The Admission and Exclusion of Unconstitutionally Obtained Evidence in Canada

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In *Collins v. Virginia*, 138 S. Ct. 1663, 1675 (2018), Justice Thomas suggested in a concurring opinion that the "assumption that state courts must apply the federal exclusionary rule is legally dubious." In Canada, evidence obtained in violation of our Constitution can only be excluded if a court concludes that its admission "would bring the administration of justice into disrepute." This applies in every criminal case in Canada. This test is mandated by section 24(2) of the *Canadian Charter of Rights and Freedoms, Constitution Act, 1982*, which states:

> 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.[1]

In this column, I intend to trace the evolution of the Supreme Court of Canada's consideration of this provision and the admission and exclusion of unconstitutionally obtained evidence in Canada.[2] As will be seen, it involves the Supreme Court of Canada issuing a reversal of a long series of judgments it had proffered in this area. But, let us start before the *Charter* was enacted.[3]

PRE-CHARTER

Prior to the inclusion of the *Canadian Charter of Rights and Freedoms* as part of the Constitution of Canada on April 17th, 1982, the exclusion of evidence in criminal matters was governed in this country by the common law. The common law was not favourable to such exclusion. With limited exceptions (such as the confessions rule) evidence was admissible if it was relevant. The manner in which it was obtained being generally irrelevant. Thus, in *R. v. Wray*, [1971] S.C.R. 272, the Supreme Court of Canada held that there "is no judicial discretion permitting the exclusion of relevant evidence, on the ground of unfairness to the accused. Judicial discretion in this field is a concept which involves great uncertainty of application. The task of a judge in the conduct of a trial is to apply the law and to admit all evidence that is logically probative unless it is ruled out by some exclusionary rule. If this course is followed, an accused person has had a fair trial" (at pages 273 to 274).

All of this changed with the inclusion of the *Charter* in Canada's constitution.

POST-CHARTER

The Supreme Court of Canada's first fulsome consideration of section 24(2) of the *Charter* commenced with Ms. Ruby Collins being grabbed by the neck by a police officer. After the officer did so, he noticed that Ms. Collins had something in her hand. It turned out to be heroin. It was argued that the actions of the police officer violated Ms. Collins's right pursuant to section 8 of the *Charter* to be free from "unreasonable search or seizure." In the Supreme Court of Canada, the primary issue became whether the heroin was admissible at Ms. Collins's trial.[4]

Footnotes

1. Note, however, that evidence can in limited circumstances also be excluded in Canada under section 24(1) of the *Charter*, which allows a court to issue a "remedy" that the court "considers just and appropriate." In *R. v. Bjelland*, [2009] 2 S.C.R. 651, at paragraph 19, the Supreme Court of Canada indicated that while the "exclusion of evidence will normally be a remedy under s. 24(2), it cannot be ruled out as a remedy under s. 24(1). However, such a remedy will only be available in those cases where a less intrusive remedy cannot be fashioned to safeguard the fairness of the trial process and the integrity of the justice system."
2. In *R. v. Mack*, [2014] 3 S.C.R. 3, the Supreme Court of Canada considered the words "obtained in a manner" in section 24(2) and held that a "causal relationship is not required to support a finding that evidence was obtained in a manner that violated the *Charter*, but the nature and extent of the causal relationship remains an important factor for the trial judge's consideration" (at paragraph 42).
3. For a comparison of the approaches taken by the Supreme Courts of Canada and the Supreme Court of the United States to the exclusion of evidence as a remedy for constitutional infringement, see Donald Stuart, *Canadian and United States Supreme Courts: Rowing in Opposite Directions on Exclusion of Unconstitutionally Obtained Evidence* (2009), 70 C.R. (6th) 62. Interestingly, in *Director of Public Prosecutions v. J.C.* [2015] IESC 31, the Supreme Court of Ireland suggested that the United States, "which at one stage had the most far-reaching exclusionary rule, has long since abandoned an absolute or near absolute exclusionary rule" (at paragraph 74).
4. In an earlier case (*R. v. Therens*, [1985] 1 S.C.R. 613), the Supreme Court had ruled that blood-alcohol analysis evidence was inadmissible pursuant to section 24(2) of the *Charter* as a result of the accused's right to contact counsel having been infringed. However, in excluding the evidence, the Supreme Court indicated that

In *R. v. Collins*, [1987] 1 S.C.R. 265, the Supreme Court of Canada commenced its analysis of this issue by noting that the accused has the burden, on the standard of the balance of probabilities, to establish that admission of the evidence would bring the administration of justice into disrepute (see paragraph 30).

The Supreme Court set out a list of factors in *Collins,* which should be considered when applying section 24(2) of the *Charter,* and held that a trial judge must have "regard to all the circumstances" in determining whether evidence obtained in violation of the *Charter* should be admitted or excluded (at paragraph 43). It concluded that the evidence seized should have been excluded because it could not "accept that police officers take flying tackles at people and seize them by the throat when they do not have reasonable and probable grounds to believe that those people are either dangerous or handlers of drugs" (at paragraph 45).

Subsequently, in *R. v. Fliss*, [2002] 1 S.C.R. 535, the factors to be considered were summarized by the Supreme Court in the following manner (at paragraph 75):

1. Does the admission of the evidence affect the fairness of the trial?

2. How serious was the *Charter* breach?

3. What would be the effect of excluding the evidence on the repute of the administration of justice?

CONSCRIPTIVE VERSUS NON-CONSCRIPTIVE

In *R. v. Stillman*, [1997] 1 S.C.R. 607, the Supreme Court created a distinction for exclusion purposes based upon whether the evidence unconstitutionally obtained was conscriptive or non-conscriptive. The Court held in *Stillman* that "admission of evidence which falls into the non-conscriptive category will, as stated in *Collins*, rarely operate to render the trial unfair" (at paragraph 74). If the accused, however, was "compelled to participate in the creation or discovery of the evidence" then it will be considered to be "conscriptive evidence," even if it is "real evidence" (at paragraph 75) and its admission will generally render the trial unfair. A few years later in *R. v. Law*, [2002] 1 S.C.R. 227, the Supreme Court confirmed this approach by suggesting that "it will be much easier to exclude evidence if its admission would affect the fairness of the trial as opposed to condoning a serious constitutional violation" (at paragraph 33).

"All of this changed with the issuance of . . . *R. v. Grant.*"

Thus, the Supreme Court started out with a general and vague test (a consideration of all of the circumstances). It then developed a test in which the nature of the evidence (conscriptive or non-conscriptive) became the crucial factor in determining admissibility. In *The Grant Trilogy and the Right Against Self-incrimination* (2009), 66 C.R. (6th) 97, Professor Hamish Stewart summarized the effect of these decisions in the following manner (at page 100):

> Evidence obtained in violation of the *Charter* is to be excluded under s. 24(2) where its admission would "bring the administration of justice into disrepute." Under the *Collins/Stillman* approach, trial judges were to consider whether admission of evidence in the proceedings would make the trial unfair, whether the *Charter* violations were serious, and whether exclusion of evidence would have an adverse effect on the repute of the justice system. And, according to the controversial majority ruling in *Stillman*, exclusion under the first branch was virtually automatic if the evidence obtained was "conscriptive" (that is, self-incriminatory) or was derived from conscriptive evidence and was undiscoverable by constitutional methods.

All of this changed with the issuance of the Supreme Court's decision in In *R. v. Grant*, [2009] 2 S.C.R. 353. The conscriptive versus non-conscriptive dichotomy was abandoned. Professor Stewart describes it as having been "swept away."[5]

R. v. GRANT

In *Grant*, the Court indicated that the "existing jurisprudence" on exclusion of evidence obtained in violation of the *Charter* was "difficult to apply and may lead to unsatisfactory results... we find it our duty, given the difficulties that have been pointed out to us, to take a fresh look at the frameworks that have been developed" (at paragraph 3).[6]

The Supreme Court commenced its fresh look by indicating

"it would be most improvident for this Court to expatiate, in these early days of life with the *Charter* upon the meaning of the expression 'administration of justice' and particularly its outer limits. There will no doubt be, over the years to come, a gradual build-up in delineation and definition of the words used in the *Charter* in s. 24(2)" (at paragraph 12).

5. At page 100. Several Canadian Courts of Appeal have also concluded that the Supreme Court of Canada's decision in *Grant* has cast doubt upon the continued validity of its pre-*Grant* jurisprudence as regards the application of section 24(2) of the *Charter*. In *R. v. Blake*, [2010] 251 C.C.C. (3d) 3 (Ont. C.A.), for instance, the Ontario Court of Appeal stated, at paragraph 21, that the Supreme Court of Canada in *Grant* "took 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." Similarly, in *R. v. Ngai*, [2010] A.J. No. 96 (C.A.), it was held that *Grant* has "refocused the section 24(2) analysis and directed courts to balance the effect of admitting the evidence on society's confidence in the judicial system" (at paragraph 33). In *R. v. Wong*, [2010] B.C.J. No. 557, the British Columbia Court of Appeal suggested that the "distinction between conscriptive and non-conscriptive evidence set out in *Stillman* is no longer as significant in analyzing admissibility. Reliability, which is often a hallmark of real evidence will always be a cogent consideration but will not be dispositive..." (at paragraph 15).

6. Professor Donald Stuart in *Welcome Flexibility and Better Criteria for Section 24(2)*, (2009), 66 C.R. (6th) 82, suggests that much "of the voluminous prior jurisprudence on section 24(2) will be of little moment" as a result of *Grant* (at page 82).

"The Supreme Court concluded . . . that there are 'three avenues of inquiry.'"

that though the test set out in section 24(2) of the *Charter* is a "broad and imprecise" one (at paragraph 60), the "words of s. 24(2) capture its purpose: to maintain the good repute of the administration of justice" (at paragraph 67).[7] Thus, the "focus is not only long-term, but prospective. The fact of the *Charter* breach means damage has already been done to the administration of justice" (at paragraph 69). The Supreme Court also indicated that section 24(2) starts "from that proposition and seeks to ensure that evidence obtained through that breach does not do further damage to the repute of the justice system.... Finally, s. 24(2)'s focus is societal. Section 24(2) is not aimed at punishing the police or providing compensation to the accused, but rather at systemic concerns. The s. 24(2) focus is on the broad impact of admission of the evidence on the long-term repute of the justice system" (at paragraphs 69–70).[8]

THE NEW GRANT TEST

The Supreme Court concluded in *Grant* that there are "three avenues of inquiry" to which consideration must be given when applying section 24(2) of the *Charter*. At paragraph 71, these three avenues were described as follows:

(1) the seriousness of the *Charter*-infringing state conduct (admission may send the message the justice system condones serious state misconduct);[9]
(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.

It is interesting that the Supreme Court of Canada not only set out these criteria, but that for the first two they included a comment in brackets. It may be that the Court has added its own explanatory notes. If so, then it appears that the Court is encouraging trial judges to consider (1) that admitting evidence obtained by the police as a result of a serious violation of the *Charter* will suggest to the public that the Court condones such conduct and (2) that admitting such evidence when the violation has had a significant impact upon the right being protected will suggest that the protected right is of little consequence.

Though the first two avenues may appear interconnected they involve two separate and distinct avenues of analysis. In the first avenue the Court must take an objective approach (i.e., how serious was the *Charter* violation?), while in the second avenue a subjective approach must be adopted (i.e., what effect did the breach of the *Charter* have on the specific rights of the accused protected by the section in issue?).

In *R. v. Cole*, [2012] 3 S.C.R. 34, the Supreme Court of Canada considered its decision in *Grant* and indicated that evidence obtained unconstitutionally "should be excluded under section 24(2) if considering all of the circumstances, its admission would bring the administration of justice into disrepute. This determination requires a balancing assessment involving three broad inquiries: (1) the seriousness of the *Charter*-infringing state conduct; (2) the impact of the breach on the *Charter*-protected interests of the accused; and (3) society's interest in the adjudication of the case on its merits" (at paragraph 81).

The Supreme Court of Canada also indicated in *Grant* that a trial judge's role when considering a section 24(2) application involves balancing "the assessments under each of these lines of inquiry to determine whether, considering all the circumstances, admission of the evidence would bring the administration of justice into disrepute" (at paragraph 71). This might be described as the fourth and final stage of inquiry.

Having described the three-avenue approach created by *Grant*, let us start with the avenue involving the seriousness of the alleged *Charter* breach.

(1) the seriousness of the *Charter*-infringing state conduct (admission may send the message the justice system condones serious state misconduct)

In *Grant*, the Supreme Court held, at paragraph 73, that this avenue requires a trial judge to evaluate "the seriousness of the state conduct that led to the breach." The more severe or deliberate the conduct involved "the greater the need for the courts to dissociate themselves from that conduct, by excluding evidence linked to that conduct" (at paragraph 72).

In *R. v. Tsekouras*, 2017 ONCA 290, the Ontario Court of Appeal considered *Grant* and indicated that to "determine the seriousness of the infringement under this line of inquiry, a court must look to the interests engaged by the right infringed and examine the extent to which the violation actually impacted on those interests….An unreasonable search that intrudes upon an area in which an individual reasonably enjoys a high expectation of privacy or that demeans a person's dignity is more seriousness than one that does not" (at paragraph 111).

7. In *R. v. Stanton*, [2010] B.C.J. No. 753, the British Columbia Court of Appeal indicated, at paragraph 52, that the "revised framework under *Grant* for the admissibility of evidence under s. 24(2) of the *Charter* recognizes that trial judges continue to have a broad discretion in determining whether evidence obtained in breach of a *Charter* right will nevertheless be admitted, but the exercise of that discretion is to be informed and guided by the words of s. 24(2)."
8. Similarly in *Marwood v. Commissioner of Police,* [2016] NZSC 139, the Supreme Court of New Zealand noted that when exclusion of evidence is sought in New Zealand, the "proper assessment to be made [is] whether the breach of the *New Zealand Bill of Rights Act* necessitated exclusion of evidence." The Supreme Court indicated that the answer to this question "turns, principally, on assessment of the seriousness of the breach of the New Zealand Bill of Rights Act and the extent to which it is proper for the court to be co-opted into countenancing it. It cannot be sufficient answer that the ends justify the admission (as is suggested) without further consideration of the nature of the breach" (at paragraph 64).
9. In *R. v. Morelli*, [2010] 1 S.C.R. 253, at paragraph 102, the Supreme Court indicated that the "repute of the administration of justice is jeopardized by judicial indifference to unacceptable police conduct."

In *R. v. Kiene*, [2015] A.J. No. 1159 (C.A.), the Alberta Court of Appeal summarized the test enunciated in *Grant* as regards section 24(2) of the *Charter* by indicating that "the goal is to preserve public confidence in the rule of law and its processes" (at paragraph 34):

> The *Grant* test for exclusion of evidence asks 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 disrepute: para 68. Exclusion of the evidence is not a punishment of those involved; the goal is to preserve public confidence in the rule of law and its processes: para 73. The court must balance the seriousness of the Charter-infringing conduct, the impact of the breach upon the appellant, and society's interest in the adjudication of the case on the merits.

(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)

In relation to this avenue, the Supreme Court indicated in *Grant*, at paragraph 76, that trial judges must concentrate on "the seriousness of the impact of the *Charter* breach on the *Charter*-protected interests of the accused." This requires an evaluation "of the extent to which the breach actually undermined the interests protected by the right infringed" and the "degree to which the violation impacted on those interests."

In *R. v. Côté*, [2011] 3 S.C.R. 215, the Supreme Court considered the second line of inquiry and held that it "deals with the seriousness of the impact of the *Charter* violation on the Charter-protected interests of the accused. The impact may range from that resulting from a minor technical breach to that following a profoundly intrusive violation. The more serious the impact on the accused's constitutional rights, the more the admission of the evidence is likely to bring the administration of justice into disrepute" (at paragraph 47).

More recently in *R. v. Paterson*, [2017] 1 S.C.R. 202, the Supreme Court noted that the "second inquiry under the s. 24(2) analysis focusses on whether the admission of the evidence would bring the administration of justice into disrepute from the standpoint of society's interest in respect for *Charter* rights. This entails considering the degree to which a *Charter* infringement undermined the *Charter*-protected interest" (at paragraph 42).

In *R. v. Morelli*, [2010] 1 S.C.R. 253, the Supreme Court of Canada had held, at paragraph 104, that the "intrusiveness of the search is of particular importance" in applying the second avenue of analysis when a breach of section 8 of the *Charter* has occurred (the right to be free from unreasonable searches or seizures). In *Morelli*, the unlawful search involved the accused person's home and personal computer. The Court stated, at paragraph 105, that "it is difficult to imagine a more intrusive invasion of privacy than the search of one's home and personal computer." In contrast, in *R. v. Harrison*, [2009] 2 S.C.R. 494, at paragraph 30, the Court indicated that "motorists have a lower expectation of privacy in their vehicles than they do in their homes. As participants in a highly regulated activity, they know that they may be stopped for reasons pertaining to highway safety .... In these respects, the intrusion on liberty and privacy represented by the detention is less severe than it would be in the case of a pedestrian. Further, nothing in the encounter was demeaning to the dignity of the appellant."

"An unreasonable search . . . may impact . . . on human dignity."

In *R. v. Stanton* (2010), 254 C.C.C. (3d) 421, the second avenue of inquiry was summarized by the British Columbia Court of Appeal in the following manner (at paragraph 54):

> The impact of a *Charter* breach may range from fleeting and technical to the profoundly intrusive. The more serious the impact on an accused's protected interests, the greater the risk that admission of the evidence may signal to the public that *Charter* rights are of little actual avail to the citizen (para. 76). An unreasonable search contrary to s. 8 may impact on the protected interests of privacy, and more broadly, human dignity. An unreasonable search that intrudes on an area in which the individual enjoys a high expectation of privacy, or that demeans his or her dignity, is more serious than one that does not (para. 78).

(3) society's interest in the adjudication of the case on its merits

In relation to this criterion, the Supreme Court suggested in *Grant*, at paragraph 79, that Canadian society "generally expects that a criminal allegation will be adjudicated on its merits." Thus, the third avenue of inquiry requires a trial judge to ask him- or herself "whether the truth-seeking function of the criminal trial process would be better served by admission of the evidence, or by its exclusion?" The Court held that the reliability of the evidence "is an important factor in this line of inquiry" because the exclusion of reliable evidence can render a trial "unfair from the public perspective, thus bringing the administration of justice into disrepute" (at paragraph 81). Ultimately, trial judges must face the question as to "whether the vindication of the specific *Charter* violation through the exclusion of evidence extracts too great a toll on the truth-seeking goal of the criminal trial" (at paragraph 82).[10]

10. Similarly, in *Hudson v. Michigan*, 547 U.S. 586 (2006), the Supreme Court of the United States noted, at paragraph 4, that the "exclusionary rule" can generate "substantial social costs" and constitute a "'costly toll' upon truth seeking and law enforcement objectives." The same point was made by the Supreme Court of Ireland in *Director of Public Prosecutions v. J.C.* [2015] IESC 31, in which it indicated that "many courts have recognised, where cogent and compelling evidence of guilt is found but not admitted on the basis of trivial technical breach, the administration of justice far from being served, may be brought into disrepute" (at paragraph 97).

"The seriousness of the offence . . . has the potential to cut both ways."

A number of years later, in *Cole*, at paragraph 95, the Supreme Court held that "the considerations under this third inquiry must not be permitted to overwhelm the s. 24(2) analysis….They are nonetheless entitled to appropriate weight and, in the circumstances of this case, they clearly weigh against exclusion of the evidence." In *Côté*, the Court held that the "reliability of the evidence and its importance to the prosecution's case are key factors" (at paragraph 47). The Supreme Court of Canada also indicated in *Côté* that "excluding highly reliable evidence may more negatively affect the truth-seeking function of the criminal law process where the effect is to 'gut' the prosecution's case" (at paragraph 47).

More recently in *Paterson*, the Supreme Court indicated, at paragraph 51, that the third avenue of inquiry "entails considering the reliability of the evidence and its importance to the Crown's case." The Court also indicated in *Paterson* that it is "important not to allow the third *Grant* factor of society's interest in adjudicating a case on its merits to trump all other considerations, particularly where (as here) the impugned conduct was serious and worked a substantial impact on the appellant's *Charter* right" (at paragraph 56).

In *Stanton*, at paragraph 56, the British Columbia Court of Appeal indicated that "the importance of the evidence to the prosecution's case is another factor that may be considered ... the exclusion of highly reliable evidence may impact more negatively on the repute of the administration of justice where the remedy effectively guts the prosecution."

In *R. v. Beaulieu*, [2010] 1 S.C.R. 248, the trial judge, in a pre-*Grant* decision, had found a violation of section 8 of the *Charter*, but ruled that the evidence in issue (a gun) was admissible. In upholding this conclusion, the Supreme Court touched on the three factors referred to in *Grant* by stating (at paragraph 8):

> As noted above, the trial judge's conclusions as to the seriousness of the breach were central to this case, and they remain equally relevant under the *Grant* approach. As for the impact of the breach, the trial judge took into account Mr. Beaulieu's reduced privacy interest in his car and the limited scope and invasiveness of the search. With regard to society's interest in adjudication on the merits, she concluded that the evidence was crucial to the Crown's case. It is also uncontested that a gun is reliable evidence.

THE SERIOUSNESS OF THE OFFENCE

The seriousness of the offence committed is a factor for consideration though it was held in *Grant* that it "has the potential to cut both ways." The Supreme Court indicated, at paragraph 84, 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."[11]

More recently, in *R. v. Marakah*, 2017 S.C.C. 59, after concluding that the police had seized text messages in contravention of the *Charter*, the Supreme Court concluded that the evidence should be excluded pursuant to section 24(2) of the *Charter*. In reaching this conclusion, the Supreme Court referred to is decision in *Grant* and indicated that "while the public has a heightened interest in seeing a determination on the merits where the offence charged is serious" it is "important not to allow... society's interest in adjudicating a case on its merits to trump all other considerations" (at paragraph 72).

BODILY EVIDENCE (BLOOD, DNA, ETC.)

The Court held in *Grant* that "the approach to admissibility of bodily evidence under s. 24(2) that asks simply whether the evidence was conscripted should be replaced by a flexible test based on all the circumstances, as the wording of s. 24(2) requires. As for other types of evidence, admissibility should be determined by inquiring into the effect admission may have on the repute of the justice system, having regard to the seriousness of the police conduct, the impact of the *Charter* breach on the protected interests of the accused, and the value of a trial on the merits" (at paragraph 107).

DERIVATIVE EVIDENCE

In relation to derivative evidence (defined in *Grant* as physical evidence obtained, for instance, as a result of an unconstitutionally obtained statement), the Court held that to "determine whether the admission of derivative evidence would bring the administration of justice into disrepute under s. 24(2), courts must pursue the usual three lines of inquiry outlined in these reasons, taking into account the self-incriminatory origin of the evidence in an improperly obtained statement as well as its status as real evidence" (at paragraph 123). However, the Court also held that 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" (at paragraph 122). Finally, on this point the Court held that a judge "should refuse to admit evidence where there is reason to believe the police deliberately abused their power to obtain a statement which might lead them to such evidence. Where derivative evidence is obtained by way of a deliberate or flagrant *Charter* breach, its admission would

11. In Wong, the British Columbia Court of Appeal, at paragraph 18, indicated that though the seriousness of the crime, "while still a relevant consideration, is perhaps of a lesser weight in the analytical exercise now to be performed under s. 24(2)." It has been held that in some cases the seriousness of the offence will be a "neutral" factor (see *R. v. Martin* (2010), 361 N.B.R. (2d) 251 (C.A.), at paragraph 96).

bring the administration of justice into further disrepute and the evidence should be excluded" (at paragraph 128).

In in *Utah v. Strieff*, No. 14–1373 (2016), the Supreme Court of the United States also considered the admissibility of derivative evidence (found after an unlawful motor vehicle stop). It concluded that the evidence was admissible because "the unlawful stop was sufficiently attenuated by the preexisting arrest warrant" (at page 8):

> Applying these factors, we hold that the evidence discovered on Strieff's person was admissible because the unlawful stop was sufficiently attenuated by the preexisting arrest warrant. Although the illegal stop was close in time to Strieff's arrest, that consideration is outweighed by two factors supporting the State. The outstanding arrest warrant for Strieff's arrest is a critical intervening circumstance that is wholly independent of the illegal stop. The discovery of that warrant broke the causal chain between the unconstitutional stop and the discovery of evidence by compelling Officer Fackrell to arrest Strieff. And, it is especially significant that there is no evidence that Officer Fackrell's illegal stop reflected flagrantly unlawful police misconduct.[12]

THE FINAL STEP: THE BALANCING

In *Grant*, the Supreme Court directed trial judges to assess section 24(2) applications by making the inquiries referred to under the three avenues (described by the Court as a "decision tree") and then "determine whether, on balance, the admission of the evidence obtained by *Charter* breach would bring the administration of justice into disrepute" (at paragraph 85). Similarly, in *R. v. Nolet*, [2010] 1 S.C.R. 851, at paragraph 54, the Supreme Court indicated that the "task for courts remains one of achieving a balance between individual and societal interests with a view to determining whether the administration of justice would be brought into disrepute by admission of the evidence."

As we have seen, the Supreme Court of Canada has created a broad societal test in its analysis of section 24(2) of the *Charter,* which requires a consideration of the long term. Thus, in *R. v. Taylor*, [2014] 2 S.C.R. 495, the Supreme Court indicated, at paragraph 37, that when "faced with an application for exclusion under s. 24(2), a court must assess and balance the effect of admitting the evidence on the public's confidence in the justice system, having regard to 'the seriousness of the *Charter*-infringing state conduct, the impact of the breach on the *Charter*-protected interests of the accused, and the societal interest in an adjudication on the merits.'"

In *Morelli*, the Supreme Court said, at paragraph 108, that in balancing the considerations set out in *Grant*, trial judges are required "to bear in mind the long-term and prospective repute of the administration of justice, focussing less on the particular case than on the impact over time of admitting the evidence obtained by infringement of the constitutionally protected rights of the accused." At paragraph 86 of *Grant*, the final step in the required analysis was succinctly summarized by the Supreme Court of Canada in the following manner:

"'No overarching rule governs how the balance is to be struck.' *Grant*."

> In all cases, it is the task of the trial judge to weigh the various indications. No overarching rule governs how the balance is to be struck. Mathematical precision is obviously not possible. However, the preceding analysis creates a decision tree, albeit more flexible than the *Stillman* self-incrimination test. We believe this to be required by the words of s. 24(2).

In *R. v. Fan*, 2017 B.C.C.A. 99, it was indicated that a section 24(2) analysis requires that the evidence "on each line of inquiry is weighed and all the circumstances are considered in determining whether admission of the impugned evidence would bring the administration of justice into disrepute. No one consideration is permitted consistently to trump or overwhelm the others. In all cases, the court must assess the effect of admission or exclusion on the long-term repute of the justice system and ensure that it is not damaged any further by the breach" (at paragraph 68).

In *R. v. Tsekouras* (2017), 353 C.C.C. (3d) 349 (Ont. C.A.), it was noted that these "lines of inquiry under *Grant* involve fact-finding and the assignment of weight to various interests often at odds with each other. There is no overarching principle that mandates how this balance is to be achieved" (at paragraph 106).

THE RESULT IN GRANT

In *Grant*, the Supreme Court concluded that the accused had been arbitrarily detained in violation of section 9 of the *Charter* because the police did not have lawful grounds to detain the accused. In addition, the Court also concluded that the police violated section 10(b) of the *Charter* by failing to advise the accused that he had the right to "contact counsel without delay." As a result, it was necessary for the Court to determine whether the evidence obtained (a gun obtained as a result of a statement made by the accused to the police in contravention of the *Charter*) should be excluded or admitted. The Supreme Court concluded that the gun should be admitted.

The Supreme Court held that "the police conduct was not egregious. The impact of the *Charter* breach on the accused's protected interests was significant, although not at the most serious end of the scale. Finally, the value of the evidence is considerable.... Unlike the situation in *R. v. Harrison*, [2009] 2 S.C.R.

12. The latter words would be very familiar to Canadian judges and lawyers. In *R. v. Fearon*, [2014] 3 S.C.R. 621, for instance, the Supreme Court, in holding that evidence obtained in that case in violation of the *Charter* was admissible, noted that there was not "even a whiff of the sort of indifference on the part of the police to the suspect's rights that requires a court to disassociate itself from that conduct" (at paragraph 95). In *R. v. Culotta*, 2018 ONCA 665, the Ontario Court of Appeal suggested that "[g]ood faith honest errors by the police represent less serious *Charter* infringements" (at paragraph 67).

"[T]he third step . . . requires a consideration of the truth seeking function of the trial process."

494, the police officers here were operating in circumstances of considerable legal uncertainty. In our view, this tips the balance in favour of admission, suggesting that the repute of the justice system would not suffer from allowing the gun to be admitted in evidence against the appellant" (at paragraph 140).[13]

SYSTEMIC BREACHES OF THE CHARTER

The Supreme Court of Canada most recent consideration of section 24(2) of the *Charter* came in *R. v. G.T.D.*, 2018 S.C.C. 7. At issue in this case was whether evidence should be excluded based upon the Edmonton Police Service's use of a standard caution form of warning to arrested individuals, which had the effect of violating their right to contact counsel pursuant to section 10(b) of the *Charter*.

The majority's decision has been interpreted as indicating that in assessing the seriousness of a breach of the *Charter* a court's analysis should not be limited to a consideration of the arresting officer's behavior individually, but should also include a pattern of institutional errors, which may have led to the breach (see *R. v. Ippak*, 2018 NUCA 3, at paragraphs 43 and 97). However, this appears somewhat overstated. The majority decision by the Supreme Court on this point consists entirely of the following brief comments (at paragraph 3):

> The next issue is whether this breach warrants the exclusion of G.T.D.'s statement under s. 24(2) of the *Charter*. A majority of the Court is of the view that it does, and relies substantially on the reasons of Justice Veldhuis at the Court of Appeal. As she noted at para. 83 of her reasons, the Crown had ample opportunity to call further evidence about Edmonton Police Service training or policy, but chose not to do so. The majority would therefore allow the appeal and order a new trial.

CONCLUSION

In *Grant* the Supreme Court dramatically changed the approach it initially created in relation to whether unconstitutionally obtained evidence should be excluded or admitted. Subsequently, its formulation in *Grant* has been the subject of significant consideration and commentary. Thus the question: Where are we in Canada as regards the admission or exclusion of unconstitutionally obtained evidence? I would proffer the following as a summary of the principles set out in *Grant* and its subsequent consideration by the Supreme Court of Canada:

1. *Grant* should be seen as a dramatic reformulation of the test applicable to section 24(2) *Charter* analysis.[14]
2. In considering and applying section 24(2) of the *Charter* a trial judge must apply and utilize the three avenues set out in *Grant*:

   (i) the first step, "the seriousness of the *Charter*-infringing state conduct," focuses on the actions of the police. The first step involves placing the breach of the *Charter* along a continuum of misconduct. The more significant or deliberate the conduct involved, the more likely the evidence will be excluded. A flagrant disregard for the *Charter* by the police will be seen as being very different than a breach in which the police believe they are acting in accordance with the law;

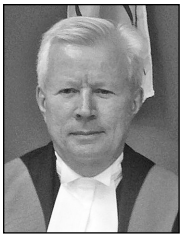
   (ii) the second step, "the impact of the breach on the *Charter*-protected interests of the accused (admission may send the message that individual rights count for little)," involves a consideration of the the impact of the *Charter* breach on the *Charter*-protected interests of the accused. This requires an evaluation of the degree to which the *Charter* violation impacted on the interests sought to be protected by the *Charter*. The intrusiveness of the breach is of particular importance in this step of the analysis. Thus, a distinction between searches involving residences and vehicles has been made; and

   (iii) the third step, "society's interest in the adjudication of the case on its merits," requires a consideration of the importance of the truth-seeking function of the trial process. In this regard, the reliability of the evidence in issue becomes a crucial factor.

13. In *Harrison*, among the factors that led the Supreme Court of Canada to conclude that the evidence obtained after a violation of the *Charter* should have been excluded was its finding that the "police conduct in stopping and searching the appellant's vehicle without any semblance of reasonable grounds was reprehensible, and was aggravated by the officer's misleading testimony in court" (at paragraph 35).
14. In *Trends for Exclusion of Evidence in 2012*, (2013) 1 C.R. (7th) 74, Ariane Asselin conducted an empirical survey of decisions rendered in 2012, which applied section 24(2) of the *Charter*. She concluded as follows (at page 74):

    > This survey shows that there continues to be a high rate of exclusion by trial judges for unconstitutionally obtained evidence comparable to earlier surveys conducted in the wake of *Grant*. Particularly noteworthy are the rates of exclusion for specific types of evidence. The survey identifies a high level of exclusion for bodily evidence, including breath samples, and a lower rate of exclusion for testimonial evidence. Moreover, with respect to non-bodily physical evidence, the survey shows that the rate of exclusion for drugs is 20% higher than for guns. These results are surprising given the Supreme Court of Canada's (SCC) comments in *Gran*t about how exclusion could operate in relation to different types of evidence and its anticipation that certain patterns would emerge. The findings of this survey signal that the emerging patterns at the trial court level are perhaps not the ones intended by the SCC.

3. Once these three factors have been applied and considered, the final step involves a balancing of the effect admission of the unconstitutionally obtained evidence would have on the repute of the administration of justice versus the effect that excluding the evidence would have on the repute of the administration of justice. It appears that the key to the last step in the analysis is balancing the seriousness of the violation against the importance and reliability of the evidence.



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AMERICAN JUDGES ASSOCIATION: PROCEDURAL FAIRNESS INTERVIEWS

The American Judges Association (AJA) conducted interviews about procedural fairness with nine national leaders on issues involving judges and the courts. The interviews, done by Kansas Court of Appeals Judge and past AJA president Steve Leben, cover the elements of procedural fairness for courts and judges, how judges can improve fairness skills, and how the public reacts to courts and judges. The interviews were done in August 2014; job titles are shown as of the date of the interviews.

Visit http://proceduralfairnessguide.org/interviews/ to watch the interviews.