TITLE: SECTION 24(2): DOES THE TRUTH COST TOO MUCH?

Matthew Pearn*

"Truth, like all other good things, may be loved unwisely –
may be pursued too keenly –
may cost too much."[1]

The Supreme Court of Canada in its 2009 *Grant* trilogy[2] significantly shifts the Canadian rationale for excluding probative evidence from a criminal trial when a state actor has breached a defendant's constitutional rights as guaranteed by the *Charter*.[3] The majority decision from *R v Grant* has broadened the trial judge's discretion to either exclude or include evidence under section 24(2) of the *Charter* in this new test for determining when a criminal investigation may bring the system of justice into disrepute.[4] In rewriting the test for *Charter* exclusion, the Court has abandoned the requirement that trial judges protect the fairness of the criminal trial by automatically excluding both conscripted testimony from the criminally accused and any otherwise non-discoverable evidence uncovered through police investigations arising from comments made during the forced testimony.[5] Trial judges may now accept into the record otherwise undiscoverable derivative physical evidence collected by police and the Crown may now attempt to use this evidence in its prosecutions.[6] The *Charter* remedy of exclusion which had, prior to *Grant*, barred this evidence also supported the expectation that the Crown bear the burden of proving its own case and respected

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* LL.B. (Cand.), University of New Brunswick. Many thanks to Jula Hughes, Nicole O'Byrne, Margaret McCallum, and Sanjeev Anand for their helpful comments and suggestions. Any errors or omissions are mine alone.

1 *Pearse v Pearse* (1846), 63 ER 950 at 957, quoted with approval by Justice Fish in *R v Bjelland*, 2009 SC 38, [2009] 2 SCR 651 at para 65 [*Bjelland*].

2 *R v Grant*, 2009 SCC 32, [2009] 2 SCR 353 [*Grant*]; *R v Harrison*, 2009 SCC 34, [2009] 2 SCR 494 [*Harrison*]; *R v Suberu*, 2009 SCC 33, [2009] 2 SCR 460. These companion decisions were joined by *R. v. Shepherd*, 2009 SCC 35, [2009] 2 SCR 527, which did not reach the *Charter* section 24(2) stage of analysis.

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

4 *Grant, supra* note 2 at para 71.

5 *Ibid* at para 65.

6 *Ibid* at paras 119-128.

the principle that the state cannot force the criminally accused to self-incriminate. This created a balance of power between the criminally accused and the state which may be upset if *Grant* is applied in a fashion that regularly allows certain kinds of evidence to be admitted into the trial record.

While *Grant* rejects large swaths of the section 24(2) jurisprudence, the Court views its re-imagining of the *Charter* exclusion remedy as more revisionary than revolutionary.[7] As Justice David Doherty of the Ontario Court of Appeal observed, in *Grant* the Court has taken a judicial "wire brush to the 20 years of jurisprudential gloss that had built up around s.24(2) and scrubbed down to the bare words of the section."[8] The Court's goal in *Grant* is to create a remedy of exclusion which better respects the text of section 24(2), while simultaneously placing a renewed emphasis upon the truth-seeking function of the court and the public's interest in adjudication on the merits. *Grant* resets the law, freeing trial judges to include or exclude any evidence obtained through a *Charter* breach if doing so will best protect the long-term reputation of Canada's administration of justice. The *Grant* majority emphasized appellate deference to this inherently factual inquiry, which requires a judge to consider whether in all the circumstances of each individual case the exclusion of evidence is the appropriate remedy.[9]

The *Grant* test overrules the earlier dictum from *Stillman* where whole categories of illegally obtained evidence were presumptively excluded in order to ensure that a criminal defendant would receive a fair trial.[10] *Grant* re-affirms the more traditional truth-seeking preference of the courts to exclude untrustworthy forced testimonial evidence and to thoroughly scrutinize all improperly collected physical evidence of probative value before excluding it. This distinction was partly lost in the *Stillman* definition of conscriptive evidence, and even trivial conscription was treated as an absolute bar upon entering evidence into the trial record. *Grant* improves upon *Stillman* by better respecting the section 24(2) goal of examining, in the totality of circumstances, whether the admission of evidence would bring the system of justice into long-term disrepute. In particular, it focuses upon whether police have demonstrated good faith in attempting to comply with the *Charter* rights of the criminally accused.

However, this focus upon good faith policing standards comes at the expense of any direct examination into whether the fairness of our adversarial criminal prosecutions has been upset by admitting improperly collected evidence. The Court in

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[7] David M. Paccioco and Lee Steusser, *The Law of Evidence, 5th ed*, in revised Chapter 9 (Toronto: Irwin Law, 2008) at 24.

[8] *R v Blake*, 2010 ONCA 1, 251 CCC (3d) 4 at para 2.

[9] *Grant, supra* note 2 at para 86. See also *R v Beaulieu*, 2010 SCC 7, [2010] 1 SCR 248 at paras 5-7.

[10] Tim Quigley, "Was it Worth the Wait? The Supreme Court's New Approaches to Detention and Exclusion of Evidence" (2009) 66 CR (6th) 88 at 91.

Grant appropriately identified that the reputation of the justice system will be harmed if trial judges are seen to support police abuse of constitutionally protected rights, but as courts generally presume that police carry out their duties in good faith, it is likely that trial judges will fail to consistently apply this check on state power.[11] Trial fairness and its rules, which are favourable to the criminally accused, impeded the successful prosecution of criminals in order to limit state power and created a measure of balance between the state and the criminally accused.[12] This balance required that certain kinds of evidence must be presumptively (if not absolutely) excluded, because the state should not be able to use its limitless resources to force the criminally accused to participate in his or her own conviction. If state power goes unchecked in this regard, this too will, in the long-term, diminish the reputation of Canada's administration of justice. As the public will only accept the correctness of decisions rendered by a justice system which assures that the public's rights are valued by the state, the important and multifaceted concept of trial fairness provided guidance upon when to use the remedy of exclusion to correct an abuse of state power. The Court in *Grant* abandoned the expectation that trial judges explicitly consider trial fairness at the price of precision in when evidence should be excluded.

In stripping section 24(2) back to its bare text, the Court in *Grant* simultaneously unsettled the law and ignored the historic purpose of this exclusion remedy. The Court further re-opened the possibility of admitting probative evidence which the drafters of section 24(2) intended to see excluded from the trial record. The Court in *Grant* properly affirmed the broad discretion of trial judges to exclude evidence when necessary, and denounced the historic injustice created by preventing judges from excluding evidence except in those rare situations where "the allowance of evidence [was] gravely prejudicial to the accused, [its] admissibility [was] tenuous and [its] probative force ... trifling".[13] However, in resettling the remedy of exclusion, the Court overlooked that this *Charter* discretion was created in order to ensure that all who are criminally accused receive a fair trial.[14] Following *Grant*, uncertainty and imprecision in the outcome of section 24(2) applications will be the rule until new "patterns ... emerge with respect to particular types of evidence", providing guidance to judges in future cases.[15] While in the short-term judges seem inclined to use their broad discretion to exclude a great deal of evidence,[16] the structure of the new section 24(2) test may allow for an easy swing to either extreme. Further, in directing the trial

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[11] Jordan Hauschildt, "Blind Faith: The Supreme Court of Canada, s. 24(2) and the Presumption of Good Faith Police Conduct" (2010) 56 Crim LQ 469 at 470.

[12] Law Reform Commission of Canada, *Control of the Process: Criminal Procedure*, Working Paper 15 (Ottawa: Information Canada, 1976) at 22 [*Control of Process*].

[13] *R v Wray*, [1971] SCR 272 at 293 [*Wray*].

[14] Peter Cory, "General Principles of Charter Exclusion (Exclusion of Conscriptive and Non-Conscriptive Evidence)" (1998) 47 UNBLJ 229 at 233,234 [Cory].

[15] *Grant*, *supra* note 2 at para 86.

[16] Mike Madden, "Empirical Data on Section 24(2) under R. v. Grant" (2010) 78 CR (6th) 278 [Madden].

judge to uphold the truth-seeking institution of the courts without reference to the necessary counterpoint of trial fairness, the Court in *Grant* tips the balance too far in favour of truth over justice.

The approach from *Grant* inferentially accepts that where the court fails to exclude evidence in the face of a *Charter* breach, a trial judge may avoid bringing the administration of justice into further disrepute by simply declaring that a *Charter* breach has occurred. The drafters of *Charter* sections 24(1) and (2) explicitly rejected declaratory remedies of this kind as an appropriate response to a *Charter* breach.[17] Moreover, Canada's courts have suggested that *Charter* section 24, as a whole, is a tool intended to "help fulfil the realization of our constitutional ideals".[18] These sections should be understood as a "sincere attempt on the part of society to provide full and adequate remedies for the violation of fundamental rights and freedoms [because to] have a right or freedom without an adequate remedy is to have a right or freedom in theory only – a hollow or empty right."[19] As section 24(2) interpretation under *Grant* will undoubtedly leave many criminally accused without a remedy for rights highly valued in Canadian society, the repute of the justice system will remain tarnished when no substantial remedy is open to a criminally accused. If Canada's courts are to protect the long-term reputation of the administration of justice, trial judges must possess some other remedy for when the exclusion of evidence cannot be justified.

The Supreme Court of Canada (SCC) is considering alternative *Charter* remedies under section 24(1) and it must develop these alternatives in order to rein in government abuse and to ensure respect for *Charter* rights. The Court must also create a better remedial scheme in order to ensure that trial judges do not overly rely upon their new, broad discretion to exclude evidence under section 24(2).[20] As the SCC recently acknowledged in *Vancouver v Ward*, courts may legitimately grant *Charter* remedies to deter future *Charter* breaches.[21] In failing to develop an appropriate alternative remedy to section 24(2) exclusion, we will leave many whose rights are breached without a remedy and will generally undermine the value of *Charter* rights belonging to society at large, perhaps legitimizing future state abuse of these rights. Until the appropriate alternatives to the remedy of exclusion are developed, it can be appropriately asked: does our court's search for the truth cost too much?

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[17] William H. Charles, Thomas A. Cromwell & Keith B. Jobson, *Evidence and the Charter of Rights and Freedoms*, (Markham: Butterworths Canada Ltd., 1989) at 217-218 [Evidence and the Charter].

[18] *R v Therens*, 5 CCC (3d) 409 (Sask C.A.) at 414.

[19] *Ibid* at 426-27.

[20] Madden, *supra* note 16.

[21] *Vancouver v Ward*, 2010 SCC 27, [2010] 2 SCR 28 at para 29.

Grant dissolves the much loathed categories of conscripted and non-conscripted evidence in favour of examining whether, in all the circumstances involved in the collection of probative evidence, any evidence regardless of its status as conscribed or non-conscribed should be excluded. While the Court recognized that forced confessions are almost certainly excluded,[22] it abandoned any concern for whether real evidence was discovered by police as a consequence of forced testimony from the criminally accused.[23] Most notably the Court erases the trial fairness principle from its section 24(2) analysis, and eliminates the presumption that non-discoverable evidence derived from forced testimony must be excluded.[24] In making these changes, Chief Justice Beverley McLachlin and Justice Louise Charron for the *Grant* majority have overlooked the history surrounding the creation of section 24(2), and ignored the contents of the ruling of Justice Ronald Martland in *R v Wray*, which the *Charter* drafters intended to correct. Examining the history, it becomes plain that section 24(2) was embedded into the *Charter* specifically to limit police abuses like those committed against John Wray, and to protect the criminally accused where non-discoverable evidence derived from his conscripted testimony would otherwise be used in assuring his conviction.

Canadian Parliament began drafting and considering section 24(2) of the *Charter* at a time when common law authority denied a trial judge the discretion to exclude otherwise reliable evidence presented by the Crown in a criminal trial, even though police in obtaining that evidence acted in a way that could bring the administration of justice into disrepute. In the 1970s, the SCC had freshly adopted common law authority from England which strongly endorsed the truth-seeking function of the court in this regard.[25] However, the perception that the common law courts are ultimately a truth-seeking establishment focused on obtaining the most accurate outcome likely influenced the Canadian jurists' decision to accept this standard. Despite this perception, common law courts had for some time allowed for exclusion of probative evidence in support of the greater public good. During the late 18th and early 19th centuries, English jurist and law reformer Jeremy Bentham campaigned to have courts enhance their truth-seeking function by examining many categories of evidence that were traditionally excluded. Bentham argued that the common law exclusion of evidence was "an extreme and a most disastrous remedy" because it was "more likely to lead to misdecision through its exclusion of relevant evidence."[26] In Bentham's view, to exclude evidence was to exclude justice.

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[22] *Grant, supra* note 2 at para 92.

[23] *Ibid* at paras 119-128.

[24] *Ibid* at paras 65, 122.

[25] *Wray, supra* note 13 at 297.

[26] C.J.W. Allen, *The Law of Evidence in Victorian England,* (Cambridge: Cambridge University Press, 1997) at 99.

Despite this concern, both Bentham and 20th century legal scholar John Henry Wigmore understood that the purpose of a trial may be something more than simply a search for truth. Bentham argued that the proper purpose of substantive law is utilitarian: it ensures "the preservation of the greatest happiness to the greatest number."[27] Bentham recognized that the admissibility of some evidence could come at too high a price if doing so allowed a general injustice to prevail.[28] In a similar vein, Wigmore acknowledged that there exists legitimate societal reasons for interfering with the fact-finding ability of the courts. Wigmore labelled these reasons as "extrinsic policies" which:

> ...forbid the admission of various sorts of evidence because some consideration extrinsic to the investigation of truth is regarded as more important and overpowering... [T]heir effect is to obstruct not to facilitate the search for truth, and... this effect is consciously accepted as less harmful on the whole than the extrinsic disadvantages which would ensue to other interest of society if no such limitations existed.[29]

Wigmore listed a number of examples of extrinsic policy choices which exclude evidence. Courts have recognized society's interest in certain zones of privacy by respecting litigation privilege, marital privilege and physician-patient privilege.[30] Underlying both Wigmore and Bentham's philosophies is a common belief that there must be a balancing of society's interests between individual rights and the truth-seeking function of the court. This balancing precludes the simple application of law to facts in order to achieve justice.

In his text on the theoretical understanding of evidence law, H. L. Ho references the work of Harvard law professor and prominent American litigator Charles Rothwell Nesson who explains that the moral dilemma involved in the admission or exclusion of tainted evidence at trial remains a live question in the 21st century. Nesson asks:

> Should the search for truth ever be compromised to enhance the acceptability of verdicts and thus the power of the law's substantive message? Should the appearance of justice ever be more important than actual justice? ... To argue that the search for truth may be compromised in order to enhance the power of the law's substantive message is to force us to confront an unsettling choice and to make an argument that is in some sense inherently unsatisfying.[31]

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[27] *Ibid.*

[28] *Ibid* at 98.

[29] John T. McNaughton, ed, *Wigmore on Evidence: Evidence in Trial at Common Law*, (Boston: Little, Brown and Company, 1961) vol 8 at 3,4.

[30] *Ibid.*

[31] H. L. Ho, *A Philosophy of Evidence Law: Justice in the Search for Truth*, (New York: Oxford University

Ho identifies the subtext of Nesson's message as saying that the primary aim of the justice system is to secure public acceptance of verdicts. However, Ho says that *de facto* public acceptance of a trial verdict should not be treated as an end in itself. Rather than focussing on mere public acceptance of a decision, he says we should focus on the acceptability of the reasoning that supports the verdict. This will sometimes mean doing justice to the individual criminally accused in a way that the public, including the direct victims of a criminal act, may find "inherently unsatisfying".[32] As Manitoba's Chief Justice Samuel Freedman wrote, not long after *Wray*, the policy choice to limit truth-seeking in favour of a greater justice helps to ensure public acceptance of the court's decisions in general:

> The objective of a criminal trial is justice. Is the quest of justice synonymous with the search for truth? In most cases, yes. Truth and justice will emerge in a happy coincidence. But not always. Nor should it be thought that the judicial process has necessarily failed if justice and truth do not end up in perfect harmony. Such a result may follow from law's deliberate policy. ... [T]he law makes its choice between competing values and declares it is better to close the case without all the available evidence being put on the record. We place a ceiling price on truth. It is glorious to possess, but not at an unlimited cost.[33]

By this logic it follows that when courts properly administer justice by guaranteeing all criminally accused a fair trial, the general public will be more inclined to accept the substantive message that the courts' verdicts are generally valid. Where courts fail to ensure trial fairness between the state and the accused, likewise the general public will be inclined to see trials as possible miscarriages of justice.

The SCC was confronted with Ho's "unsettling choice" between the substantive message of the law and the search for truth in *Grant* and earlier in *Stillman, Collins* and *Wray*. The Court's goal in these decisions was to guide judges in determining when exclusion or inclusion of evidence would best ensure the public's acceptance of verdicts and thus protect the repute of the Canadian justice system. The Canadian Parliament and provincial legislatures' choice to create constitutional rights and the constitutional remedy of exclusion instructs the courts that the unreasonably high common law standard of excluding only evidence collected in a manner which "shocks the conscience" of the community is a standard too high for the valued rights enshrined within the *Charter*.[34] Under the *Charter*-era standard, if a trial judge finds that failing to distance the court from the inappropriate actions of a state officer may

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Press Inc., 2008) at 59.

[32] *Ibid* at 60.

[33] Samuel Freedman, "Admissions and Confessions" in Roger Salhany, Robert Carter, eds, *Studies in Canadian Criminal Evidence* (Toronto: Butterworths, 1972) at 99.

[34] *Rothman v R*, [1981] 1 SCR 640, 59 CCC (2d) 30 at 74 [*Rothman*].

tarnish the long-term reputation of justice, the trial judge must exclude evidence connected to those actions. The content of what informs this standard is found, in part, from the history related to its creation.

In the years leading up to the incorporation of the *Charter* into Canada's constitution, Canadian courts found little reason to exclude evidence of solid probative value in order to maintain the abstract principle of trial fairness or to protect the repute of justice. Rather, the fairness of a trial would only be compromised by "the admission of evidence the probative value of which [was] outweighed by its prejudicial effect."[35] The SCC's 1971 decision, *R v Wray*, defined the common law rule for exclusion of illegally obtained evidence.[36] In adopting an English standard from *Kuruma v R*, the SCC decided to "turn a blind eye to the manner in which the evidence was obtained" and rejected "fairness to the accused" and "protection of the integrity of the judicial process" as reasons for excluding evidence.[37] The Court accepted this principle in the face of blatant police abuse of the criminally accused's rights, where police used state power to collect evidence key to the Crown's case against the defendant.

John Wray was arrested by Ontario Provincial Police on 4 June, 1968 in connection with a murder. During Wray's nine-hour interrogation, the police denied Wray access to his lawyer despite the fact that his lawyer had called the police station searching for Wray. After obtaining a confession from Wray, the police ordered him to guide them to the rifle Wray had used in the killing. Wray had thrown the rifle into a swamp some 15 miles from the murder scene.[38] The Crown's case relied heavily on the probative value of the confession and the weapon as there was no eye witness to the crime.

At Wray's trial, the judge excluded both the confession and the weapon from consideration, believing that to enter this evidence would render Wray's trial unfair. At the Ontario Court of Appeal, Justice Aylesworth wrote for the majority saying that the trial judge had the discretion to reject the evidence regardless of its substantial importance to the prosecution's case should the trial judge believe that admitting it would "be unjust or unfair to the accused or...bring the administration of justice into disrepute."[39] In reversing the lower courts, Justice Martland writing for the SCC majority ruled that the trial judge could not grant Wray the remedy of excluding the illegally obtained probative physical evidence merely because the trial judge believed that the evidence might deny Wray a fair trial and thus bring the

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[35] Alan W. Bryant, Sidney N. Lederman & Michelle K. Fuerst, *The Law of Evidence in Canada*, 3d ed (Markham: LexisNexis Canada Inc., 2009) at 566 [Sopinka].

[36] *Wray*, *supra* note 13.

[37] Evidence and the Charter, *supra* note 17 at 201.

[38] *Wray*, *supra* note 13 at 300.

[39] *R v Wray*, [1970] 2 OR 3, 3 CCC 122 at 123 (Ont CA).

"administration of justice into disrepute."[40] If Wray was entitled to any remedy, it would have to be found in the narrowly construed *Canadian Bill of Rights* in a separate civil proceeding.[41] Probative evidence needed to be admitted at trial in order to ensure that the trial judge rendered the proper verdict. Meanwhile, in dissent, Chief Justice John Robert Cartwright reasoned that because there exists a common law right against self-incrimination, both the confession and the derivative physical evidence needed to be excluded. Chief Justice Cartwright said the physical evidence should be excluded because the accused had been conscripted into assisting the Crown in discovering the location of the weapon.

Following *Wray,* the courts were not inclined to resurrect any prior common law discretion to exclude evidence based upon a sense of "fairness to the accused" or in "protection of the integrity of the judicial process".[42] In response, Parliament initially attempted to soften the common law through legislation. In enacting provisions authorizing a warrant scheme for wiretapping, Parliament gave the court permission to exclude evidence where the "admission [of the evidence] would bring the administration of justice into disrepute."[43]

Wray prompted further consideration of a broader exclusionary remedy from the Law Reform Commission of Canada.[44] Commissioners working on the project included future Supreme Court of Canada Chief Justice Antonio Lamer, a man whose later reforms to Canadian criminal law were defined by his careful balancing of the "relative values of truth and justice."[45] Commissioner Lamer's understanding of trial fairness was formed in part by his work as a Quebec criminal defence lawyer during the Duplessis era.[46] Lamer saw how police used interrogation and other investigative techniques to conscript a criminally accused into assisting the Crown's case.[47] He feared that the state's unrestrained use of criminal law could easily become a tool for political oppression, and was "deeply affected by [the] injustices of the system"

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[40] *Wray, supra* note 13 at 287.

[41] Evidence and the Charter, *supra* note 17 at 203.

[42] *Ibid* at 201, 202.

[43] *Ibid* at 202.

[44] Law Reform Commission of Canada, *Report on Evidence*, (Ottawa: Information Canada, 1975), s 15.

[45] Patrick Healy, "Lamer, the Exclusion of Evidence and the Scent of Truth 1975-2000" in Adam Dodek, Daniel Jutras, eds, *The Sacred Fire: The Legacy of Antonio Lamer* (Toronto: Lexis Nexis, 2009) 177 at 203 [Healy].

[46] Jula Hughes, "Control of Process: The Criminal Procedure Jurisprudence of Chief Justice Lamer" in Adam Dodek, Daniel Jutras, eds, *The Sacred Fire: The Legacy of Antonio Lamer* (Toronto: Lexis Nexis, 2009) 151 at 153 [Hughes].

[47] Healy, *supra* note 45 at 178.

common to the time.[48] He felt that judges must have the discretion to exclude evidence at trial in order to control these abuses.[49]

At the same time, Lamer and his fellow commissioners said that in our adversarial trial system, "judicial impartiality also place[s] restraints upon the degree of control the judiciary can exercise over the conduct of the prosecution."[50] Judges cannot simply become the champions of civil rights because to do so "would imperil the impartiality of our courts."[51] In the Commission's view, judges must be granted the discretion to restrain systemic abuses of the criminal justice system, but must not be granted a discretion so broad as to become partial. For this reason, the Commission favoured rules governing trials which would only act as "a check on the otherwise limitless powers of the state, its institutions and officials."[52] The rights of individuals came second to the restraint of power.

This idea of levelling the playing field and the obligation of the state to deliver trial fairness in its prosecutions animated much of Chief Justice Lamer's later work. His understanding of the Crown's obligation to bring a case to meet (burden of proof), the presumption of innocence, the right to silence, and the principle against self-incrimination operate together to limit state power and protect the integrity of the administration of justice. As he would later say:

> ...perhaps the single most important organizing principle in criminal law is the right of an accused not to be forced into assisting in his or her own prosecution' – the "case to meet" principle. This principle ... is perhaps best described in terms of the overarching principle against self-incrimination, which is firmly rooted in the common law and is a fundamental principle of justice ...[53]

In its *Report on the Law of Evidence (1975)* the Commission in response to Justice Martland's decision in *Wray* recommended that judges should have a discretionary power to exclude evidence obtained in such a manner that its admission would tend to bring the administration of justice into disrepute.[54] The Commission's pre-*Charter* report joined others which also recommended that this remedy of exclusion be granted to trial judges, but both the provinces and civil rights activists were concerned with how courts might apply this discretion. Provinces worried that the

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[48] Hughes, *supra* note 46 at 153.

[49] *Ibid.*

[50] *Control of Process*, *supra* note 12 at 22.

[51] *Ibid* at 28.

[52] *Ibid* at 31.

[53] *R v S (RJ)*, [1995] 1 SCR 451 at 469.

[54] Sopinka, *supra* note 35 at 550.

exclusionary power would be used as a mandatory rule which would remedy even the most minor or technical civil rights breaches, as was commonly done in the American prosecutions.[55] Conversely, civil libertarians worried that the courts would choose not to use an unfocused discretion to overrule the precedent set in *Wray*.[56] Meanwhile, the McDonald Commission in its investigation into illegal acts committed by RCMP officers recommended that Parliament compromise between the two positions and legislate a limited exclusionary discretion like the one recommended by the Law Reform Commission.[57]

The earliest draft versions of a unified section 24 of the *Charter* would have restricted *Charter* remedies to declarations, injunctions, prerogative writs and would also have inhibited the court's ability to create new remedies for *Charter* breaches.[58] In the end Parliament settled on a two-part enforcement clause, where section 24(2) was to "reflect an intent on the part of the framers to erect a half-way house that was an improvement on the common law rule but without the excess of the American rule."[59] Section 24(1) and (2) read as follows:

> Enforcement of Guaranteed Rights and Freedoms
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> **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.
>
> Exclusion of evidence bringing administration of justice into disrepute
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> **24. (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.

The purpose of the section 24(2) exclusion remedy was explored by the SCC in the 1987 case, *R v Collins*.[60] The appellant, Ruby Collins, was arrested by Vancouver police for possession of heroin. During her arrest a police officer seized

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[55] Evidence and the Charter, *supra* note 17 at 207-211.

[56] *Ibid.*

[57] *Ibid* at 203, 204.

[58] *Ibid* at 218.

[59] *Ibid* at 218.

[60] *R v Collins*, [1987] 1 SCR 265, 33 CCC (3d) 1 [*Collins*].

her by the throat, administering a hold intended to prevent Collins from swallowing a balloon containing heroin. After pulling Collins to the floor and before giving her a reading of her rights the police officer noticed she was clenching one of her hands. He ordered Collins to show him what she was holding. It was a balloon full of heroin.[61] Collins moved for the exclusion of this evidence because the Vancouver police officer subjected her to an unreasonable search and seizure contrary to her section 8 *Charter* right. The SCC found that the Crown had not proved reasonable grounds for the search and seizure of the evidence and considered its exclusion.

Justice Antonio Lamer (as he then was), writing for the majority of the Court in *Collins*, explained the purpose of the exclusionary rule as follows:

> It is whether the *admission of the evidence* would bring the administration of justice into disrepute that is the applicable test. Misconduct by the police in the investigatory process often has some effect on the repute of the administration of justice, but s. 24(2) is not a remedy for police misconduct, requiring the exclusion of the evidence if, because of this misconduct, the administration of justice was brought into disrepute. Section 24(2) could well have been drafted in that way, but it was not. Rather, the drafts of the *Charter* decided to focus on the admission of the evidence in the proceedings, and the purpose of s.24(2) is to prevent having the administration of justice brought into further disrepute by the admission of the evidence in the proceedings. This further disrepute will result from the admission of evidence that would deprive the accused of a fair hearing, or from judicial condonation of unacceptable conduct by the investigatory and prosecutorial agencies. It will also be necessary to consider any disrepute that may result from the exclusion of the evidence....if its exclusion would bring the administration of justice into greater disrepute than would its admission. Finally, it must be emphasized that even though the inquiry under s.24(2) will necessarily focus on the specific prosecution, it is the long-term consequences of regular admission or exclusion of this type of evidence...which must be considered.[62]

The purpose of section 24(2) as understood by the *Collins* majority was to create a remedy which would protect the long-term repute of the justice system. Justice Lamer saw no basis to the idea that this remedy was created to punish the conduct of police officers or to grant a specific remedy to a particular accused. Rather, this is a remedy given to the community for a breach of the social contract between government and the governed. This interpretation of the exclusion clause was intended to affirm institutional and fundamental social values.[63] Justice Lamer recognized that by the time the court considers offering this remedy the reputation of the justice

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[61] *Ibid* at paras 1-6.

[62] *Ibid* at para 31.

[63] Evidence and the Charter, *supra* note 17 at 268.

system has already been damaged. The test laid out in *Collins* also acknowledged that there will be disrepute brought on the justice system whether evidence is included or excluded. The trial judge is to examine in the particular context of the case before the court which of these two options would bring the least future disrepute upon the justice system.

Justice Lamer characterized this test as imposing a lower threshold for exclusion than the "community shock" test accepted by the Court in its pre-*Charter* decisions.[64] He stated that this must be the case because a violation of the *Charter* is a violation of the most important law of the land.[65] Examining the text of both the English and French versions of section 24(2), Lamer explained that evidence should be excluded even where it would only "tend" to bring justice into disrepute.[66]

In *Collins*, the majority of the court laid out factors which determined whether admitting evidence *could* bring the justice system into disrepute. These include the kind of evidence obtained, the seriousness of the *Charter* violation, the importance of the evidence to the Crown's case, the seriousness of the offense, and whether there are other remedies available. The SCC acknowledged in *Collins* that trial fairness is key to the repute of the Canadian justice system. If the requirement of a fair trial is not met, the Court in *Collins* held there is a presumptive requirement to exclude evidence:

> If the admission of the evidence in some way affects the fairness of the trial, then the admission of evidence would tend to bring the administration of justice into disrepute and, subject to a consideration of the other factors, the evidence generally should be excluded....However, the situation is very different with respect to cases where, after a violation of the *Charter*, the accused is conscripted against himself through a confession or other evidence emanating from him. The use of such evidence would render the trial unfair, for it did not exist prior to the violation and it strikes at one of the fundamental tenets of a fair trial, the right against self-incrimination ... The use of self-incriminating evidence obtained following a denial of the right to counsel will...generally go to the very fairness of a trial and should generally be excluded.[67]

The Court's concern with conscripted self-incrimination, as laid out in the above passage from *Collins*, reached its zenith ten years later in the ruling *R v Stillman*.[68] On 12 April 1991, the accused, William Stillman, was consuming alcohol and drugs at a camp in the woods outside Oromocto, New Brunswick. Stillman left

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[64] *Rothman, supra* note 35.

[65] *Collins, supra* note 60 at para 42.

[66] *Ibid* at para 43.

[67] *Ibid* at paras 36, 37.

[68] [1997] 1 SCR 607 [*Stillman*].

the camp with a 14-year-old girl, whose body police later discovered below a train bridge near to the camp. When she was discovered, the victim had a human bite mark on her abdomen and semen was found in her vagina. The cause of her death was a wound or wounds to the head. When Stillman returned home that evening, he had mud and grass on his pants and a cut above one eye. He claimed to have been in a fight with five people. A week after the girl's body was discovered, Stillman was arrested for murder. Stillman's lawyer specifically refused a request of the police to collect physical evidence and said his client was not to speak to police without a lawyer present. Police ignored these directions and, under threat of force, collected hair from Stillman's head and pubic area and made a dental impression of his teeth. They had no statutory authority to collect this physical evidence. The police then interrogated Stillman for an hour, during which time Stillman said nothing but cried throughout. When Stillman left the interrogation cell sobbing, he blew his nose on a tissue and discarded it into the trash. Police collected the tissue he used and submitted that tissue for DNA analysis, along with the hair samples. Stillman was arrested and found guilty of murder at trial.[69] The SCC, in a 7-2 decision, found that a new trial was warranted and excluded all evidence, save for the abandoned tissue.

Writing for the majority in *Stillman*, Justice Peter Cory elaborated upon the three key considerations from *Collins* used in determining when to exclude evidence: its impact upon the fairness of the trial, the seriousness of the *Charter* violation related to its creation/discovery, and the possibility that excluding the evidence could bring the system of justice into disrepute.[70] In particular, Justice Cory focused on the concept of trial fairness as the major determinant of whether evidence should be excluded. He stated:

> A fair trial for those accused of a criminal offence is a cornerstone of our Canadian democratic society. A conviction resulting from an unfair trial is contrary to our concept of justice ... The concept of trial fairness must then be carefully considered for the benefit of society as well as for an accused ... The primary aim and purpose of considering the trial fairness factor in the s.24(2) analysis is to prevent an accused person whose *Charter* rights have been infringed from being forced or conscripted to provide evidence in the form of statements or bodily samples for the benefit of the state. It is because the accused is compelled as a result of a *Charter* breach ... that the admission of that evidence would generally tend to render the trial unfair.
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> It is repugnant to fair-minded men and women ... that police can without consent or statutory authority take or require an accused to provide parts of their body or bodily substances in order to incriminate themselves.[71]

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[69] *Ibid* at paras 2-15.

[70] *Ibid* at para 69.

[71] *Ibid* at paras 72, 73, 89.

Justice Cory rejected the idea that "real" evidence will always fall into the "non-conscriptive" category. Rather, if the accused is compelled by police to make a statement or provide a bodily substance in violation of *Charter* standards this evidence is of a conscriptive nature. In *Stillman*, the real evidence was of probative value and the manner in which it was collected in no way rendered it any less accurate. It speaks for itself independent of any conscription of the accused. However, Justice Cory dissolved the long-held distinction between real and testimonial evidence in expanding the court's view of self-incrimination. He emphasized that the Crown must make its own case without taking bodily samples absent a warrant scheme that was designed to be minimally invasive to the rights of the accused. No warrant scheme existed to support the actions of police in taking evidence from Stillman's body. Justice Cory also affirmed the rule of discoverability; where evidence is discovered as a consequence of information collected during an illegal interrogation, that evidence will only be admitted at trial if the Crown can prove police could have found this evidence without having to breach a *Charter* right. This discoverability exception was a limited compromise intended to prevent the criminally accused from pre-emptively dumping evidence on police in advance of police giving the criminally accused a reading of his or her *Charter* right to counsel. [72]

In her concurring judgment, Justice McLachlin (as she then was) foreshadowed her position in *Grant* while criticizing the *Stillman* majority for its elaboration upon the *Collins* framework. She laid out three criticisms:

> First, it runs counter to the spirit and wording of s.24(2), which requires that judges in all cases balance all factors which may affect the repute of the administration of justice, and elevates the factor of trial unfairness to a dominant and in many cases conclusive status. Second, it rests on an expanded and, with respect, erroneous concept of self-incrimination or conscription which equates any non-consensual participation by or use of the accused's body in evidence gathering with trial unfairness. Third, it erroneously assumes that anything that affects trial fairness automatically renders the trial so fundamentally unfair that other factors can never outweigh the unfairness, with the result that it becomes unnecessary to consider the other factors.[73]

Justice McLachlin argued that trial fairness exists on a sliding scale, and that society's interest in a trial on the merits should be considered in deciding whether to exclude any probative evidence.[74] As will be discussed below, this critique of *Stillman* forms the essence of the majority's ruling in *Grant*.

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[72] *Ibid* at para 106.

[73] *Ibid* at para 250.

[74] *Ibid* at paras 240, 250.

In the wake of the *Stillman* expansion of conscripted evidence as including some real evidence, trial judges began applying *Stillman* in a fashion which presumptively excluded large amounts of real evidence without it first meeting the more thorough legal scrutiny imposed upon real but otherwise non-conscriptive evidence. In trying to exclude the "fruit of the poisoned tree", courts expanded a sphere of protection to the accused beyond the original purpose of 24(2). Examining the history, the rule was created to prevent the abuse of state power as demonstrated in *Wray*. Non-discoverable conscripted evidence and forced confessions were to have no place in Canadian trials. By creating a wide and uncertain definition of conscription, Justice Cory's judgment in *Stillman* was applied in a manner which ignored the plain text of the exclusion provision of the *Charter* and muddied the waters. Judges are obliged to consider "in all the circumstances" whether the evidence would *tend* to bring the justice system into disrepute before excluding it. Though the short-hand category of "conscripted evidence" made the legal analysis simpler, it also motivated defence counsel to see that all probative real evidence collected in breach of *Charter* standards was categorised as being conscripted from the accused.

In effect, *Stillman* made even the most trivial conscriptive act very relevant to the trial judge's decision to exclude probative, real evidence. Imagine a situation where a police officer arrests a male suspect on suspicion of drug dealing. The police officer fails to give the accused a reading of his right to counsel. The police officer then does one of two things. In the first scenario the police officer orders the accused to show her what the accused has in his pocket. The accused pulls out a baggie full of methamphetamines. This evidence is considered conscripted because the accused is asked to participate in the Crown's search for evidence and it is presumptively excluded. In the second scenario the police officer reaches into the pocket of the accused and discovers the baggie of drugs. This is labelled non-conscripted real evidence. The conscripted evidence is presumptively excluded, while the non-conscripted evidence is not. This imagined application of *Stillman* demonstrates how the test tended to ignore the seriousness of the breach upon the criminally accused's *Charter* rights. If police had improperly strip-searched the criminally accused, then this invasive state action would have a serious effect upon the core right to privacy granted by section 8 of the *Charter*; when a police officer directs the criminally accused to show her what is in his pocket, this has a relatively trivial effect upon his right to counsel. Regardless, evidence collected from a police-ordered strip search would have to survive more thorough legal scrutiny than evidence collected in the conscriptive scenario described above in order to be excluded

Queen's University professor Don Stuart anticipated the coming reform to the section 24(2) exclusion remedy in his 2008 article, "Charter Standards for Investigative Powers: Have the Courts Got the Balance Right?"[75] Other academics and

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[75] Printed in Jamie Cameron & James Stribopoulous, eds, *The Charter and Criminal Justice: Twenty-Five Years Later*, (Markham: LexisNexis Canada Inc, 2008) 3 [Stuart: Balance].

jurists joined Stuart in complaining that the near-automatic exclusion of the overbroad category of conscripted evidence was leading to unacceptable results at trial. In 2005, Justice Louis LeBel in his dissent in *R v Orbanski* signalled that the intemperance of the legal community had not gone unnoticed by the SCC:

> It is likely that few *Charter* provisions have generated so much academic comment, conflicting jurisprudential developments, media rhetoric or just plain uneasiness as s.24(2). Since the *Charter* came into force, our Court has returned on many occasions to the interpretation and application of this provision. It has developed and refined methods of analysis and application. Despite all these efforts, doubts and misunderstandings remain. They arise mostly from views which attempt to read into the jurisprudence of our Court the creation of an exclusionary rule in the case of conscripted evidence... The creation and application of a rule, based on a presumption that conscriptive evidence necessarily affects the fairness of a trial, of almost automatic exclusion whenever such evidence is involved might be viewed as a clear and effective method to manage aspects of the criminal trial. Nevertheless, our Court has never adopted such a rule, which could not be reconciled with the structure and the wording of s.24(2).[76]

In response to Justice LeBel's opinion in *Orbanski*, Canada's trial judges started treating both conscripted and non-conscripted evidence in the same fashion. The presumption was that neither type of evidence would automatically render a trial unfair. As a consequence, all evidence had to pass through the full scrutiny of the *Collins/Stillman* test.[77]

While the SCC was working on the *Grant* decision, Don Stuart argued that the division between conscripted and non-conscripted evidence first discussed by Chief Justice Lamer in *Collins* and re-affirmed by Justice Cory in *Stillman* must be dissolved. Stuart believed that the confusion was rooted in Justice Cory's approach to defining conscription. In one breath, Justice Cory defined conscriptive evidence as including any evidence produced where an accused is "compelled to participate in the creation or discovery of the evidence."[78] In the next breath, Justice Cory wrote of a more categorical approach to defining conscription, including compelled incrimination "by means of a statement, the use of the body or the production of bodily samples."[79] Additionally, Stuart objected to the "doctrine of discoverability" where evidence could only be considered at trial if the police could have otherwise found the evidence without breaching the *Charter* rights of the accused. To uncover whether evidence is discoverable, the court must enter into a speculative process as

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[76] *R v Orbanski*, 2005 SCC 37, [2005] 2 SCR 3 at paras 87, 98.

[77] Stuart: Balance, *supra* note 75 at 38.

[78] *Stillman*, *supra* note 68 at para 75.

[79] *Ibid* at para 80.

to whether police could have eventually found the evidence. Stuart believed the focus on discoverability allowed the court to excuse the seriousness of the state's breach of the criminally accused's *Charter* right where discoverability was inevitable. This exception distracted from the illegal, bad faith actions of police officers. Stuart argued that this inappropriate distinction would become immediately superfluous if the conscripted and non-conscripted categories were abandoned. He hoped instead for a test which would put greater emphasis on the seriousness of the *Charter* breach and on the goal of deterring police misconduct.[80]

In *Grant*, the Court found an appropriate case for reframing the analysis of the section 24(2) remedy. Donnohue Grant was arrested by Toronto police on 17 November 2003, and was subsequently charged with a number of firearms offences. Two plain clothes officers patrolling an area near a number of public schools detained Grant for walking in a way they considered to be suspicious. The two plain clothes officers were joined by a uniformed officer who asked Grant if he was carrying anything they should know about. During the course of police questioning, Grant admitted he was carrying a small amount of marijuana and a loaded firearm.[81] Grant was not given a reading of his rights before answering the questions of the officers.

In its ruling, the SCC decided that Grant's *Charter* right against arbitrary detention was violated by the officers. The majority said Grant reasonably believed he was obliged to speak to police, to follow instructions, and to answer questions honestly. His testimony and the derivative physical evidence taken off his person would have been excluded under Justice Cory's analysis from *Stillman*. However, the Court rejected the *Stillman* approach and came up with a new way to determine when evidence should be excluded. Chief Justice McLachlin and Justice Charron, writing for the majority of the Court, ruled that the police officers were acting in an arena of considerable legal uncertainty with regard to whether they had detained Grant and thus would need to offer him access to counsel before questioning him further. Because of this uncertainty, the majority held that the police demonstrated no bad faith. Further, the majority held that the public had an interest in seeing Grant tried on the merits. McLachlin and Charron ruled that the evidence should not be excluded from consideration at trial, but Grant was acquitted from weapons charges because his conduct did not meet the definition of the offense.

In reframing the guiding test for section 24(2), the Court in *Grant* laid out three factors to be considered in deciding when to exclude otherwise probative evidence from a criminal trial:

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[80] Stuart: Balance, *supra* note 75 at 48-53.

[81] *Grant*, *supra* note 2 at para 7.

> (1) the seriousness of the *Charter*-infringing state conduct (admission may send the message the justice system condones serious state misconduct), (2) the impact of the breach on the *Charter*-protected interests of the accused (admission may send the message that individual rights count for little), and (3) society's interest in the adjudication of the case on its merits.[82]

The first factor of the *Grant* test directs trial judges to examine whether there are systemic or individual police practices which the court should not condone in accepting evidence at trial.[83] This factor is not created to punish police behaviour, but is meant to give a positive guide to police on when their conduct could lead to the exclusion of evidence. The more severe or deliberate the state conduct that led to the *Charter* violation, the greater the obligation of the court to disassociate itself from this conduct.[84] This factor raises questions regarding both the importance of the connection between the breach and the evidence arising from the breach, and also the question of what constitutes a "good faith" effort from police in carrying out their duties.

As stated by Chief Justice Brian Dickson in *R v Strachan*, so long as the evidence is collected in part of the "chain of events during which a *Charter* violation occurred" it can be excluded.[85] A strict "but for" standard of proof that the *Charter* violation led to the discovery of evidence was not necessary; defence counsel need only prove that evidence was found within the chain of events involving the breach. This is appropriate, since the bulk of the evidence surrounding the actual breach of the criminally accused's *Charter* rights will be controlled by those representatives of the state who breached the rights. This relaxes the evidentiary standard required of the criminally accused in proving that the *Charter* breach created the evidence used against him or her. In *Grant*, the Court focuses upon the police misconduct causing the breach in its decision to exclude. If there is little evidence that the conduct of the police officer directly led to the breach, there is less motivation for the court to dissociate itself from the act, placing a greater onus on defence counsel to prove this connection and diminishing the value of the rule from *Strachan*.

The *Grant* majority fails to give lower courts proper guidelines in determining whether police have demonstrated good faith in executing their duties. Rather, the Court chose to define bad faith. Chief Justice McLachlin and Justice Charron said that unless a police officer is operating in a sphere of legal uncertainty, that officer must be presumed to know proper procedure and have a fulsome understanding of the law.[86] Therefore, if an officer acts outside of the law that officer is deemed to be acting in

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[82] *Ibid* at para 71.

[83] *Ibid* at para 72, 74.

[84] *Ibid* at para 72.

[85] *R v Strachan*, [1988] 2 SCR 980 at para 116.

[86] *Grant*, *supra* note 2 at para 140.

bad faith. This favours excluding the evidence. By failing to define what constitutes good faith, this leaves open the question of when an officer is acting in a manner that is above reproach. It also leaves trial judges with the unchecked presumption that officers are ordinarily acting with good faith.

In its second factor, the *Grant* majority presents a good standard for evaluating all of the relevant circumstances in determining whether to exclude evidence under section 24(2). In examining the impact of the *Charter* breach, the Court examines whether the core right has been infringed in deciding if the breach is serious and therefore favouring exclusion.[87] This means that the court will favour exclusion where a person is ordered under threat of force to strip in the street, but is less likely to do so when a police officer reaches into the half-opened backpack of the accused to discover evidence. It likely also means that where inconsequential conscription has taken place, it will not be treated as of overwhelming importance.

In its third factor, Chief Justice McLachlin and Justice Charron create an indefinite and frustrating lever for the exclusion or inclusion of evidence which will most likely become a selectively used tool weighing in favour of inclusion. In determining society's interest in the adjudication of a case on its merits, the majority "asks whether the truth-seeking function of the criminal trial process would be better served by admission of the evidence, or by its exclusion."[88] This inquiry is meant to consider society's interest in seeing a criminal brought to trial and dealt with according to the law. The more reliable the evidence, the stronger the perceived public interest in seeing it admitted at trial.[89] The more important the evidence is to the Crown's case, the more likely it is to be included at trial. The Court also states that the seriousness of the offense is not a major factor in deciding when to exclude evidence.[90]

This third factor raises two immediate criticisms. The first is that a serious breach of a *Charter* right is rendered less valuable to the accused based upon the Crown's assertion as to how reliable the evidence is and how important it is to their case. This inserts the Crown's motives to include the evidence too close to the judge's mind and further creates an unfortunate distinction based on the kind of crime allegedly committed by the criminally accused. In the prosecution of complex white-collar crimes, it is rare that a single piece of evidence will be the lynchpin. Meanwhile, the smoking gun is always at the heart of a murder trial. The second problem with this test is that it is beyond the ability of defence counsel to refute a claim that there is a "public interest" in any trial upon its merits, let alone when a criminally accused faces

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[87] *Ibid* at para 76.

[88] *Ibid* at para 79.

[89] *Ibid* at para 83.

[90] *Ibid* at para 84.

sanction for a serious offense. Ultimately, it is unsatisfactory to have so convenient an option to ignore a severe breach of a *Charter* right.

The less immediate but no less disconcerting problem with the overall structure of the three-part test from *Grant* is that in abandoning trial fairness and the related concept of non-discoverability as standards for exclusion, *Grant* may upset both the balance of power between the Crown and the criminally accused and between the Crown and the judiciary. In his robust development of the right to counsel and the pre-trial right to silence, we can see Chief Justice Lamer making inroads to control police conduct.[91] This created a conflict with the Crown's ability to direct its case, and some would suggest these judicial powers should be narrowed. In his work for the Law Reform Commission during the 1970s, Commissioner Lamer joined other authors in justifying the creation of procedures favourable to the criminally accused "as a check on the otherwise limitless powers of the state, its institutions and officials."[92] Judges are now more dependent upon Crown prosecutors in deciding when to assert their authority over these pre-trial matters and thus the Crown's power is enlarged.

Chief Justice Lamer also saw it as essential to the administration of justice that the trial judge have a broad discretion to exclude evidence from consideration if it might taint the reputation of justice.[93] His goal at both the Law Reform Commission and the SCC was to replace the common law rule in *Wray* which denied the existence of a trial judge's exclusionary discretion.[94] As Chief Justice Lamer said in an address to St. Louis University some two weeks after the SCC ruled on *Stillman*:

> It is, in my opinion, sound theory to stipulate that we will admit or exclude unconstitutionally obtained evidence on the basis of how it affects respect for criminal justice. ... Where the *Charter* breach is particularly serious such as in the case of a bad faith and highly intrusive body cavity search, that consideration would tend to outweigh the other factors [from *Collins*] regardless of whether the evidence obtained was purely real evidence or if the evidence was essential to substantiate the charge.
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> However, there were signs of one fairly rigid rule developing in the aftermath of *Collins* in the lower courts. Where the Court determined on the basis of the nature of the evidence that its submission [*sic*] would render the trial unfair under the first ruling, the sense emerged that the conclusion could not be undone by reference to the other two sets of factors. Here, the fluidity was lost.

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[91] Hughes, *supra* note 46 at 158.

[92] *Control of Process*, *supra* note 12 at 31.

[93] Healy, *supra* note 45 at 194.

[94] *Ibid* at 195.

While Chief Justice Lamer acknowledged that the idea of trial fairness need not always take supremacy or operate in an absolute fashion, he certainly understood that trial fairness protects the accused from state abuse by way of forced self-incrimination.[95] Trial fairness has been accepted by the Court as fundamental to our criminal justice system.[96] The Court in *Grant* recognized that trial fairness remains an "overarching systemic goal", but elected to treat trial fairness as an abstract, untenable standard of analysis under section 24(2).[97] By doing so, the Court has incidentally undermined the obligation upon the state to bring its own case to meet, and all of the other corollaries of trial fairness developed under the *Collins/Stillman* test. The *Collins/Stillman* framework, for all its practical problems, had trial fairness as its reasonable underlying logic and this helped safeguard these checks on state power.

As shown by the choices of Parliament, the Law Reform Commission, and the Supreme Court of Canada under Chief Justice Lamer, the essential purpose of section 24(2) is to protect the administration of justice from disrepute caused by police misconduct. It was created to prevent police from conscripting the criminally accused, like John Wray, into participating in his or her own criminal conviction. The discoverability of real, probative evidence and the onus it placed upon the Crown was an appropriate limit upon state power and simultaneously respected the truth-seeking function of the court. While the Court's focus upon bad faith policing will support the public acceptability of verdicts, trial fairness should have remained the primary focus for this remedy. Trial fairness provided an appropriate guide for trial judges in deciding when to correct an imbalance or abuse of state power by excluding evidence when it precluded the obligation of the state to bear the onus of proving its own case.

In its new test the *Grant* majority gives trial judges too broad a discretion to choose when to give a section 24(2) remedy. As will be seen, the new test set out in *Grant* has created obstacles for defendants attempting to obtain a fair trial and has led to uneven results.

The SCC's goal in *Grant* is to guide trial judges in how to balance "all the circumstances of the case" in deciding whether to execute or reserve the *Charter* exclusion remedy.[98] The proper balance must be struck among society's competing interests in proper police respect for the *Charter*, an individual's *Charter* protected rights including the idea of a zone of privacy and the adjudication of criminal trials on their merits. However, as Don Stuart suggests in his evaluation of the cases discussed

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[95] Cory, *supra* note 14 at 231.

[96] *Stillman*, *supra* note 68 at para 72.

[97] *Grant*, *supra* note 2 at para 65.

[98] *Ibid* at para 85.

below, this revision of the section 24(2) jurisprudence hasn't yet offered sufficient clarity to those who are applying *Grant* to the facts presented at trial.[99]

In the 2009 decision, *R v Campbell*,[100] the ambiguity of the Court's definition of police "good faith" creates considerable difficulty for the Superior Court of Ontario. Additionally, in deciding whether the public has an interest in seeing a trial on the merits, the trial judge in *Campbell* gives considerable weight to the seriousness of the criminal offence with which the accused is charged.

In 2006, Toronto police began investigating Andrew Campbell on suspicion that he was dealing drugs. Detective constable Rick St. Anand received a tip that a man named Campbell was dealing in crack, methamphetamine and marijuana and also that Campbell was in possession of three unlicensed hand guns. The detective constable found a police record for an Andrew Campbell that fit the description of the person identified by the tipster. This record included Campbell's home address. St. Anand conducted a short surveillance of Campbell's apartment building, but identified nothing that would raise a reasonable suspicion that Campbell was dealing in drugs. The detective constable wanted a warrant to seize weapons and drugs from Campbell's apartment. Instead of following police procedure and appearing before a Justice of the Peace or using the tele-warrant system, St. Anand approached a judge who had earlier offered himself up to review the detective's warrant requests. Police regulations did not permit St. Anand to get a warranted search in this way. The detective also failed to disclose information to the judge that surveillance of Campbell's apartment had failed to yield any evidence of drug trade.

In ruling for the Ontario Superior Court of Justice, Judge Frank Marrocco decided that the breach of Campbell's right to privacy in his home was a serious one. However, Judge Marrocco ruled that despite failing to follow proper procedure in both obtaining and executing the warrant, the police had acted in good faith.[101] In applying the exclusion remedy from *Grant,* Judge Marrocco split up the evidence discovered during the improperly warranted search of Campbell's home. The court gave a section 24(2) remedy to exclude drugs seized from Campbell's apartment, but refused to exclude the guns. Judge Marrocco ruled that society's interest in seeing gun violence prosecuted was greater than that for drug possession. In effect, Judge Marrocco made a decision which deemed the seriousness of the offence relevant to the decision to exclude one set of evidence while admitting the other. To justify this

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[99] Don Stuart, "Canadian and United States Supreme Courts Rowing in Opposite Directions on Exclusion of Unconstitutionally Obtained Evidence" (2009) 70 CR (6th) 62 [Rowing in Opposite Directions].

[100] [2009] OJ No. 4132 (Ont SCJ) [*Campbell*].

[101] *Ibid* at para 48.

decision he pointed to the authority of *Harrison* from the *Grant* trilogy stating that seriousness of the charges favours admitting the evidence.[102]

In *Harrison*, Chief Justice McLachlin speaking for the majority of the court does not explicitly reject the seriousness of the offense as a consideration. However, she does say that the same approach to exclusion should apply however serious the offence to be prosecuted:

> [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'"... Additionally, the trial judge's observation that the *Charter* breaches "pale in comparison to the criminality involved" in drug trafficking risked the appearance of turning the s. 24(2) inquiry into a contest between the misdeeds of the police and those of the accused.[103]

The SCC intended to explicitly tell the lower courts that this kind of consideration should not be determinative. However, the holistic view of the new *Grant* test does make room for courts to give seriousness of the offence an inappropriate weight. The confusion about what constitutes "good faith" or "bad faith" is also at play in *Campbell*. It is hard to see why the finding of Detective Constable St. Anand's carelessness didn't lead to the exclusion of all evidence seized during the illegal search of Andrew Campbell's apartment.[104] The SCC saw a need to encourage exclusion not only where police have been deliberate or reckless in their *Charter* violations but also where they have acted in ignorance or in a careless fashion in breaching a right.

Meanwhile, Judge Kenneth Nielson of the Alberta Court of Queen's Bench has come to the exact opposite conclusion from *Campbell*. In *R v Goodwin*, Judge Nielson found no "good faith" could save an unintended police *Charter* violation following an arbitrary detention and illegal search which resulted in the discovery of both drugs and a loaded rifle and hand-gun.[105] Judge Nielson noted that he considered the *Campbell* ruling, but still came to the conclusion that a police failure to follow standards for investigatory detention and right to counsel warnings cannot be overwhelmed by the irrelevant public interest in prosecuting a weapons related offense.

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

[103] *Ibid* at paras 40, 41.

[104] Rowing in Opposite Directions, *supra* note 99 at 64.

[105] 2009 ABQB 710 at paras 101-104.

These two cases demonstrate the uncertainty of obtaining a section 24(2) exclusion remedy for a serious breach of a *Charter* right after *Grant*. At present, the remedy of exclusion appears to be the only satisfactory way to give effect to the extrinsic policy choices of Parliament embodied in the *Charter* sections protecting the procedural rights of the criminally accused. Canada's courts are now searching for new ways to give meaningful remedy to *Charter* breaches where the exclusion of evidence or a stay of proceedings is not appropriate.

In its 2010 ruling, *R v Nasogaluak*,[106] the SCC examines a novel way in which the court may give some meaningful remedy for a *Charter* breach by making the breach relevant when determining the sentence imposed upon a guilty party. On 12 May 2004, Lyle Nasogaluak was involved in a high-speed car chase with RCMP after police had been tipped off to the possibility that he was driving while drunk. After Nasogaluak brought his car to a stop he resisted police requests to exit his vehicle. While pulling him out of the car, one of the police officers at the scene punched him twice in the head. Then when he refused to be hand-cuffed both of the attending officers held him down. One punched him, breaking two of his ribs. When he was taken to the police station, Nasogaluak provided a breath sample that showed his blood alcohol level was high enough to deem him impaired. The officers did not report the physical force used in arresting the defendant. After spending a night in a holding cell, Nasogaluak checked himself into a hospital where doctors discovered that one of his lungs was perforated. He was admitted for emergency surgery.[107]

At trial, the judge accepted Nasogaluak's guilty plea to charges for impaired driving and for fleeing from police. The judge found that Nasogaluak's section 7 *Charter* right to security of the person was breached and applied section 24(1) of the *Charter* in determining Nasogaluak's sentence.[108] He reduced Nasogaluak's sentence to below the statutory minimum sentence for these crimes. At the Court of Appeal, the court set Nasogaluak's sentence to the statutory minimum, and said that it was appropriate to consider the *Charter* breach when deciding a fit sentence.[109]

In delivering the judgement of the Court, Justice LeBel stated that a *Charter* breach should be considered when deciding, in the totality of the circumstances, what is a fit sentence.[110] He said it was not useful to consider section 24(1) of the *Charter* in deciding how to set the sentence in this particular case, as the sentence itself accorded with *Charter* principles. However, Justice LeBel did say that in exceptional circumstances, a sentence reduction outside of the statutory limits may be appropriate,

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[106] 2010 SCC 6, [2010] 1 SCR 206 [*Nasogaluak*].

[107] *Ibid* at paras 10-13.

[108] *Ibid* at paras 17, 18.

[109] *Ibid* at para 21.

[110] *Ibid* at para 48.

if it is the sole effective remedy for egregious conduct of state agents.[111] In his dissent from the earlier ruling in *R v Bjelland*, Justice Morris Fish would have protected the trial judge's wide discretion to create remedies under section 24(1). He said that trial judges should still retain the right to create remedies to prevent a trial being rendered unfair for the accused.[112]

As it was originally drafted, section 24 of the *Charter* was intended to simply offer up declarations that separated the court from the poor conduct of state actors who illegally obtained evidence through a breach of the *Charter* rights of a criminally accused. This position was rejected in later drafts of the *Charter*. While *Grant* does bring the test for *Charter* exclusion closer to the literal text of section 24(2), the history of the *Charter* should indicate to Canada's courts that a simple declaration will not be a sufficient remedy for a serious *Charter* breach. This is why the remedy of exclusion should be understood as only a subset of those remedies the Court should consider under its section 24 review. A range of remedies are needed in order to rein in government abuse and also to avoid the inappropriate reliance by trial judges upon section 24(2) exclusion when some other remedy would better serve the situation. The Court must strive to find an effective remedy for those breaches where evidentiary exclusion is inappropriate; in order to protect the value of human dignity which the Court has acknowledged underlies all of the rights granted by the *Charter,* such remedies must exist.[113] Until the Court finds a way to preserve these core societal values enshrined within the *Charter*, the truth will continue to cost too much.

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[111] *Ibid* at paras 5, 6.

[112] *Bjelland, supra* note 1 at paras 53-56.

[113] *R v Kapp*, [2008] 2 SCR 483 at para 21.