physical evidence and less exclusion for conscripted evidence if self-incrimination rights were indeed receiving less protection than before *Grant*.

a. Non-Bodily Physical Evidence

Dawe and MacArthur assert that the emphasis on police misconduct in *Grant* and the reduced focus on the principle against self-incrimination would lead to higher exclusion in gun cases involving deliberate or negligent breaches.[341] Under *Collins* and *Stillman*, the principle against self-incrimination was not engaged in cases involving non-conscripted evidence making exclusion less likely. It was thought that *Grant*'s change in focus would result in more exclusion for such evidence.

As noted, the exclusion rate found in the present survey was 68 % in relation to non-bodily physical evidence. Although this is not the highest rate of exclusion compared to other types of evidence, it comes very close to matching the overall exclusion rate of 73% at the trial level.

[341] Dawe and McArthur, *supra* note 306 at 423.

In my view, the fact that exclusion rates are relatively consistent across the various categories of evidence is a positive sign since the decision to exclude should not hinge on the type of evidence at issue. Relative uniformity among exclusion rates, with the exception of gun evidence that was excluded in only 56% of cases, seems to suggest that no particular type of evidence is being excluded more than others.

b. Bodily Evidence

Dawe also asserts that *Grant* would significantly impact cases involving bodily evidence, including breath samples: "Admission of this type of evidence is likely to become the norm, while exclusion being reserved for cases involving exceptionally invasive searches or especially egregious police misconduct".[342] The results of my survey do not support this conclusion. The high exclusion rate for bodily evidence (83%) and comments by trial judges in cases involving breath samples suggested that exclusion is not being reserved for particularly serious cases. In some cases, the lack of adequate grounds for administration of the breath test was sufficient to merit exclusion even if the police conduct was not particularly egregious.

[342] *Ibid*. at 421.

Chapter 11 Specific Issues: Good Faith and Discoverability

i. The Doctrine of Good Faith

A finding of good faith is considered to mitigate the seriousness of the *Charter* breach. *Grant* states that good faith will "reduce the need for the court to disassociate itself from the police conduct".[343] Based on my review of the case law for 2012, there is, in my opinion, considerable variation in the way that the term "good faith" is used to characterize police conduct. The lack of consensus on the meaning and use of good faith is problematic. Whether the doctrine is given a wide or narrow scope of interpretation leads courts to varying interpretations and conclusions regarding the seriousness of the police conduct at issue.

The doctrine of good faith has been justifiably criticized because of its ambiguous interpretation and the varying meanings that have been attributed to good faith police conduct. For instance, Steve Coughlin writes that good faith has been treated in different ways by courts and is a flexible concept:

> Some cases have treated good faith as the mere absence of bad faith, and have therefore held either that a lack of malice is a factor favouring admission, or have held that a failure to act in good faith is not automatically bad faith, and therefore is not necessarily a factor favouring exclusion. Similarly, there has been confusion over whether bad faith requires a conscious decision by police to ignore the limits on their powers, or whether simple ignorance of the limits of those

[343] *Grant*, *supra* note 1 at para. 75.

powers is sufficient.[344]

Apart from specifying that "negligence or wilful blindness cannot be equated with good faith"[345] the Court in *Grant* gives no guidelines as to how good faith as a mitigating factor should be interpreted under the new test for exclusion.

a. Recommendation Regarding Good Faith

In my view, the doctrine of good faith, as well as bad faith, should not enter into the analysis when courts are characterizing police conduct under the first line of inquiry under *Grant*. The discrepancies in the use of the term have led to analytic confusion. Furthermore, the good faith analysis does not necessarily assist the analysis of the seriousness of the violation. In some cases, the fact that the officer acted in good faith did not lead to a finding that the first line of inquiry favoured admission. Even though courts found police acted in good faith, they were nonetheless willing to find that the violation was serious and favoured exclusion.

The SCC in *Harrison* found that "[w]hat is important is the proper placement of the police conduct along that fault line, not the legal label attached to the conduct".[346] The

[344] Steve Coughlan, "Common Law Police Powers and Exclusion of Evidence: the Renaissance of Good Faith" (2006) 36 C.R. (6th) 353.
[345] *Grant*, *supra* note 1 at para. 75.
[346] *Harrison*, *supra* note 2 at para. 23, citing *R. v. Kitaitchik* (2002), 166 C.C.C. (3d) 14 (Ont. C.A.) at para. 41.

placement of the police conduct on the fault line is dependent, in part, on the officer's level of knowledge of the *Charter* violation.

In my view, an officer's level of knowledge is best described using language related to intentionality. What should be central to the inquiry is where the violation falls on a scale ranging from unintentional, negligent, to deliberate. Courts should describe the officer's level of knowledge according to this scale, rather than label conduct as good faith or bad faith. This will promote analytic clarity as these labels are not being used as a stand-in for what is really meant. A classification based on intentionality more accurately describes the officer's level of knowledge. In turn, this allows courts to better assess the officer's blameworthiness and the courts need to dissociate itself, as required, from police conduct.

A court's finding that a breach is inadvertent conveys that the officer's blameworthiness is reduced due to lack of intention. In my view, a subsequent finding of good faith based on that fact complicates the matter. Given the current use of the term, good faith can refer to a range of meanings, not all of which should lead to mitigation. For instance, good faith can refer to the absence of bad faith, to the absence of knowledge of the breach or to a technical violation. It can also refer to a finding that the officer showed diligence in carrying out his or her duties or to circumstances where the officer acted in a context of uncertainty about the law.

The confusion and inconsistency surrounding the use of the terms good faith and bad faith provide the basis for a strong case for abolishment of these concepts. The confusion

is unnecessary. If a breach is inadvertent courts can simply state that this is so. For instance, the officer's conduct in *Kolevski*[347] in breaching the accused's section 10(b) rights was categorized as inadvertent. It was, therefore, held that the officer acted in good faith. [348] Police put the accused in telephone communication with duty counsel even though it was unclear whether this was, in fact, the accused's counsel of choice. The officer's level of knowledge of the breach was at the lowest end. The fact that the officer tried to respect the accused's rights by putting him in touch with duty counsel should not be considered to be "good faith". The officer was simply carrying out the duties that are required of a police officer. The officer made an inadvertent mistake in carrying out his duties. The fact that the breach was not deliberate is a factor weighing in favour of admissibility of the evidence, but need not be classified as good faith conduct.

Furthermore, in my view, an officer's subjective belief that he or she was acting lawfully should not be characterized as good faith police conduct. As *Grant* found, officers "are rightly expected to know what the law is".[349] In my view, the fact that an officer simply believed he or she was acting lawfully, perhaps due to lack of training or knowledge of the law, should not lead to a finding of good faith conduct. Rather, unlawful police action in these circumstances should be characterized as careless or negligent conduct. A subjective belief on the officer's part should only be viewed as mitigating if there is an objective reason validating the officer's belief that the conduct complied with law. For instance, this will be the case where the officer acted reasonably in accordance with a law that was later struck down as unconstitutional.

[347] *Kolevski*, *supra* note 128.
[348] *Ibid.* at para. 34.
[349] *Grant*, *supra* note 1 at para. 133.

In *Auger*[350] the court found the officer acted in good faith since the officer believed that she was acting lawfully[351] when she conducted an unlawful strip search. The officer's reasons for the search were lacking and she did not keep a proper record of it. Her subjective belief in the lawfulness of her actions should not be viewed as mitigating. If police are not complying with well-settled law, this should not be viewed as good faith conduct.

In *R. v. Thompson*,[352] a case in which the Ontario Superior Court excluded a loaded handgun and drugs for several serious *Charter* breaches, Justice Hill stated that police are deemed to have knowledge of the law within a reasonable time after courts have interpreted *Charter* rights. Officers are expected to know the limits of police powers:

> [A]t a reasonable point in time after the court has interpreted a material aspect of the contours of a *Charter* right, the police will be deemed to have knowledge of the governing authority. Put differently, it may reasonably be said that the police ought to have known. Section 24(2) "should not be used as a matter of course to excuse conduct which has in the past been found to be unlawful": *R. v. Silveira*, [1995] 2 S.C.R. 297, at para. 162.[353]

Police are deemed to have knowledge of *Charter* rights once courts have interpreted material aspects of these rights. Where police ought to have known that their behavior violated the *Charter*, the officer's lack of knowledge should not be viewed as mitigating.

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[350] *Auger*, *supra* note 126.
[351] *Ibid*. at para. 513.
[352] *R. v. Thompson*, 2013 ONSC 1527, [2013] O.J. No. 1236 [*Thompson*].
[353] *Ibid*. at para. 192.

b. Bad Faith

In my view, the term bad faith should similarly not be used when courts are classifying negligent or deliberate police conduct. In *Thompson*, the police conduct was placed towards the deliberate and flagrant end of the spectrum. The court found that one officer wrongly believed that section 10 rights did not need to be given to individuals upon detention. The court held that "[n]ot only is there an absence of good faith, but the conduct of the supervising police officer approaches, if not reaches, bad faith in the sense of casual disregard for a suspect's constitutional rights".[354] The officers' casual disregard for rights should not to be classified as bad faith. The fact that police ought to have known that section 10 rights needed to be given upon detention should simply be viewed as negligent police conduct.

In some cases, as noted above in Chapter 5, courts equated a lack of bad faith with a finding that police acted in good faith. In my view, the absence of bad faith should not, lead, as a direct consequence, to a finding that the police acted in good faith. This analytic leap is not justified if police were simply fulfilling their duties without malicious intent. In some cases, it appeared that courts viewed good faith and bad faith as the only two possible scenarios. As Coughlin states, with this view, good and bad faith "fill the field"[355], conduct is either one or the other. There is no neutral territory between the two. If the police are not acting in bad faith, then they are acting in good faith, and vice versa.

[354] *Ibid.* at para. 206.
[355] Steve Coughlan, "Good Faith, Bad Faith and the Gulf Between: A Proposal for Consistent Terminology" (2011) 15 Can. Crim. L. Rev. 197 at 199.

c. Police Knew or Ought to Have Known

In some cases, courts used the language in *Harrison* that police "knew or ought to have known" that their actions were in violation of the *Charter*.[356] The use of the phrase "knew or ought to have known" is ambiguous since it does not describe the officer's actual level of knowledge. If the officer did not have actual knowledge of the breach, then the court should find that the officer was negligent or careless. This is the case where the officer ought to have known that he was failing to adhere to *Charter* standards.

d. Coughlin's Position on Good Faith

In an effort to bring greater clarify and consistency to the analysis, Coughlin proposes that courts distinguish between three situations:

1) Good faith

2) Absence of good faith/Absence of bad faith

3) Bad faith[357]

Coughlin argues that courts should only use the terms good faith and bad faith in very specific circumstances. All other cases would fall into a middle category in which both good faith and bad faith are absent. Coughlin limits the use of the terms good faith and bad faith to situations where such a finding would "settle the seriousness issue":

> [I]f the motive behind the behavior (which is typically what determines whether we should call something good or bad faith) is not itself so overpowering as to determine the issue, we should not use those labels...

[356] *Liew*, *supra* note 150; *R. v. Thompson*, 2012 ONCJ 758, 2012 CarswellOnt 15578.
[357] *Coughlan*, *supra* note 355 at 199.

> A finding that the police behavior falls into the middle category is more neutral, in that it does not by itself clearly indicate whether the facts favour exclusion or non-exclusion. That is, finding no bad faith means that a particular reason that might have led to exclusion of the evidence is not present: that is not an argument *for* inclusion, it is merely the absence of an argument against it... Finding "this is X faith" will settle the seriousness issue: finding "this is not X faith" leaves the issue still to be settled.[358]

According to Coughlin, the absence of bad faith should not mitigate the seriousness of the breach.[359] Rather, the conduct should be viewed as neutral. Coughlin notes that in *Harrison* it was found that the absence of an aggravating factor, i.e. systemic issues, was not mitigating. The same should hold true with regards to the absence of bad faith.[360]

Coughlin also argues that police action "in the face of legal uncertainty" [361] should not be classified as good faith conduct. However, if the police acted in accordance with the law as it existed at the time, and that law was subsequently struck down, this would justify categorizing the conduct as good faith. In such cases, Coughlin asserts "there are positive reasons *not* to exclude".[362]

In my view, Coughlin's proposal for creating a scale between bad faith, absence of good faith or bad faith, and good faith is useful if the doctrine of good faith is maintained in the section 24(2) analysis. It increases clarity by proposing that conduct only fall into the good faith or bad faith categories in certain limited circumstances.

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[358] *Ibid*.
[359] *Ibid*. at 206.
[360] *Ibid*.
[361] *Ibid*. at 207.
[362] *Ibid*.

However, in my view, the good faith inquiry adds a step to the seriousness of the violation inquiry that does not provide significant added value to the analysis. What is important is not the legal label attached to the conduct but, instead, where the seriousness of the breach falls on the spectrum ranging from unintentional to deliberate. It may be that the police conduct in any given case falls at one extreme end of the spectrum such that it would "settle the seriousness question".[363] However, rather than classify the behavior as good faith or bad faith, courts could simply say that the conduct was deliberate or inadvertent.

In the case where an officer acted based on "what was at the time a correct understanding of the law",[364] the court should simply make this point rather than classify this as good faith. The conduct of the officer should not favour exclusion since the culpability of the officer is low or non-existent. However, it can be misleading to classify this as good faith conduct given the varying meanings that are attributed to this term.

ii. The Doctrine of Discoverability

As discussed in Chapter 10, the conscription-discoverability doctrine developed in *Collins* and *Stillman* was abandoned in *Grant*. However, the doctrine of discoverability was maintained as a non-determinative factor bearing on the second line of inquiry:

> Discoverability retains a useful role, however, in assessing the actual impact of the breach on the protected interests of the accused. It allows the court to assess the strength of the causal connection between the *Charter*-infringing self-incrimination and the resultant evidence. The more likely it is that the evidence would have been obtained even without the statement, the lesser the impact of the breach on the accused's underlying interest against self-incrimination. The

[363] *Ibid*. at 199.
[364] *Ibid*. at 207.

converse, of course, is also true.[365]

In *Coté*, the SCC held that, in the context of an illegal search, discoverability could be relevant at both the first and second inquiries. The seriousness of the police conduct is heightened if police "could have conducted the search legally but failed to turn their minds to obtaining a warrant or proceeded under the view that they could not have demonstrated to a judicial officer that they had reasonable and probable grounds".[366] On the second inquiry, "[i]f the search could not have occurred legally, it is considerably more intrusive of the individual's reasonable expectation of privacy". Conversely, if police had reasonable and probable grounds for the search, this attenuates the impact of the illegal search on the accused's privacy and dignity interests.[367]

As discussed in Chapter 6, in *R. v. Cole*,[368] the finding that police had reasonable grounds to obtain a warrant for the accused's work computer mitigated the impact of the illegal search. The SCC found that the seriousness of the breach was attenuated because of the officer's honest, though mistaken, belief that he had respected the accused's *Charter* rights. The law pertaining to an individual's right to privacy in a work computer was unsettled.[369]

In my view, if police had knowledge that they could have acted in compliance with the *Charter* and did not do so, this should aggravate the seriousness inquiry. If, as in *Cole*,

[365] *Grant*, *supra* note 1 at 122.
[366] *Coté*, *supra* note 13 at 71.
[367] *Ibid*. at 73.
[368] *Cole*, *supra* note 178.
[369] *Ibid.* at para. 86.

the level of knowledge attributed to the officer is minimal, this should attenuate the breach on the first inquiry. To come to this finding, however, it is not necessary to consider whether the evidence could have been found without the breach. The focus should be on the officer's level of knowledge, rather than on what could have hypothetically happened had the events unfolded differently.

With regards to the second inquiry, the impact of the breach on the accused's *Charter* rights should focus, similarly, on the events that actually occurred and the corresponding impact on the accused's *Charter*-protected interests. In my view, discoverability should not be considered in the section 24(2) inquiry.

Paciocco questions whether it is "theoretically sound" for the SCC to have considered discoverability in the assessment of the impact of the breach:

> The matter in issue is supposed to be the intrusiveness of the breach *on the* Charter-*protected interests of the accused* (citation omitted). The *Charter* does not protect accused persons against the discovery of probative evidence, or the prospect of facing a stronger case... The degree of intrusiveness of the breach should therefore arguably turn on the nature of the investigative violation and not on what the breach happened to make available.[370]

Paciocco further states that discoverability is arguably relevant under the third inquiry since "[i]t is more costly to society to exclude evidence the Crown would have had even without the breach".[371]

[370] Paciocco, *Evidence*, *supra* note 334 at 391.
[371] *Ibid*.

Paciocco's view that discoverability is not relevant on the second inquiry is justified. However, in my view, discoverability should be abandoned altogether because of the speculative and confusing nature of the inquiry. On all three factors, the inquiry should look at the events that actually occurred, rather than an alternative hypothetical scenario. On the second factor, the assessment of the impact of the breach should focus on the violation itself, rather than what evidence was discovered as a result of the breach. This is aligned with the focus in *Grant* on the seriousness of the *Charter*-infringing state conduct.

Under the first inquiry, the seriousness of the police conduct should depend on the level of knowledge attributed to the officer. If the officer knew he could have obtained the evidence in a manner that respected the accused's *Charter* rights, and failed to do so, this shows either carelessness or deliberate conduct by police.

Stuart argues that the seriousness of the violation is heightened if the evidence could have been found legally: "There should be a catch-22 for Crown arguments about discoverability in that the reality police could have found the evidence without violating the Charter surely makes the violation more serious".[372]

In the recent case of *R. v. MacMillan*,[373] the Ontario Court of Appeal overturned the trial judge's decision to exclude breath sample results in a case involving a charge of operating a vessel "over 80" causing death. The trial judge had committed several errors,

[372] Stuart, *supra* note 307 at 600.
[373] *R. v. MacMillan*, 2013 ONCA 109 [*MacMillan*].

one of which related to his consideration of discoverability as a factor in the section 24(2) inquiry. The trial judge held that "[s]ince the Intoxilyzer results would not have been discovered without the results from the approved screening device demand, this was an aggravating factor".[374] The Court of Appeal found that the "issue was not whether the Intoxylizer results were discoverable without the screening device demand, but whether results of the screening device demand were discoverable".[375]

The inquiry as to whether the accused would have complied with the screening device demand had she been advised of her s. 10(b) rights was speculative: "It was speculative whether the respondent would have consulted counsel and speculative whether counsel would have advised the respondent not to comply with the demand".[376] Therefore, it was impossible to determine whether the results of the screening device demand would have been discovered had the breach not occurred. As such, discoverability should have had no impact on the analysis. It was an error in law for the trial judge to engage in "impermissible speculation".[377] It was open to the Court of Appeal to conduct its own balancing of the three inquiries given the trial judge's errors. On balance, the Court of Appeal held that the three lines of inquiry favoured admission of the breath sample evidence.

MacMillan shows how the discoverability analysis is confusing and can lead courts to engage in speculation as to the potential chain of events. In the case law surveyed,

[374] *Ibid*. at para. 17.
[375] *Ibid*. at para 75.
[376] *Ibid*. at para. 75.
[377] *Ibid*. at para. 63.

discoverability was considered in 15 out of 98 trial court cases. Trial courts are not considering this factor to a great extent. Looking at this factor would, in many cases, require considering hypothetical scenarios that do not assist in determining whether admission of the evidence would bring the administration of justice into disrepute. For these reasons, the focus should be placed on the events that actually occurred rather than on whether police could have obtained the evidence by legal means.

Part IV Conclusion

The purpose of the research work outlined in this thesis is to determine what impact the new test for exclusion developed in *Grant* and *Harrison* has had on exclusionary trends in Canada, to assess this new approach and to provide recommendations for improvement.

To this end, I conducted an empirical survey of section 24(2) cases rendered in 2012 across Canada. Based on the results of this survey, I described the current trends for exclusion in relation to the three lines of inquiry and the *Charter* right at issue. I also examined the application of the test to varying types of evidence.

The survey results show that developing trends do not match the predictions made by the SCC in *Grant* about how exclusion would operate in relation to different types of evidence. For example, there was a higher than expected rate of exclusion for breath sample results. The taking of breath samples was considered to be minimally intrusive

and would therefore generally favour admission. In some cases, it appeared that courts were concerned with the initial detention or events that followed the breath testing rather than the testing itself.

The low exclusion rate for guns was interesting, particularly in contrast to the higher exclusion rate for other types of non-bodily physical evidence. Given these differences, it is possible that the seriousness of the offence does indeed have a role to play in exclusion decisions even though this factor was found, in *Grant*, to "cut both ways". The rate of exclusion for section 10(b) breaches was lower than expected given the importance of the *Charter* interests that section 10(b) protects. There appeared to be many trivial or fleeting breaches of an accused's right to counsel which led to less exclusion for section 10(b) *Charter* rights.

There was inconsistency surrounding the level of weight that courts attributed to the seriousness of the offence as a factor in the analysis of society's interest in adjudication of the case on its merits. Some cases placed great emphasis on this factor while others downplayed it or were not willing to consider it at all.

The survey results identify a high overall rate of exclusion at the trial court level. When considering these results it is important to note that the cases surveyed are only those in which courts found a violation of an accused's *Charter* rights. It may be that the courts, in many other cases, were not willing to find violations because of the prospect that probative evidence would be excluded at trial. In a survey such as this, it is impossible to

take into account this potential reality. There are also, possibly, many other circumstances whereby individual *Charter* rights have not been respected by the state and where the encounter did not result in evidence of an alleged crime. The number of cases included in this survey is finite and the results of this survey cannot speak to other cases where *Charter* rights have possibly been violated.

The change in regime from a categorical approach to a discretionary one is, in my view, a positive development to the exclusionary rule in Canada. The three lines of inquiry in the assessment of whether admission of the evidence would bring the administration of justice into disrepute appropriately balance the relevant considerations. This is a fact-based determination by trial judges who are best positioned to assess the facts of the case and the credibility of the witnesses. For this reason, deference should be given to the trial judge's determination if the judge has considered the proper factors and has not come to unreasonable findings.

The discretionary approach to exclusion is, in my view, generally satisfactory. However the test could be improved. As regards the first *Grant* factor, there was considerable variation in the assessment of the seriousness of the violation given the fact-specific nature of the inquiry. For greater consistency and transparency, the test, in future, should not incorporate the good faith doctrine. Police conduct should be assessed on the basis on a scale of intentionality ranging from negligent to deliberate conduct, rather than the current process of labeling police conduct as good or bad faith.

Moreover, the doctrine of discoverability should be abandoned. The focus should be placed on the events that actually occurred rather than on an alternative hypothetical scenario. My hope is that this research work will lead to consideration of my recommendations in light of improved application of the test by judges in future.

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