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Charter Detention and the Exclusion of Evidence after *Grant*, *Harrison* and *Suberu*

Jonathan Dawe and Heather McArthur*

I. INTRODUCTION

The quartet of judgments released by the Supreme Court of Canada on July 17, 2009 — *R. v. Grant*, *R. v. Suberu*, *R. v. Harrison* and *R. v. Shepherd*[1] — are among the Court's most important criminal law *Canadian Charter of Rights and Freedoms*[2] decisions in recent years, making major changes to the law governing the section 9 right against arbitrary detention, the section 10(b) right to counsel, and the exclusion of unconstitutionally obtained evidence under section 24(2). Most significantly, *Grant* overturns 22 years of settled section 24(2) jurisprudence that emphasized the importance of "trial fairness" and the principle against self-incrimination. The Court has substantially modified the seminal *Collins* test and effectively reversed its 1997 decision in *R. v. Stillman*, where a majority held that unconstitutionally obtained and otherwise

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* Sack Goldblatt Mitchell LLP and McArthur Barristers. This paper has previously been published in (2010) 56 Crim. L.Q. 376, and is reprinted with permission. An earlier version of this paper appeared in the Criminal Lawyers' Association (Ontario) newsletter, *For the Defence*, Vol. 30, No. 4.

[1] *R. v. Grant*, [2009] S.C.J. No. 32, 2009 SCC 32 (S.C.C.) [hereinafter "*Grant*"]; *R. v. Suberu*, [2009] S.C.J. No. 33, 2009 SCC 33 (S.C.C.) [hereinafter "*Suberu*"]; *R. v. Harrison*, [2009] S.C.J. No. 34, 2009 SCC 34 (S.C.C.) [hereinafter "*Harrison*"]; and *R. v. Shepherd*, [2009] S.C.J. No. 35, 2009 SCC 35 (S.C.C.) [hereinafter "*Shepherd*"]. One of the authors of this paper (JD) was counsel for the appellant in *Grant* and for the intervener Canadian Civil Liberties Association in *Harrison*. Of the four cases, *Grant* serves as the lead judgment on the ss. 9 and 24(2) issues, while *Suberu* is the lead judgment on s. 10(b). *Suberu* is also important as an example of the Court applying the *Grant* detention framework to its facts, while *Harrison* is important as an example of the Court applying the new *Grant* s. 24(2) test to a case involving egregious police misconduct. *Shepherd* is the least significant of the new decisions, since the Court finds no Charter violation and does not reach the s. 24(2) issue.

[2] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "Charter"].

undiscoverable conscriptive evidence "must be excluded"[3] to preserve the fairness of the trial. *Grant* thus opens the door to a considerable amount of evidence that would have been excluded under the *Collins/Stillman* approach now being ruled admissible. At the same time, the Court's decision in *Harrison* may give new teeth to the principle that courts cannot be seen to condone serious police misconduct, since this would send the message to the public that Charter rights are unimportant.

Grant also clarifies the meaning of detention under sections 9 and 10 of the Charter, although the majority muddies the waters when it applies its new test to the facts of *Suberu* and surprisingly finds no detention. The Court also holds for the first time that unlawful detentions are necessarily arbitrary and contravene section 9. With respect to the right to counsel, *Suberu* establishes that a section 10(b) caution must be given "immediately" after a detention crystallizes, reversing the Ontario Court of Appeal's holding in the decision on appeal that section 10(b) permits "a brief interlude between the commencement of an investigative detention and the advising of the detained person's right to counsel".[4] The Supreme Court also holds that the duty to give a section 10(b) caution is triggered by a *Mann* "investigative detention", a point that was expressly left open in *Mann* itself.[5] Finally, *Grant* addresses the elements of the *Criminal Code*'s "weapons trafficking" offences,[6] reversing the trial court and the Ontario Court of Appeal's extremely broad interpretation of "trafficking". As interpreted by the Supreme Court, a person who merely moves a weapon from place to place, without more, does not commit a "weapons trafficking" offence.[7]

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[3] *R. v. Stillman*, [1997] S.C.J. No. 34, [1997] 1 S.C.R. 607, at para. 122 (S.C.C.) [hereinafter "*Stillman*"].

[4] *R. v. Suberu*, [2007] O.J. No. 317, 218 C.C.C. (3d) 27, at para. 50 (Ont. C.A.) [hereinafter "*Suberu* (C.A.)"].

[5] *R. v. Mann*, [2004] S.C.J. No. 49, [2004] 3 S.C.R. 59, at para. 22 (S.C.C.) [hereinafter "*Mann*"].

[6] *Criminal Code*, R.S.C. 1985, c. C-46, s. 99 ("weapons trafficking") and s. 100 ("possession for purpose of weapons trafficking"). Both sections rely on the definition of "transfer" in s. 84.

[7] Mr. Grant was convicted at trial of the s. 100(1) *Criminal Code* offence of "possession for the purpose of weapons trafficking", which makes it an offence for a person to possess a firearm for the purpose of unlawfully "transferring" it. Section 84 defines "transfer" to mean "sell, provide, barter, give, lend, rent, send, *transport*, ship, distribute or deliver". On a literal reading of this definition, a person who merely moves a gun from one place to another could be said to "transport" it, and thus "transfer" it within the meaning of ss. 84, 99 and 100. Mr. Grant was convicted at trial on the basis that he had "transported" the gun within the meaning of ss. 84 and 100 by carrying it while walking down the street, and his conviction was upheld by the Ontario Court of Appeal. The Supreme Court of Canada unanimously disagreed with the broad interpretation adopted by the trial judge and the Court of Appeal, concluding (*supra*, note 1, at para. 144) that "Parliament did not intend s. 100(1) to address the simple movement of a firearm from one place to another", or impose a substantial mandatory minimum

II. Detention and Sections 9 and 10

1. The Meaning of Detention: *R. v. Grant*

In one of its earliest Charter decisions, *R. v. Therens*,[8] the Supreme Court of Canada held that the concept of detention in sections 9 and 10 of the Charter is not limited to physical restraint or legal compulsion. Rather, as Le Dain J. explained (writing for the Court on this issue):

> [I]t is not realistic, as a general rule, to regard compliance with a demand or direction by a police officer as truly voluntary, in the sense that the citizen feels that he or she has the choice to obey or not, even where there is in fact a lack of statutory or common law authority for the demand or direction and therefore an absence of criminal liability for failure to comply with it. Most citizens are not aware of the precise legal limits of police authority. Rather than risk the application of physical force or prosecution for wilful obstruction, the reasonable person is likely to err on the side of caution, assume lawful authority and comply with the demand. The element of psychological compulsion, in the form of a reasonable perception of suspension of freedom of choice, is enough to make the restraint of liberty involuntary. Detention may be effected without the application or threat of application of physical restraint if the person concerned submits or acquiesces in the deprivation of liberty and reasonably believes that the choice to do otherwise does not exist.[9]

In *Grant* and *Suberu*, the Court revisits and expands on this holding.

(a) The Facts of Grant

One afternoon in November 2003, two plainclothes officers, Constable Worrell and Constable Forde, were on patrol in the Greenwood and Danforth area of Toronto. They were not investigating any particular

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sentence on people who simply move a firearm from one place to another without legal authorization. The Supreme Court's narrow interpretation of ss. 99 and 100 offences accords with what was plainly Parliament's intent. The Code's "weapons trafficking" provisions are structurally indistinguishable from the "drug trafficking" provisions in the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19 and its predecessor legislation. On a literal reading of the CDSA definition of "trafficking", which also includes the word "transport", a person who walked down the street with a joint of marijuana in his or her pocket could be convicted as a "drug trafficker". For over 40 years Canadian courts have consistently avoided this absurd result by construing the definition of "traffic" in a narrower, non-literal manner (see, *e.g.*, *R. v. Harrington*, [1963] B.C.J. No. 98, [1964] 1 C.C.C. 189, at 193-98 (B.C.C.A.)). Parliament would have been aware of this jurisprudence and almost certainly intended the ss. 99 and 100 "trafficking" offences to be interpreted similarly.

[8] [1985] S.C.J. No. 30, [1985] 1 S.C.R. 613 (S.C.C.) [hereinafter "*Therens*"].

[9] *Id.*, at 644.

crime, and had no information that any crime had recently been committed. They noticed Donnohue Grant, an 18-year-old black male who was a stranger to them, walking down the sidewalk. The officers said they became suspicious when they saw Mr. Grant "fidgeting with his coat" and staring at them in an unusual manner. However, it was undisputed that they had no grounds to lawfully arrest him or detain him for investigative purposes.

Constable Worrell and Constable Forde directed a nearby uniformed officer, Constable Gomes, to "have a chat" with Mr. Grant and "see what's up with him". Constable Gomes left his vehicle and approached Mr. Grant, directing him to "keep his hands in front of him" in plain view. Mr. Grant complied, and Constable Gomes proceeded to question him about where he was going, what he was doing, and whether he had ever been arrested. This questioning lasted for approximately six minutes. About two minutes into this interrogation, Constable Worrell and Constable Forde left their vehicle and joined Constable Gomes on the sidewalk, standing behind him and blocking the sidewalk in the direction Mr. Grant had been walking. When Constable Gomes asked whether Mr. Grant "had anything on him that he shouldn't", Mr. Grant initially replied "No," but then admitted that he had "a small bag of weed" in his coat pocket. Constable Gomes then asked "Is that it?" Mr. Grant hung his head and replied: "Well, no." After further questioning from Cst. Gomes, Mr. Grant eventually admitted: "I have a firearm." The three officers then arrested and searched him, finding a loaded revolver in a waist pouch under his coat and a small bag of marijuana in his coat pocket. When Constable Worrell asked Mr. Grant why he had a gun, he replied that he was "just dropping it off … up the road". Mr. Grant was charged with a variety of firearms offences, including the *Criminal Code* section 100(1)(a) offence of possession of a weapon "for the purpose of … transferring it".[10]

(b) The Judgments Below

Mr. Grant's defence at trial was primarily Charter based: he argued that the police infringed his sections 8, 9 and 10(b) Charter rights when they stopped and questioned him, and sought to have both his inculpatory responses and the seized gun excluded under section 24(2). Since it was undisputed that the police did not have sufficient grounds to lawfully

[10] *Criminal Code*, R.S.C. 1985, c. C-46. This count is discussed at footnote 7, *supra*.

detain Mr. Grant before he answered their questions, the central issue was whether he was "detained" for Charter purposes before he made his inculpatory utterances. The trial judge concluded that Mr. Grant was not detained, characterizing the police questioning as mere "chit chat". The Ontario Court of Appeal disagreed, concluding that Mr. Grant was arbitrarily detained during the initial questioning, in violation of his section 9 rights.[11] The Court declined to address Mr. Grant's argument that his section 10(b) Charter right was also infringed, in part because it was "an open question" whether section 10(b) was triggered by an investigative detention short of an arrest.[12] The Ontario Court of Appeal went on to admit the evidence under section 24(2).[13]

(c) The Supreme Court of Canada's Detention Analysis

Mr. Grant appealed to the Supreme Court of Canada, primarily on the section 24(2) issue.[14] In response, the Crown sought to uphold the result in the court below by arguing that Mr. Grant's section 9 rights had not been infringed because he was not "detained" when he made his inculpatory admission. The Crown urged the Supreme Court to apply a lower level of Charter scrutiny to "community-based policing".

The Supreme Court of Canada unanimously concluded that Mr. Grant was arbitrarily detained. Chief Justice McLachlin and Charron J. wrote joint majority reasons,[15] while Deschamps J. wrote a separate concurrence. Justice Binnie wrote separate reasons setting out his disagreement with the majority's approach to the detention issue, but he agreed with the majority's conclusion on the facts.[16]

The Chief Justice and Charron J. began their reasons by commenting that "the existing jurisprudence on the issues of detention and exclusion of evidence is difficult to apply and may lead to unsatisfactory results", and that the Court should thus "take a fresh look at the frameworks that have been developed for the resolution of these two issues".[17] On the detention issue, the majority acknowledged that "a generous, purposive

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[11] *R. v. Grant*, [2006] O.J. No. 2179, 209 C.C.C. (3d) 250 (Ont. C.A.) [hereinafter "*Grant* (C.A.)"].

[12] *Id.*, at para. 31.

[13] This issue is discussed in Section III, below.

[14] He also challenged the Ontario Court of Appeal's interpretation of s. 100 of the *Criminal Code* (see footnote 7, *supra*).

[15] LeBel, Fish and Abella JJ. concurring.

[16] See Section II.1.d, *infra*.

[17] *Grant*, *supra*, note 1, at para. 3.

and contextual approach should be applied" to the interpretation of constitutional provisions,[18] but cautioned that "[w]hile the twin principles of purposive and generous interpretation are related and sometimes conflated, they are not the same."[19] The purpose of the right is the dominant concern, while generosity of interpretation is subordinate to and constrained by the purpose. Thus, the language of sections 9 and 10 of the Charter must be construed in a generous manner that "furthers, without overshooting, its purpose".[20]

The *Grant* majority noted that everyone in Canada enjoys a broad right to liberty, both at common law and under section 7 of the Charter. The broad purpose of section 9 is the protection of individual liberty, both physical and mental, from unjustified state interference:

> [Section] 9 guards not only against unjustified state intrusions upon physical liberty, but also against incursions on mental liberty by prohibiting the coercive pressures of detention and imprisonment from being applied to people without adequate justification.[21]

The concept of detention must be interpreted in accordance with this purpose, and with regard to the fact that detention triggers the section 10 Charter right to counsel, which is "designed to ensure that the person whose liberty has been curtailed retains an informed and effective *choice* whether to speak to state authorities, consistent with the overarching principle against self-incrimination" and to "ensure that the person who is under the control of the state be afforded the opportunity to seek legal advice in order to assist in regaining his or her liberty".[22] The majority noted that:

> [W]hile the forms of interference s. 9 guards against are broadly defined to include interferences with both physical and mental liberty, not every trivial or insignificant interference with this liberty attracts Charter scrutiny. To interpret detention this broadly would trivialize the applicable Charter rights and overshoot their purpose. Only the individual whose liberty is meaningfully constrained has genuine need of the additional rights accorded by the Charter to people in that situation.[23]

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18 *Id.*, at para. 15.
19 *Id.*, at para. 17.
20 *Id.*
21 *Id.*, at para. 20.
22 *Id.*, at para. 22.
23 *Id.*, at para. 26.

The majority reaffirmed the holding in *Therens* that a detention for sections 9 and 10 purposes can arise through either physical or psychological restraint. The Chief Justice and Charron J. identified two distinct forms of "psychological detention":

> The first is where the subject is legally required to comply with a direction or demand, as in the case of a roadside breath sample. The second is where there is no legal obligation to comply with a restrictive or coercive demand, but a reasonable person in the subject's position would feel so obligated.[24]

In the latter situation, the perceptions of a reasonable person must be determined objectively, focusing "on the state conduct in the context of the surrounding legal and factual situation, and how that conduct would be perceived by a reasonable person in the situation as it develops".[25] However, the majority added:

> While the test is objective, the individual's particular circumstances and perceptions at the time may be relevant in assessing the reasonableness of any perceived power imbalance between the individual and the police, and thus the reasonableness of any perception that he or she had no choice but to comply with the police directive. To answer the question whether there is a detention involves a realistic appraisal of the entire interaction as it developed, not a minute parsing of words and movements. In those situations where the police may be uncertain whether their conduct is having a coercive effect on the individual, it is open to them to inform the subject in unambiguous terms that he or she is under no obligation to answer questions and is free to go. It is for the trial judge, applying the proper legal principles to the particular facts of the case, to determine whether the line has been crossed between police conduct that respects liberty and the individual's right to choose, and conduct that does not.[26]

In its prior decision in *Mann*, the Court (*per* Iacobucci J.) had held that:

> [T]he police cannot be said to "detain", within the meaning of ss. 9 and 10 of the Charter, every suspect they stop for purposes of identification, or even interview. The person who is stopped will in all cases be "detained" in the sense of "delayed", or "kept waiting". But the constitutional rights recognized by ss. 9 and 10 of the Charter are not

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[24] *Id.*, at para. 30.
[25] *Id.*, at para. 31.
[26] *Id.*, at para. 32, see paras. 30-32.

> engaged by delays that involve no significant physical or psychological restraint.[27]

The *Grant* majority reaffirmed this holding, noting that not all police-citizen interactions involving some physical delay or police questioning will necessarily amount to a Charter detention. For example, the Chief Justice and Charron J. stated:

> In many common situations, reasonable people understand that the police are not constraining individual choices, but rather helping people or gathering information. For instance, the reasonable person would understand that a police officer who attends at a medical emergency on a 911 call is not detaining the individuals he or she encounters. This is so even if the police in taking control of the situation, effectively interfere with an individual's freedom of movement. Such deprivations of liberty will not be significant enough to attract Charter scrutiny because they do not attract legal consequences for the concerned individuals.[28]

Even when the police are investigating a crime, not every interaction they have with a witness or potential suspect will necessarily give rise to a detention:

> In the context of investigating an accident or a crime, the police, unbeknownst to them at that point in time, may find themselves asking questions of a person who is implicated in the occurrence and, consequently, is at risk of self-incrimination. This does not preclude the police from continuing to question the person in the pursuit of their investigation. Section 9 of the Charter does not require that police abstain from interacting with members of the public until they have specific grounds to connect the individual to the commission of a crime. Nor does s. 10 require that the police advise everyone at the outset of any encounter that they have no obligation to speak to them and are entitled to legal counsel.
>
> Effective law enforcement is highly dependent on the cooperation of members of the public. The police must be able to act in a manner that fosters this cooperation, not discourage it. However, police investigative powers are not without limits. The notion of psychological detention recognizes the reality that police tactics, even in the absence of exercising actual physical restraint, may be coercive enough to effectively remove the individual's choice to walk away from the police. This creates the risk that the person may reasonably

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[27] *Mann*, *supra*, note 5, at para. 19.

[28] *Grant*, *supra*, note 1, at para. 36.

> feel compelled to incriminate himself or herself. Where that is the case, the police are no longer entitled simply to expect cooperation from an individual. Unless, as stated earlier, the police inform the person that he or she is under no obligation to answer questions and is free to go, a detention may well crystallize and, when it does, the police must provide the subject with his or her s. 10(b) rights. That the obligation arises only on detention represents part of the balance between, on the one hand, the individual rights protected by ss. 9 and 10 and enjoyed by all members of society, and on the other, the collective interest of all members of society in the ability of the police to act on their behalf to investigate and prevent crime.[29]

The majority acknowledged that "neighbourhood policing" could sometimes raise "[a] more complex situation", in which "the non-coercive police role of assisting in meeting needs or maintaining basic order can subtly merge with the potentially coercive police role of investigating crime and arresting suspects".[30] In such cases, the focus can shift from community-oriented concern to focused suspicion:

> Focussed suspicion, in and of itself, does not turn the encounter in[to] a detention. What matters is how the police, based on that suspicion, interacted with the subject. The language of the Charter does not confine detention to situations where a person is in potential jeopardy of arrest. However, this is a factor that may help to determine whether, in a particular circumstance, a reasonable person would conclude he or she had no choice but to comply with a police officer's request. The police must be mindful that, depending on how they act and what they say, the point may be reached where a reasonable person, in the position of that individual, would conclude he or she is not free to choose to walk away or decline to answer questions.[31]

The *Grant* majority summarized its conclusions as follows:

1. Detention under ss. 9 and 10 of the Charter refers to a suspension of the individual's liberty interest by a significant physical or psychological restraint. Psychological detention is established either where the individual has a legal obligation to comply with the restrictive request or demand, or a reasonable person would conclude by reason of the state conduct that he or she had no choice but to comply.

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29 *Id.*, at paras. 38-39.
30 *Id.*, at para. 40.
31 *Id.*, at paras. 40-41.

> 2. In cases where there is no physical restraint or legal obligation, it may not be clear whether a person has been detained. To determine whether the reasonable person in the individual's circumstances would conclude that he or she had been deprived by the state of the liberty of choice, the court may consider, *inter alia*, the following factors:
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> a) The circumstances giving rise to the encounter as would reasonably be perceived by the individual: whether the police were providing general assistance; maintaining general order; making general inquiries regarding a particular occurrence; or, singling out the individual for focussed investigation.
>
> b) The nature of the police conduct, including the language used; the use of physical contact; the place where the interaction occurred; the presence of others; and the duration of the encounter.
>
> c) The particular characteristics or circumstances of the individual where relevant, including age; physical stature; minority status; level of sophistication.[32]

The *Grant* majority also resolved the outstanding question of whether an unlawful detention is necessarily "arbitrary" and contrary to section 9. Some early Charter cases, notably the Ontario Court of Appeal's decision in *R. v. Duguay*,[33] had suggested that an unlawful detention would not be "arbitrary" if it was not also "capricious" or "random". The *Grant* majority rejected this approach, holding that section 9 should be interpreted to mirror the section 8 guarantee against unreasonable search and seizure:

> [Under the s. 8 jurisprudence] a search must be authorized by law to be reasonable; the authorizing law must itself be reasonable; and the search must be carried out in a reasonable manner. Similarly, it should now be understood that for a detention to be non-arbitrary, it must be authorized by a law which is itself non-arbitrary.[34]

The majority noted that if a law permits arbitrary detentions, the resulting infringement of section 9 might be justified under section 1.[35]

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[32] *Id.*, at para. 44.

[33] [1985] O.J. No. 2492, 18 C.C.C. (3d) 289 (Ont. C.A.).

[34] *Grant*, *supra*, note 1, at para. 56.

[35] *Id.*, at para. 56, citing *R. v. Hufsky*, [1988] S.C.J. No. 30, [1988] 1 S.C.R. 621 (S.C.C.) [hereinafter "*Hufsky*"] and *R. v. Ladouceur*, [1990] S.C.J. No. 53, [1990] 1 S.C.R. 1257 (S.C.C.).

(d) Justice Binnie's Dissent

Although Binnie J. agreed that Mr. Grant was "detained", he wrote separate reasons expressing his disagreement with the majority's detention analysis.[36] In his view, the existence or non-existence of a Charter detention should not depend solely on the perceptions of a reasonable person in the subject's shoes. Rather, he believed "more attention should be paid to the *objective* facts of the encounter between a police officer and members of the public, whether or not such facts are made apparent to the person stopped".[37] These external facts would sometimes support the conclusion that the subject was detained, and sometimes have the opposite effect. Justice Binnie expressed concern that the majority's detention test will be uncertain in its application, since so much depends on the particular qualities attributed to the hypothetical reasonable person placed in the subject's position. He stated:

> Insistence that the claimant's circumstances be viewed from the more detached perspective of a "reasonable person" provides in some cases a welcome corrective, but in other cases, by exaggerating the ability of ordinary people to stand up to police assertion of authority, that approach may compel the conclusion that the claimant had the choice to walk away whereas in reality no such choice existed.[38]

In his opinion, when viewed purely from the subject's perspective a great many police-citizen encounters would properly be seen as involving detentions, given "the Canadian reality" recognized in *Therens* that most members of the public "will almost always regard a direction from a police officer as a demand that must be complied with".[39] However, Binnie J. believed such a broad conception of detention cannot be justified on a purposive approach to sections 9 and 10 of the Charter, since many people who reasonably believe they are being detained by the police actually "do not reasonably require the assistance of counsel".[40] Conversely, "the device of putting in [the subject's] place an artificially robust and assertive 'reasonable person'"[41] can exclude cases where a

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[36] Justice Deschamps also wrote a separate concurrence in which she briefly addressed the issue of detention on the facts of the case, agreeing with the majority and Binnie J. that Mr. Grant was detained. Her concurrence focused on the s. 24(2) issue and her disagreement with the new s. 24(2) framework adopted by the majority (discussed below in Section III).

[37] *Grant*, *supra*, note 1, at para. 175, *per* Binnie J.

[38] *Id.*, at para. 166, *per* Binnie J.

[39] *Id.*, at para. 170, *per* Binnie J.

[40] *Id*.

[41] *Id.*, at para. 169, *per* Binnie J.

detention *should* be recognized on a purposive approach, because "the liberty interest of the person stopped is truly at issue".[42] He observed:

> This gap between the reality on the street and the court constructed "reasonable person" is of particular relevance to visible minorities who may, because of their background and experience, feel especially unable to disregard police directions, and feel that assertion of their right to walk away will itself be taken as evasive and later be argued by the police to constitute sufficient grounds of suspicion to justify a *Mann* detention.[43]

Justice Binnie concluded:

> In the absence of explicit criteria, various judges will tend to read into the "reasonable person" their own projections of the moment at which, in *their* view, the person stopped *ought* to be able to call a lawyer. This creates the risk of a very results-oriented analysis. Perceptions will vary depending on the personality of the judge seized with the case. My colleagues emphasize at different places the need for deference to the assessment of the trial judges (e.g., para. 43) which may further complicate the task of developing a consistent approach. In other words, continued reliance on the "reasonable person" whose attributed experience and choice of criteria are unspecified except for a presumed commitment to "reasonableness" helps to mask rather than clarify the actual criteria being applied by the Court.[44]

Further, in his opinion:

> A central problem with the … claimant-centred approach … is that it does not take adequately into account what the police know and when they knew it except insofar as this information is conveyed to the person stopped, but which the police may not consider to be in their interest to convey. Police may know … if a crime has allegedly been committed and whether they are making the approach to an individual with a view to obtaining general information or, on the other hand, corralling a suspect and collecting admissible evidence to bring him or her to justice. Possession of such knowledge may in fact place the police in an adversarial relationship to the person approached whether that person is aware of the jeopardy or not. It is the adversarial relationship together with the "stop" that generates the need for counsel. At that point, the power imbalance is significant. The unsuspecting suspect may fatally compromise his or her position

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42 *Id.*, at para. 155, *per* Binnie J.
43 *Id.*, at para. 169, *per* Binnie J.
44 *Id.*, at para. 174, *per* Binnie J. (emphasis in original).

> simply through ignorance of his or her rights and the fact the police have now adopted an adversarial position. At that point, as Le Dain J. put it in *Therens*, "a person may reasonably require the assistance of counsel" (pp. 641-42), but may not have any idea of the perilous turn of events.[45]

2. Section 10(b): *R. v. Suberu*

The rights in section 10 of the Charter are guaranteed to "[e]veryone … on arrest or detention". In *Hufsky*,[46] the Court held that detention has the same meaning in sections 9 and 10. However, in *R. v. Mann* the Court raised the possibility that not every section 9 Charter detention would necessarily trigger the full panoply of section 10 rights. *Mann* recognized a common law power authorizing the police to conduct brief "investigative detentions", based on a standard of reasonable suspicion. The Court held that persons detained pursuant to this power must "[a]t a minimum … be advised, in clear and simple language, of the reasons for the detention," as required by s. 10(a).[47] However, the Court (*per* Iacobucci J.) declined to address whether these detainees must also be advised of their section 10(b) rights, stating:

> Section 10(b) of the Charter raises more difficult issues. It enshrines the right of detainees "to retain and instruct counsel without delay and to be informed of that right". Like every other provision of the Charter, s. 10(b) must be purposively interpreted. Mandatory compliance with its requirements cannot be transformed into an excuse for prolonging, unduly and artificially, a detention that, as I later mention, must be of brief duration. Other aspects of s. 10(b), as they arise in the context of investigative detentions, will in my view be left to another day. They should not be considered and settled without the benefit of full consideration in the lower courts, which we do not have in this case.[48]

Subsequently, in *R. v. Orbanski*,[49] a majority of the Court held that motorists detained under a provincial highway traffic statute *did not* have to be advised of their section 10(b) rights, holding that the statute contained an implied exemption from the section 10(b) informational duties that could be justified under section 1.

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45 *Id.*, at para. 178, *per* Binnie J.
46 *Supra*, note 35, at 632.
47 *Mann*, *supra*, note 5, at para. 21.
48 *Id.*, at para. 22.
49 *R. v. Orbanski; R. v. Elias*, [2005] S.C.J. No. 37, [2005] 2 S.C.R. 3 (S.C.C.).

Accordingly, when *Grant* and *Suberu* were argued there was some uncertainty surrounding the exact relationship between section 9 "detentions" and the police informational duties in section 10(b).[50] The section 10(b) Charter issue appeared to have more practical significance in *Suberu* than in *Grant*, and the two appeals were argued on this basis.[51] The Court made its judgment in *Suberu* the lead decision on the section 10(b) issue, although it rather surprisingly proceeded to decide the *Suberu* appeal itself on the basis that the defendant was not detained — an issue the Crown had conceded in every level of court.

(a) The Facts of Suberu

Mr. Suberu and another man used a stolen credit card to purchase items from several stores, including gift certificates from a liquor store. Later that day, the other man tried to use one of these certificates to buy beer at a different liquor store in a nearby town. The store staff knew about the earlier fraudulent gift certificate purchase and called the police. Constable Roughley responded to the call, and was advised by another officer that there were two male suspects in the store. When he entered the store, he saw the other officer speaking with a male customer. Mr. Suberu left the store, saying to Constable Roughley as he walked past: "He did this, not me, so I guess I can go." Constable Roughly followed Mr. Suberu outside, and as he was getting into his vehicle told him: "Wait a minute. I need to talk to you before you go anywhere." He proceeded to question Mr. Suberu about who he was and what he was doing. While he was doing so, he received a radio report advising that the men who had used the stolen credit card earlier in the day had been driving the vehicle in which Mr. Suberu was now sitting. Constable Roughley asked Mr. Suberu to produce identification and vehicle registration

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[50] Section 10(b) gives detainees "the right to retain and instruct counsel without delay and to be informed of that right". This latter informational duty has been interpreted as requiring the police to advise detainees of the existence and availability of free legal advice from duty counsel, and the means by which this advice can be obtained immediately (see *R. v. Brydges*, [1990] S.C.J. No. 8, [1990] 1 S.C.R. 190 (S.C.C.); *R. v. Bartle*, [1994] S.C.J. No. 74, [1994] 3 S.C.R. 173 (S.C.C.)).

[51] The central issue in *Grant* was whether Mr. Grant had been detained; if he was, it was undisputed that this detention was arbitrary and contrary to s. 9, and it was a secondary issue whether his s. 10(b) rights were also infringed. In contrast, in *Suberu* the Crown conceded a detention, but the defence conceded that it was authorized by *Mann* and did not violate s. 9. Accordingly, the parties in *Suberu* both approached the case as turning on the s. 10(b) Charter issue. A number of interveners participated in both appeals, which were heard a few weeks apart making their submissions on s. 10(b) in *Suberu* and using *Grant* to address ss. 9 and 24(2).

papers. As Mr. Suberu was locating these documents, the officer noticed bags in the vehicle from some of the stores where the stolen credit card had been used. At this point, he arrested Mr. Suberu for fraud and advised him for the first time of his right to counsel.

(b) Proceedings in the Courts Below

At trial, Mr. Suberu argued that he had been detained at the point that the officer told him to "wait" and began questioning him, and that the officer should at that point have advised him of his section 10(b) rights. The trial judge agreed that there was a "momentary investigative detention", but held that the officer was not obliged to inform Mr. Suberu of his right to counsel before asking him preliminary exploratory questions. The summary conviction appeal court held that *Mann* "investigative detentions" do not engage section 10(b). Mr. Suberu appealed further to the Ontario Court of Appeal. Justice Doherty, writing for the Court of Appeal, agreed that Mr. Suberu had been "detained" (as the Crown had conceded, both in the Court of Appeal and in the courts below), and held that "investigative detentions" *do* trigger section 10(b). However, he interpreted the words "without delay" in section 10(b) as permitting a brief period at the beginning of an investigative detention during which the officer may ask exploratory questions to determine whether a lengthier detention is required, *before* informing the detainee of his or her right to counsel. He concluded that applying this standard to the facts of *Suberu*, there was no section 10(b) violation.

The Supreme Court of Canada unanimously[52] rejected the summary conviction appeal court's holding that section 10(b) is not triggered by "investigative detentions", and also rejected Doherty J.A.'s interpretation of the term "without delay" in section 10(b). Noting that *Mann* had left open the question of "whether the police duty to inform an individual of his or her section 10(b) Charter right to retain and instruct counsel is triggered at the outset of an investigative detention", the Court held:

> It is our view that this question must be answered in the affirmative. The concerns regarding compelled self-incrimination and the interference with liberty that s. 10(b) seeks to address are present as soon as a detention is effected. Therefore, from the moment an

[52] Chief Justice McLachlin and Charron J. wrote joint reasons in *Suberu*, joined by LeBel, Deschamps and Abella JJ. Justice Binnie and Fish J. dissented in the result but agreed with the majority on the s. 10(b) issue.

> individual is detained, s. 10(b) is engaged and, as the words of the provision dictate, the police have the obligation to inform the detainee of his or her right to counsel "without delay".

Further, the Court found Doherty J.A.'s interpretation of the term "without delay" to be inconsistent with a purposive interpretation of section 10, stating:

> A situation of vulnerability relative to the state is created at the outset of a detention. Thus, the concerns about self-incrimination and the interference with liberty that s. 10(b) seeks to address are present as soon as a detention is effected. In order to protect against the risk of self-incrimination that results from the individuals being deprived of their liberty by the state, and in order to assist them in regaining their liberty, it is only logical that the phrase "without delay" must be interpreted as "immediately". If the s. 10(b) right to counsel is to serve its intended purpose to mitigate the legal disadvantage and legal jeopardy faced by detainees, and to assist them in regaining their liberty, the police must immediately inform them of the right to counsel as soon as the detention arises.
>
> To allow for a delay between the outset of a detention and the engagement of the police duties under s. 10(b) creates an ill-defined and unworkable test of the application of the s. 10(b) right. The right to counsel requires a stable and predictable definition. What constitutes a permissible delay is abstract and difficult to quantify, whereas the concept of immediacy leaves little room for misunderstanding. An ill-defined threshold for the application of the right to counsel must be avoided, particularly as it relates to a right that imposes specific obligations on the police. In our view, the words "without delay" mean "immediately" for the purposes of s. 10(b). Subject to concerns for officer or public safety, and such limitations as prescribed by law and justified under s. 1 of the Charter, the police have a duty to inform a detainee of his or her right to retain and instruct counsel, and a duty to facilitate that right immediately upon detention.[53]

The Court also declined to adopt the Crown's suggestion and create a common law rule suspending section 10(b) duties during investigative detentions, holding that no case had been made out for justifying such a general suspension of rights under section 1.[54] Rather, the Court suggested

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[53] *Suberu*, *supra*, note 1, at paras. 41-42.

[54] The Court thus declined to address the argument made by the appellant and several interveners that a law suspending s. 10(b) would survive s. 1 scrutiny only if it provided the detainee with use immunity in relation to any statements made before a s. 10(b) caution was provided.

that a general suspension was unnecessary having regard to "the purposive approach to detention taken in *Grant*":

> Because the definition of detention, as understood in these reasons, gives the police leeway to engage members of the public in non-coercive, exploratory questioning without necessarily triggering their *Charter* rights relating to detention, s. 1 need not be invoked in order to allow the police to effectively fulfill their investigative duties.[55]

3. The Majority's Detention and Section 10(b) Tests Applied: *Grant* and *Suberu*

Applying its analytic framework for determining the existence of a detention to the facts in *Grant*, the majority found that Mr. Grant was detained:

> Although Cst. Gomes was respectful in his questioning, the encounter was inherently intimidating. The power imbalance was obviously exacerbated by Mr. Grant's youth and inexperience. Mr. Grant did not testify, so we do not know what his perceptions of the interaction actually were. However, because the test is an objective one, this is not fatal to his argument that there was a detention. We agree with Laskin J.A.'s conclusion that Mr. Grant was detained. In our view, the evidence supports Mr. Grant's contention that a reasonable person in his position (18 years old, alone, faced by three physically larger policemen in adversarial positions) would conclude that his or her right to choose how to act had been removed by the police, given their conduct.
>
> The police conduct that gave rise to an impression of control was not fleeting. The direction to Mr. Grant to keep his hands in front, in itself inconclusive, was followed by the appearance of two other officers flashing their badges and by questioning driven by focussed suspicion of Mr. Grant. The sustained and restrictive tenor of the conduct after the direction to Mr. Grant to keep his hands in front of him reasonably supports the conclusion that the officers were putting him under their control and depriving him of his choice as to how to respond.
>
> We conclude that Mr. Grant was detained when Cst. Gomes told him to keep his hands in front of him, the other two officers moved into position behind Cst. Gomes, and Cst. Gomes embarked on a pointed

[55] *Suberu*, *supra*, note 1, at para. 45.

> line of questioning. At this point, Mr. Grant's liberty was clearly constrained and he was in need of the *Charter* protections associated with detention.[56]

Although Binnie J. disagreed with the majority's approach to the detention issue, he agreed with this conclusion, as did Deschamps J. in her separate concurrence. Since it was undisputed that any detention of Mr. Grant was unlawful and arbitrary, the Court unanimously found a breach of his section 9 Charter rights. It was undisputed that the police had not advised Mr. Grant of his right to counsel. Applying its holding in *Suberu*, the Court also found a section 10(b) violation.[57]

In *Suberu*, on the other hand, the majority found that the defendant *had not* been detained prior to his arrest, notwithstanding that the Crown had conceded throughout the proceedings that he *was* detained, a concession all of the courts below accepted.[58] In the majority's view:

> ... As a whole, the circumstances of the encounter support a reasonable perception that Constable Roughley was orienting himself to the situation rather than intending to deprive Mr. Suberu of his liberty.[59]

According to the majority, the exchange between Constable Roughley and Mr. Suberu, during which Mr. Suberu asked if he could leave and Constable Roughley replied that he could not, was ambiguous:

> In the context, these words admit more than one interpretation. They might be understood as, "I need to talk to you to get more information". They might also be construed as an order not to leave, suggestive of putting Mr. Suberu under police control. In interpreting these words, it is relevant to note that Constable Roughley made no move to obstruct Mr. Suberu's movement. He simply spoke to him as he sat in his van. Further, while the exact duration of the encounter is not clear on the record, it was characterized by the Court of Appeal as a "very brief dialogue" (para. 17). Taken as a whole, the conduct of the officer viewed objectively supports the trial judge's view that what was

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[56] *Grant*, *supra*, note 1, at paras. 50-52.

[57] As discussed below, the Court went on to admit the evidence against Mr. Grant under s. 24(2). See Section III, *infra*.

[58] The trial judge in *Suberu* expressly found that there had been an "investigative detention", but held (for reasons not fully explained) that the police nevertheless did not have to advise Mr. Suberu of his s. 10(b) rights. According to the *Suberu* majority, the trial judge's conclusion that there was no s. 10(b) violation "effectively determined as a question of law that there had been no detention before the time of arrest", thus allowing the Court to revisit the detention issue (*Suberu*, *supra*, note 1, at para. 19).

[59] *Id.*, at para. 32.

> happening at this point was preliminary questioning to find out whether to proceed further.[60]

Although neither Mr. Grant nor Mr. Suberu testified on their respective Charter *voir dires*, in *Grant* the Court held that this was "not fatal" to Mr. Grant's detention argument, since the detention analysis was ultimately objective. In *Suberu*, however, the majority placed considerable emphasis on the fact that Mr. Suberu had not himself given evidence.[61]

Justices Binnie and Fish dissented, holding that the facts of *Suberu* gave rise to a detention under the *Grant* majority's test. In Binnie J.'s view, the exchange between the officer and Mr. Suberu "clearly established an unambiguous police order":

> Constable Roughley's words were only ambiguous if one ignores the preceding remark from Mr. Suberu. Constable Roughley was replying to Mr. Suberu, who had essentially said, "Can I leave?", by essentially saying, "No". It was clear to Mr. Suberu that he was not free to go "anywhere" and any reasonable person in that position would have come to the same conclusion. At that point there was, within the meaning of the test in *Grant*, a detention, in my view, which was unsupported at that stage by any grounds of reasonable suspicion as required by *R. v. Mann* …. My colleagues point out correctly that Constable Roughley did not try *physically* to obstruct Mr. Suberu's movement but that is why this is a case of *psychological*, not physical, detention.[62]

In his view, "[i]f a finding of detention in these circumstances produces an anomalous result then a re-examination of the claimant-centred test is warranted."[63] Justice Binnie suggested that *Suberu* may be "one of the cases where taking into account the police perspective — even though it was unknown to Mr. Suberu — might have strengthened the Crown's case".[64] Justice Fish wrote his own brief dissenting reasons explaining that he agreed with the *Grant* majority's test for detention but agreed with Binnie J.'s application of this test to the facts of *Suberu*.[65]

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60 *Id.*, at para. 33.
61 *Id.*, at paras. 32 and 34.
62 *Id.*, at para. 56, *per* Binnie J. (dissenting) (emphasis in orginal; citation omitted).
63 *Id.*, at para. 58, *per* Binnie J. (dissenting).
64 *Id.*, at para. 59, *per* Binnie J. (dissenting).
65 *Id.*, at para. 65, *per* Fish J. (dissenting).

4. Analysis

On its face, the *Grant* majority's section 9 analytic framework is not radically different from the tests arising out of the earlier Charter detention jurisprudence. Before *Grant*, one of leading cases on the factors to be considered when assessing whether or not there was a detention was the Ontario Court of Appeal's 1987 decision in *R. v. Moran*,[66] in which Martin J.A. set out a non-exhaustive list of seven relevant considerations:

> 1. The precise language used by the police officer in requesting the person who subsequently becomes an accused to come to the police station, and whether the accused was given a choice or expressed a preference that the interview be conducted at the police station, rather than at his or her home;
>
> 2. whether the accused was escorted to the police station by a police officer or came himself or herself in response to a police request;
>
> 3. whether the accused left at the conclusion of the interview or whether he or she was arrested;
>
> 4. the stage of the investigation, that is, whether the questioning was part of the general investigation of a crime or possible crime or whether the police had already decided that a crime had been committed and that the accused was the perpetrator or involved in its commission and the questioning was conducted for the purpose of obtaining incriminating statements from the accused;
>
> 5. whether the police had reasonable and probable grounds to believe that the accused had committed the crime being investigated;
>
> 6. the nature of the questions: whether they were questions of a general nature designed to obtain information or whether the accused was confronted with evidence pointing to his or her guilt;
>
> 7. the subjective belief by an accused that he or she is detained, although relevant, is not decisive, because the issue is whether he or she reasonably believed that he or she was detained. Personal circumstances relating to the accused, such as low intelligence, emotional disturbance, youth and lack of sophistication are circumstances to be considered in determining whether he had a subjective belief that he was detained.[67]

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66 [1987] O.J. No. 794, 36 C.C.C. (3d) 225 (Ont. C.A.) [hereinafter "*Moran*"].

67 *Id.*, at 258-59.

Moran involved a police station interview, and some of the *Moran* factors are specific to this particular context. However, later cases had adapted the *Moran* factors to better fit other situations, including police-citizen street encounters. Most of the specific factors listed in *Grant* majority's three-prong detention test have direct counterparts in *Moran.*[68] However, the two sets of factors are not completely identical. For instance, the *Grant* majority supplements the list of personal attributes listed in the seventh *Moran* branch by adding "physical stature" and "minority status" as relevant considerations. Justice Binnie's concurring reasons (dissenting on the legal framework, but concurring in the result) are also sensitive to the issue of race, noting:

> A growing body of evidence and opinion suggests that visible minorities and marginalized individuals are at particular risk from unjustified "low visibility" police interventions in their lives. … The appellant, Mr. Grant, is black. Courts cannot presume to be colour-blind in these situations.[69]

The majority and Justice Binnie's frank and express recognition of race as a relevant consideration in the detention analysis is a welcome development.

As Binnie J. points out in his dissent, the majority's "claimant-centred" test appears to ignore the fourth and fifth *Moran* factors, to the extent that they involve matters unknown to the claimant. However, it is important to note that the *Grant* factors are not necessarily exhaustive, and are specifically presented as bearing on the issue of *psychological* detention. If the police have formed reasonable and probable grounds to arrest a suspect and have decided to physically stop the suspect if he or she tries to leave, it remains at least arguable that the suspect is *physically* detained at this point, even if he or she remains ignorant of the detention for some further period.

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[68] For instance, the factors in part 2(a) of the *Grant* framework are substantially similar to those in the fourth *Moran* branch, the part 2(b) factors have analogues in the first and sixth *Moran* branches, while most of the part 2(c) factors can be found in the seventh branch of *Moran*.

[69] *Grant*, *supra*, note 1, at para. 154, *per* Binnie J. (citations omitted), citing *R. v. Golden*, [2001] S.C.J. No. 81, 2001 SCC 83, [2001] 3 S.C.R. 679, at para. 83 (S.C.C.); A. Young, "All Along the Watchtower: Arbitrary Detention and the Police Function" (1991) 29 Osgoode Hall L.J. 329, at 390; D.M. Tanovich, "Using the Charter to Stop Racial Profiling: The Development of an Equality-Based Conception of Arbitrary Detention" (2002) 40 Osgoode Hall L.J. 145; Ontario Human Rights Commission, Inquiry Report, *Paying the Price: The Human Cost of Racial Profiling* (2003); *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* (1995), at 337.

At several points in its judgment, the *Grant* majority notes that the police will sometimes be able to prevent a detention from crystallizing by specifically informing the subject that he or she is free to leave:

> In those situations where the police may be uncertain whether their conduct is having a coercive effect on the individual, it is open to them to inform the subject in unambiguous terms that he or she is under no obligation to answer questions and is free to go.[70]

While it is hard to dispute the relevance of such a statement by the police, it should not be seen as dispositive in every case. Even if the police tell a person that he or she does not have to answer any questions and can leave, the subject may not understand this, or may not believe it. In some cases, the assurance will be contradicted by subsequent police actions. Trial courts will also have to grapple with the fact that the police and the subject will often give very different accounts of the encounter and of what was said. It is essential that trial judges not treat this kind of police assurance as a prophylactic, but continue to examine *all* of the circumstances when considering whether there has been a detention. This is particularly important given the *Grant* majority's repeated statement that trial judges' decisions on detention should be afforded "appropriate deference".[71]

Further, the *Suberu* majority's conclusion that Mr. Suberu was *not* detained is startling and troubling. If the police can sometimes prevent a detention from crystallizing by "inform[ing] the subject in unambiguous terms that he or she is under no obligation to answer questions and is free to go", as the *Grant* majority holds, the converse should also be true: unambiguously telling the subject that he or she *is not* free to go should almost invariably trigger a detention. With respect, the *Suberu* majority's characterization of the exchange between the officer and Mr. Suberu as ambiguous is unpersuasive. As Binnie J. points out in his dissent, in essence Mr. Suberu asked the officer if he was allowed to leave, and the officer replied: "No." Justice Binnie adds:

> Generally speaking, the police mean what they say when they direct a citizen to stay put. … No rational person in Mr. Suberu's position would have thought that he was free to walk away or that the police would have let him go, had he tried.[72]

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70 *Grant*, *supra*, note 1, at para. 32; see also para. 39.
71 *Id.*, at para. 45; see also para. 43.
72 *Suberu*, *supra*, note 1, at paras. 50, 53.

It is difficult not to see the *Suberu* majority as backpedalling to avoid the practical implications of its expansive approach to section 10(b).

In the first three months following *Grant* and *Suberu*, a number of lower courts have applied the *Grant* detention framework. In several of these cases the Crown conceded that there had been a detention.[73] However, in *R. v. Peacock*,[74] where the existence of a detention was contested, Greene J. of the Ontario Court of Justice applied the *Grant* framework to find a detention. The police had approached the defendant as he walked down the street, ordered him to "stop", and "launch[ed] into a pointed inquiry … focused on their suspicions of criminal conduct … [which] quickly escalated into questions about any contraband he may be carrying".[75] Justice Greene found that this amounted to an arbitrary detention, and also found that the police failure to advise the defendant of his right to counsel violated section 10(b).

On the other hand, in *R. v. Connor*[76] Molloy J. of the Ontario Superior Court interpreted *Grant* and *Suberu* as *narrowing* the meaning of detention, relying on the new decisions to reverse her own previous finding that the defendant had been detained. The police had executed a search warrant on Mr. Connor's home, looking for child pornography. The lead investigating officer testified that although he did not initially think he had sufficient grounds to arrest Mr. Connor, he "would not have permitted Mr. Connor to leave, even if Mr. Connor had asked".[77] The trial judge found:

> … that Mr. Connor felt intimidated and believed he was not free to leave. That was a reasonable conclusion on his part, and indeed correct; the police had no intention of allowing him to leave at that stage of the inquiry.[78]

The police did not advise Mr. Connor of his right to counsel, and he made some inculpatory admissions. Shortly before *Grant* and *Suberu* were released, the trial judge ruled orally, with written reasons to follow,

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[73] See, *e.g.*, *R. v. Crocker*, [2009] B.C.J. No. 1816, 2009 BCCA 388 (S.C.C.) [hereinafter "*Crocker*"] (police officer approached parked car, displayed his badge and ordered the driver to roll down his window); *R. v. Lee*, [2009] O.J. No. 3868, 2009 ONCJ 434 (Ont. C.J.) (police stop man in underground parking garage and question him for between 45 and 60 minutes).

[74] [2009] O.J. No. 4073, 2009 ONCJ 479, at paras. 21-35 (Ont. C.J.).

[75] *Id.*, at para. 31. Justice Greene also found as fact that the police had threatened to physically search the defendant if he did not admit he was carrying drugs, but noted that she would have found a detention even in the absence of this threat (at para. 32).

[76] [2009] O.J. No. 3827, 2009 CanLII 48830 (Ont. S.C.J.).

[77] *Id.*, at para. 56.

[78] *Id.*, at para. 60.

that there had been a detention but no section 10(b) violation, based on the Ontario Court of Appeal's holding in *Suberu* that there could be a "brief interlude" between the onset of a detention and the duty to give a section 10(b) caution. In her subsequent written reasons, Molloy J. acknowledged that the Supreme Court of Canada had overturned the Court of Appeal on this point. Nevertheless, she upheld her previous conclusion that there was no section 10(b) Charter breach by reversing herself on the detention issue. She explained:

> Although the circumstances in the case before me do not fall easily within the *Grant* test, it is nevertheless useful to consider the three factors within the test. There was no physical restraint of Mr. Connor. However, the police were executing a search warrant and would not have permitted Mr. Connor to simply wander about or leave while that was ongoing. In that sense, he was "detained" or "delayed," but this is not dissimilar from police restraining individuals who attempt to enter a crime scene. Mr. Connor was not detained at that point because of who he was, or because he had been singled out, but rather because he happened to be on the scene when the search warrant was being executed. Further, the police objective was merely to explain the warrant to Mr. Connor and to keep him out of the way while the search proceeded. No questions were asked. Accordingly, the analysis of the circumstances under the first factor in *Grant* favours a conclusion that there was no detention within the meaning of s. 10(b).
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> The second factor deals with the nature of the police conduct. There was nothing about that conduct, in and of itself, that would suggest Mr. Connor was detained. There was virtually no physical contact, the police tone was polite, no orders were issued to Mr. Connor, the tone of voice used was calm and professional, no weapons were drawn and the duration of the encounter was very brief. Again, this analysis supports a finding that Mr. Connor was not detained.
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> With respect to the third factor, Mr. Connor had been a firefighter for 22 years, he was well acquainted with many police officers professionally, his own brother was a police officer, he was in a position of some authority as acting captain of his fire station and he was proficient in martial arts as well as being an instructor of martial arts. He was not unsophisticated. All of these facts point to a person who would not be easily intimidated by the police and support a determination that there was no detention in this case.[79]

[79] *Id.*, at paras. 77-79.

Justice Molloy acknowledged that "it seems odd to say that there was no detention of Mr. Connor in circumstances where he clearly perceived he was not free to leave and the police clearly would not have permitted him to leave if he had asked".[80] However, she read *Suberu* as justifying this conclusion:

> I recognize that in *Suberu* the police officer told Mr. Suberu not to leave before he had spoken to him and then proceeded to ask a number of questions, which Mr. Suberu answered. Also, as was noted by Binnie J. in his dissenting opinion, the officer himself testified that if, instead of answering questions, Mr. Suberu had attempted to drive away in his van, he would have given chase and effected a vehicle stop. I do not see that situation as being substantially different from the situation with Mr. Connor. If anything, there was less of a detention in Mr. Connor's situation as the officers did not say anything to detain or delay him and did not ask him any questions.
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> Accordingly, it seems to me that an application of the *Grant* test, as further expanded on in *Suberu*, leads to the conclusion that there was no detention of Mr. Connor in this case up to the point of his arrest. Still, it seems strange to find no detention in circumstances where both the police and Mr. Connor believed that his liberty was restricted.[81]

Justice Molloy's interpretation of the *Grant* and *Suberu* detention analysis can be criticized.[82] As the *Grant* majority explained, the key question is "whether the reasonable person in the individual's circum-

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[80] *Id.*, at para. 80.

[81] *Id.*, at paras. 80-81.

[82] In the alternative, the trial judge suggested that "detentions" during the execution of a search warrant should not be considered "detentions" for s. 9 or 10(b) purposes, having regard to the purpose of s. 10(b) and the practical consideration that it would be "wholly unworkable to require police executing a search warrant to provide every person on the premises with their right to counsel immediately upon entering the premises". She relied on Lamer J.'s comment in *R. v. Debot*, [1989] S.C.J. No. 118, [1989] 2 S.C.R. 1140, at 1146 (S.C.C.) that "as a general rule police proceeding to a search are not obligated to suspend the search and give a person the opportunity to retain and instruct counsel, as for example when the search is of a home pursuant to a search warrant". It can be argued that the trial judge misinterpreted *Debot*. Immediately after the passage cited by the trial judge, Lamer J. stated that "the matter is entirely different" when the subject of the search is also *detained*. In this case, "immediately upon detention, the detainee does have the right to be informed of the right to retain and instruct counsel" (at 1146). Justice Lamer noted that although "the police are not obligated to suspend the search … until the detainee has the opportunity to *retain* counsel", the detainee "immediately upon detention … does have the right to be *informed* of the right to retain and instruct counsel" (at 1146, emphasis added). While it may well sometimes be impracticable for the police to give persons detained during a search warrant immediate *access* to counsel, it is not generally impracticable to *advise them of their rights*. On a purposive analysis, even if not *everyone* detained during the execution of a search warrant is in need of counsel, *some* people — including Mr. Connor — plainly are.

stances would conclude that he or she had been deprived by the state of the liberty of choice".[83] The enumerated "*Grant* factors" are not meant to be an exhaustive test, but are simply considerations that may in some cases help shed light on this issue. Justice Molloy found as fact that Mr. Connor believed he was being detained and, further, that his belief was not only objectively reasonable, but correct. Having already reached this conclusion, her close examination of the *Grant* factors arguably caused her to lose sight of the forest for the trees.[84] Right or wrong, however, her ruling illustrates both the malleability and imprecision of the *Grant* test, and the possibility that *Suberu* may be understood by lower courts as substantially raising the bar for a finding of a detention.

III. SECTION 24(2)

1. The *Collins/Stillman* Framework

The Supreme Court of Canada's first major section 24(2) decision, *R. v. Collins*,[85] released in 1987, established the now-familiar three-part analytical framework for determining the admissibility of unconstitutionally obtained evidence. The "*Collins* test" directed judges to consider:

(1) the effect of admitting the evidence on the fairness of the trial;

(2) the seriousness of the violation; and

(3) the effect of exclusion on the repute of the administration of justice.

Although in his majority opinion Lamer J. (as he then was) characterized this grouping of factors as merely "a matter of personal preference",[86] over time the *Collins* framework acquired a talismanic quality. For the next 10 years, the Court engaged in a vigorous debate over how the three sets of *Collins* factors should properly be applied,

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[83] *Grant*, *supra*, note 1, at para. 44.

[84] For instance, the third set of *Grant* factors — the "particular characteristics or circumstances of the individual … including age; physical stature, minority status, level of sophistication" — is meant to help identify situations where someone might reasonably submit to perceived police authority in circumstances where a more assertive or legally sophisticated person might refuse. Since the police acknowledged that they were *in fact* detaining Mr. Connor, it is not apparent why his relative sophistication should weigh against him on the detention issue.

[85] [1987] S.C.J. No. 15, [1987] 1 S.C.R. 265 (S.C.C.) [hereinafter "*Collins*"].

[86] *Id.*, at 284.

with judges on all sides seeking to characterize their preferred position as the one truest to the spirit of *Collins*.[87]

This debate came to a head in 1997 in *Stillman*.[88] A panel of seven justices originally heard Stillman's appeal, but a re-hearing by the full Court was ordered:

> … [i]n view of the importance of the issues raised on the facts of this appeal which, in some aspects, invite a re-consideration of established principles as regards the application of s. 24(2).[89]

The Court expressly invited interveners to participate in the rehearing. Some observers expected the Court to use *Stillman* as an opportunity to substantially change the section 24(2) framework. However, by a 6-3 majority the Court instead reaffirmed the key principles that had emerged in the decade since *Collins*.

A central issue in *Stillman* involved the proper relationship between the "trial fairness" branch of the *Collins* test and the second and third sets of *Collins* factors. The dispute between the *Stillman* majority and the three dissenters turned on two key questions:

(1) What does it mean for a trial to be "unfair" in the section 24(2) context?

(2) What consequences should flow from a finding that admitting evidence would cause an "unfair" trial?

These questions are closely intertwined, since the impact on the repute of the administration of justice of allowing an "unfair" trial to proceed cannot be measured without understanding the nature of the "unfairness".

Justice Lamer's reasons in *Collins* expressly linked the concept of trial fairness to the principle against self-incrimination. He stated that when an accused is unconstitutionally "conscripted against himself through a confession or other evidence emanating from him", admitting the 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".[90] The *Stillman* majority reaffirmed this strong linkage between "trial fairness" and the principle against self-incrimination, holding (*per* Cory J.):

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87 See, *e.g.*, *R. v. Burlingham*, [1995] S.C.J. No. 39, [1995] 2 S.C.R. 206 (S.C.C.).

88 *Supra*, note 3.

89 Supreme Court of Canada Bulletin, May 23, 1996.

90 *Collins*, *supra*, note 85, at 284.

> It has, for a great many years, been considered unfair and indeed unjust to seek to convict on the basis of a compelled statement or confession. If it was obtained as a result of a breach of the Charter its admission would generally tend to render the trial unfair.[91]

Although McLachlin J. dissented in *Stillman*, she agreed with the majority on three points: (i) that the "trial fairness" branch of *Collins* was principally concerned with protecting the principle against self-incrimination; (ii) that this principle is a component of "fundamental justice" in section 7 of the Charter; and (iii) that the principle applies both to statements and to otherwise undiscoverable "derivative real evidence" — evidence found as a result of a compelled statement.[92] However, L'Heureux-Dubé J. wrote separate dissenting reasons advocating a narrower conception of "trial fairness". She would have replaced the *Collins* distinction between "conscriptive" and "non-conscriptive" evidence with a distinction between "reliable" and "unreliable" evidence.[93]

The main dispute in *Stillman* was over the consequences that should flow from a finding that admitting evidence would offend the principle against self-incrimination. Several previous majority judgments had suggested that the "unfairness" caused by admitting compelled self-incriminatory evidence is so great that "there is no need to consider the other factors referred to in *Collins*, *supra*".[94] The *Stillman* majority endorsed this approach, holding that:

> A consideration of trial fairness is of fundamental importance. If after careful consideration it is determined that the admission of evidence obtained in violation of a Charter right would render a trial unfair then the evidence must be excluded without consideration of the other *Collins* factors. 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. To uphold such

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[91] *Stillman*, *supra*, note 3, at para. 86.

[92] Justice McLachlin's position on these issues in *Stillman* accorded with the position she had taken previously in *R. v. Hebert*, [1990] S.C.J. No. 64, [1990] 2 S.C.R. 151 (S.C.C.) and *R. v. Evans*, [1991] S.C.J. No. 31, [1991] 1 S.C.R. 869 (S.C.C.), where she had been writing for the majority.

[93] Justice L'Heureux-Dubé had proposed this analytic framework in her earlier dissents in *Burlingham*, *supra*, note 87, and *R. v. S. (R.J.)*, [1995] S.C.J. No. 10, [1995] 1 S.C.R. 451 (S.C.C.). In *Burlingham*, Sopinka J. wrote a separate majority concurrence specifically *rejecting* L'Heureux-Dubé J.'s emphasis on reliability, characterizing it as a "close relative of the rule in *R. v. Wray"* that was inconsistent with *Collins*.

[94] *R. v. Mellenthin*, [1992] S.C.J. No. 100, [1992] 3 S.C.R. 615, at 629 (S.C.C.); *R. v. Elshaw*, [1991] S.C.J. No. 68, [1991] 3 S.C.R. 24, at 45-46 (S.C.C.); *R. v. Bartle*, [1994] S.C.J. No. 74, [1994] 3 S.C.R. 173, at 219 (S.C.C.).

> a conviction would be unthinkable. It would indeed be a travesty of justice.
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> . . . . .
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> [A] finding that the admission of the evidence would render the trial unfair means that the administration of justice would necessarily be brought into disrepute if the evidence were not excluded under s. 24(2). … The Court, as a general rule, will exclude the evidence without considering the seriousness of the breach or the effect of exclusion on the repute of the administration of justice. This must be the result since an unfair trial would necessarily bring the administration of justice into disrepute.[95]

Justice Cory emphasized that this did not mean that "conscriptive" evidence would automatically be excluded. Rather, he held that admitting conscriptive evidence "will generally not render the trial unfair" if the Crown can show "that it would have been discovered by alternative non-conscriptive means",[96] and that when this burden is met the admissibility of the evidence will depend on the balancing of the second and thirds sets of *Collins* factors. Although critics of the *Stillman* framework sometimes described it as creating an "automatic exclusionary rule" for conscriptive evidence, this is incorrect. What *Stillman* actually established was automatic exclusion of evidence that *would render the trial unfair*, in the sense that its admission would violate the principle against self-incrimination.

In her *Stillman* dissent, McLachlin J. disagreed with the majority on this issue. She drew a distinction between trials that merely have "aspects of unfairness" and trials that are "fundamentally unfair", in the sense that there is a real "danger that an innocent person may have been convicted".[97] In her view, a court that concluded that admitting evidence would cause an unfair trial should then balance this unfairness against the other *Collins* factors:

> Depending on the degree of unfairness and countervailing circumstances, the fairness of the manner in which the evidence was obtained may or may not result in rejection of the evidence under s. 24(2). In an extreme case, where the unfairness casts doubt on the safety of the verdict, it may, as a matter of application of the balancing

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95 *Stillman*, *supra*, note 3, at paras. 72, 118-119

96 *Id.*, at para. 119.

97 *Id.*, at para. 257, *per* McLachlin J., dissenting.

> process, be predicted that the interest in admitting the evidence will never outweigh the harm that would be done by its admission.[98]

As noted above, L'Heureux-Dubé J. would have narrowed the "trial fairness" branch to focus exclusively on concerns about reliability, but she indicated that she "[did] not disagree with McLachlin J. and her analysis on this point".[99]

A second important area of disagreement between the *Stillman* majority and the dissenters was over the scope of the principle against self-incrimination. Justice Cory, for the majority, extended the definition of "conscriptive evidence" to include not only compelled statements and derivative evidence, but also evidence obtained through the use of a suspect's body. Justice McLachlin agreed that statements and derivative evidence both engaged the principle against self-incrimination, but disagreed with the majority's extension of the principle to include bodily substances and similar evidence.

In summary, the *Stillman* majority treated the principle against self-incrimination as so fundamentally important that it *required* evidence to be excluded, regardless of other considerations such as the degree of police fault, the reliability of the evidence and the seriousness of the offence. The dissenters, in contrast, contemplated that evidence should sometimes be admitted on the strength of these factors *even though* this would render the trial "unfair", as long as the reliability of the verdict was not compromised. The dissenters also disagreed that the principle against self-incrimination was engaged by evidence arising from "the compelled use of the body".

2. The Section 7 Self-Incrimination Jurisprudence

The evolution of the section 24(2) *Collins* test leading up to *Stillman* occurred in parallel with another important development in the Charter — the recognition of the principle against self-incrimination as a section 7 principle of fundamental justice. Section 7 comes into play when people are *lawfully* compelled to speak. Section 13 of the Charter protects compellable witnesses[100] in "proceedings" from having their testimony used

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[98] *Id.*, at para. 259, *per* McLachlin J., dissenting.

[99] *Id.*, at para. 189, *per* L'Heureux-Dubé J., dissenting.

[100] In *R. v. Henry*, [2005] S.C.J. No. 76, [2005] 3 S.C.R. 609 (S.C.C.), the Court held (at para. 34) that for the purposes of s. 13, "evidence of compellable witnesses should be treated as compelled even if their attendance was not enforced by a subpoena".

directly as evidence against them, but it does not prevent the prosecution from using derivative evidence — that is, evidence found as a result of the witnesses' testimony. In a series of decisions in the 1990s, the Court held that section 7 supplements section 13 by barring the self-incriminatory use of such derivative evidence, if it was otherwise undiscoverable. Since lawful testimonial compulsion does not itself violate the Charter, a compelled witness cannot seek to have derivative evidence excluded under section 24(2), which applies only to evidence that was "obtained in a manner that infringed [the Charter]". However, the Court held that the use of otherwise undiscoverable evidence derived from compelled testimony would violate the principle against self-incrimination, which the Court recognized to be one of the section 7 "principles of fundamental justice".

Under the section 7 self-incrimination jurisprudence, undiscoverable derivative evidence is excluded to prevent the section 7 Charter breach that would be caused by its admission. The section 7 self-incrimination cases draw heavily on the Courts' post-*Collins* section 24(2) decisions, and establish rules under section 7 that deliberately mirror the Court's emerging approach to self-incriminatory evidence under section 24(2), which was ultimately reaffirmed in *Stillman*. Both branches of Charter jurisprudence are founded on the same key premise: that it is inherently unfair to convict people by compelling them to become witnesses against themselves. The section 7 cases take this premise a step further, holding that it is not merely unfair but contrary to the principles of fundamental justice enshrined in the Charter.

The Court consciously crafted section 7's residual protection against self-incrimination to dovetail with the *Collins/Stillman* section 24(2) framework, in order to ensure that lawfully compelled speakers receive the same protection under section 7 that section 24(2) gives to people who are compelled to speak in breach of their Charter rights. In his majority reasons in *R. v. S. (R.J.)*, Iacobucci J. referred to the section 24(2) "trial fairness" cases and held:

> Since it is the principle against self-incrimination which is at stake, and since that principle finds recognition under s. 24(2) … we should avoid the incongruity which would result if a different quality of protection was offered to the witness who is compelled to answer questions. The Charter should be construed as a coherent system. Accordingly, I think that evidence which could not have been obtained, or the significance of which could not have been appreciated, but for the testimony of a

> witness, ought generally to be excluded under s. 7 of the Charter in the interests of trial fairness.[101]

Like the section 24(2) "trial fairness" cases, the leading section 7 self-incrimination decisions were not unanimous. However, the judges on both sides of the debate agreed that consistency between sections 7 and 24(2) was essential. In particular, everyone agreed (i) that if admitting certain lawfully obtained evidence would violate the principles of fundamental justice, the same evidence must necessarily be excluded under section 24(2) when it is obtained unconstitutionally; and (ii) conversely, if evidence is routinely *admitted* under section 24(2), its admission must not offend the principles of fundamental justice. As Iacobucci J. explained in *R. v. S. (R.J.)*:

> If evidence derived from a Charter breach can be admitted on the theory that its use will not bring the administration of justice into disrepute, how then can it be said that to admit *any* evidence derived from compelled testimony would be contrary to the principles of fundamental justice? *To make this argument is to suggest, inferentially, that the admission of evidence which offends the principles of fundamental justice does not bring the administration of justice into disrepute. How can this be? As L'Heureux-Dubé J. observed in Thomson Newspapers, supra, "[t]o state the question is to answer it.*"[102]

While everyone agreed with this general proposition, different members of the Court extracted different conclusions from this. The majority decided that sections 7 and 24(2) should *both* be understood to prohibit the admission of otherwise undiscoverable derivative evidence. In contrast, L'Heureux-Dubé J. thought that consistency should be achieved by making derivative evidence *admissible* under both regimes. In her concurrence in *R. v. S. (R.J.)*, she was sharply critical of the majority's decision to model the section 7 standard on the section 24(2) "trial fairness" jurisprudence, declaring that this would "raise serious problems if this Court were to modify its approach to s. 24(2)".[103]

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[101] *Supra*, note 93, at para. 191 (S.C.C.).
[102] *Id.*, at para. 177 (emphasis added).
[103] *Id.*, at para. 275, *per* L'Heureux-Dubé J.

3. The Ontario Court of Appeal's Decision in *Grant*

The Ontario Court of Appeal (*per* Laskin J.A.) concluded: (i) that Mr. Grant had been arbitrarily detained, contrary to section 9 of the Charter; (ii) that his inculpatory admissions were "compelled"; (iii) that the gun seized from his person was derivative evidence that the police would not have located but for these admissions; and (iv) that admitting the gun into evidence would thus render the trial "unfair".[104] However, the Ontario Court declined to take the next step mandated by *Stillman* and exclude the gun. Justice Laskin justified his refusal to follow *Stillman* on the strength of LeBel J.'s concurring reasons in *R. v. Orbanski*, which he interpreted as implying that evidence rendering a trial unfair "will not always bring the administration of justice into disrepute", and thus need not always be excluded.[105]

Justice Laskin proposed a new section 24(2) test in which exclusion would depend on "the resulting degree of trial unfairness and on the strength of the other two *Collins* factors".[106] He suggested further that the degree of trial unfairness should be measured by examining the evidence's reliability and considering whether it had been obtained by "flagrant … abuse".[107] The self-incriminatory character of the evidence played little or no role in his proposed analysis. Justice Laskin's suggestion that "trial unfairness" can be outweighed by other *Collins* factors if it does not affect the reliability of the outcome is directly contrary to the majority judgment in *Stillman*, and closely resembles the views of the *Stillman* dissenters.

4. The Supreme Court of Canada's New Section 24(2) Test in *Grant*

(a) The Grant *Majority's New Test*

When *Grant* was heard in April 2008, 11 years after *Stillman*, none of the judges who had constituted the *Stillman* majority remained on the Court. The seven justices[108] who heard *Grant* unanimously decided to

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[104] *Grant* (C.A.), *supra*, note 11, at paras. 29-30, 46-48.

[105] *R. v. Orbanski; R. v. Elias*, *supra*, note 49. Justice LeBel's concurrence was joined by Fish J. The majority found no Charter breach and did not address s. 24(2).

[106] *Grant* (C.A.), *supra*, note 11, at para. 52.

[107] *Id.*, at para. 58.

[108] Shortly before the hearings in *Suberu*, *Grant* and *Shepherd*, Bastarache J. had announced that he was retiring from the Court. Although his retirement did not formally take effect until the end of the spring term, his health did not permit him to sit on the *Grant* and *Shepherd* appeals, which

adopt a "revised approach" to section 24(2). Six justices agreed on a new section 24(2) framework, as set out in the majority reasons written jointly by McLachlin C.J.C. and Charron J.[109] The *Grant* majority's new test eliminates the "trial fairness" branch of the *Collins* test and repackages the remaining two sets of *Collins* factors into a new three-prong test.

Significantly, the majority characterizes the section 24(2) exclusionary remedy as solely directed at "societal" concerns, stating:

> 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.[110]

Consistent with this conception of section 24(2)'s purpose, the three branches of the *Grant* majority's new test emphasize the "message" that would be sent by excluding or admitting evidence in a particular case. Courts are directed to consider and balance the following three factors:

> (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
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> (3) society's interest in the adjudication of the case on its merits.[111]

According to the majority:

> The court's role on a s. 24(2) application is to balance 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. These concerns, while not precisely tracking the categories of considerations set out in *Collins*,

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were heard together, or on *Suberu*, which was heard the previous week. When *Harrison* was argued in December 2008, Bastarache J. had left the Court, but his replacement (Cromwell J.) had not yet been formally appointed. Accordingly, all four appeals were heard by the same seven-member panel (McLachlin C.J.C., and Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ.).

[109] Justices LeBel, Fish and Abella concurred with the majority. Justice Binnie wrote separate reasons on s. 9 of the Charter but concurred with the majority on s. 24(2). Justice Deschamps, writing only for herself, agreed with the majority's decision to overturn *Collins* and *Stillman* but disagreed with the majority's new s. 24(2) analytic framework.

[110] *Grant*, *supra*, note 1, at para. 70.

[111] *Id.*, at para. 71.

> capture the factors relevant to the s. 24(2) determination as enunciated in *Collins* and subsequent jurisprudence.[112]

The Chief Justice and Charron J. rejected the *Collins/Stillman* framework's emphasis on "trial fairness", declaring that "'trial fairness' in the *Collins/Stillman* sense is no longer a determinative criterion for the s. 24(2) inquiry".[113] They stated:

> It is difficult to reconcile trial fairness as a multifaceted and contextual concept with a near-automatic presumption that admission of a broad class of evidence will render a trial unfair, regardless of the circumstances in which it was obtained. In our view, trial fairness is better conceived as an overarching systemic goal than as a distinct stage of the s. 24(2) analysis.[114]

Under the new *Grant* framework, the self-incriminatory character of unconstitutionally obtained evidence remains a relevant and weighty consideration under the second branch, in which the impact of the breach on the accused's Charter-protected interests is considered. However, it is no longer a decisive factor: evidence will sometimes be admissible *even if* its admission offends the principle against self-incrimination.

The *Grant* majority goes on to discuss how the different categories of evidence established by the *Collins/Stillman* framework[115] should be analyzed under its new test. A recurring theme in the majority's judgment is that appeal courts should defer to trial courts' weighing of the relevant factors:

> 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). We also take comfort in the fact that patterns emerge with respect to particular types of evidence. These patterns serve as guides to judges faced with s. 24(2) applications in future cases. In this

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[112] *Id.*

[113] *Id.*, at para. 121.

[114] *Id.*, at para. 65.

[115] The *Collins/Stillman* framework divided unconstitutionally obtained evidence into two broad categories — "conscriptive" and "non-conscriptive". Conscriptive evidence was defined to include statements, evidence derived from statements, and evidence obtained through the "use of the body". Conscriptive evidence that was undiscoverable by non-conscriptive means was generally subject to exclusion under the trial fairness branch, without regard to the second and third sets of *Collins* factors. These factors only came into play in the case of non-conscriptive evidence and discoverable conscriptive evidence, the admission of which would not render the trial unfair.

> way, a measure of certainty is achieved. Where the trial judge has considered the proper factors, appellate courts should accord considerable deference to his or her ultimate determination.[116]

(b) Application of the New Grant *Test to Particular Types of Evidence*

(i) Statements

The *Grant* majority suggests that under its new test, unconstitutionally obtained *statements* will be subject to a "presumptive general, although not automatic"[117] rule of exclusion. Chief Justice McLachlin and Charron J. state:

> [T]he heightened concern with proper police conduct in obtaining statements from suspects and the centrality of the protected interests affected will in most cases favour exclusion of statements taken in breach of the *Charter*, while the third factor, obtaining a decision on the merits, may be attenuated by lack of reliability. This, together with the common law's historic tendency to treat statements of the accused differently from other evidence, explains why such statements tend to be excluded under s. 24(2).[118]

However, the majority suggests that a statement may still be admissible under its new test in certain narrow circumstances, such as if it was made following a "technically defective" section 10(b) caution that nevertheless "clearly informed [the suspect] of his or her choice to speak to the police".[119]

(ii) Derivative Evidence

The *Collins/Stillman* framework and the section 7 self-incrimination jurisprudence both treat otherwise undiscoverable evidence derived from statements as essentially indistinguishable from the statements themselves. The *Grant* majority, however, holds that otherwise undiscoverable derivative evidence can now be *admitted* even in circumstances where the statement itself should be excluded. Under the majority's new approach, the undiscoverability of derivative evidence is no longer

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116 *Grant*, *supra*, note 1, at para. 86.
117 *Id.*, at para. 92.
118 *Id.*, at para. 98.
119 *Id.*, at para. 96.

dispositive under section 24(2), although it remains a relevant factor when assessing the impact of the Charter breach on the accused's protected interests (the second branch of the new *Grant* test). Further, since under the *Stillman* framework the Crown bore the burden of establishing on a balance of probabilities that the police would have found the evidence by other, non-conscriptive means,[120] any uncertainty on this question was resolved in favour of the accused. In contrast, the *Grant* majority states that "in cases where it cannot be determined with any confidence whether evidence would have been discovered in absence of the statement, discoverability will have no impact on the section 24(2) inquiry".[121]

The *Grant* majority notes that when the accused's interest in making a free and informed decision about whether or not to speak is "significantly compromised" by the Charter breach, this will be a factor "strongly favour[ing] exclusion".[122] On the other hand, since physical derivative evidence will generally not raise reliability concerns, "the public interest in having a trial adjudicated on the merits will usually favour admission of the derivative evidence".[123] The majority concludes:

> The weighing process and balancing of these concerns is one for the trial judge in each case. Provided the judge has considered the correct factors, considerable deference should be accorded to his or her decision. As a general rule, however, it can be ventured that where reliable evidence is discovered as a result of a good faith infringement that did not greatly undermine the accused's protected interests, the trial judge may conclude that it should be admitted under s. 24(2). On the other hand, deliberate and egregious police conduct that severely impacted the accused's protected interests may result in exclusion, notwithstanding that the evidence may be reliable.
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> The s. 24(2) judge must remain sensitive to the concern that a more flexible rule may encourage police to improperly obtain statements that they know will be inadmissible, in order to find derivative evidence which they believe may be admissible. The 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

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120 *Stillman*, *supra*, note 3, at paras. 103, 107, 116, 119.
121 *Grant*, *supra*, note 1, at para. 122.
122 *Id.*, at para. 125.
123 *Id.*, at para. 126.

> or flagrant Charter breach, its admission would bring the administration of justice into further disrepute and the evidence should be excluded.[124]

On the facts of *Grant* itself, the majority found that the impact of the breach on Mr. Grant's Charter interests "was significant". On the other hand, the reliability of the gun as evidence favoured its admission. The seriousness of the offence cut both ways — while it increased the societal importance of the prosecution, it also made it "all the more important that [Mr. Grant's] rights be respected". Accordingly, the majority found this factor to "not … be of much assistance".[125] Ultimately, the majority concluded that while this was a "close case", the fact that the police had been "operating in circumstances of considerable legal uncertainty … tips the balance in favour of admission". The majority noted:

> We add that the Court's decision in this case will be to [*sic*] render similar conduct less justifiable going forward. While police are not expected to engage in judicial reflection on conflicting precedents, they are rightly expected to know what the law is.[126]

(iii) Bodily Substances, *etc*.

The *Stillman* majority had held that evidence obtained unlawfully through the use of a suspect's body, including seized bodily substances, engaged the principle against self-incrimination as much as statements and derivative evidence. Justice Cory stated:

> It is repugnant to fair-minded men and women to think 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. The recognition of the right to bodily integrity and sanctity is embodied in s. 7 of the Charter which confirms the right to life, liberty and the security of the person and guarantees the equally important reciprocal right not to be deprived of security of the person except in accordance with the principles of fundamental justice. This right requires that any interference with or intrusion upon the human body can only be undertaken in accordance with principles of fundamental justice. Generally that will require valid statutory authority or the consent of the individual to the particular bodily intrusion or interference required for the purpose of the particular procedure the

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[124] *Id.*, at paras. 127-128.
[125] *Id.*, at para. 139.
[126] *Id.*, at para. 133.

> police wish to undertake. It follows that the compelled use of the body or the compelled provision of bodily substances in breach of a Charter right for purposes of self-incrimination will generally result in an unfair trial just as surely as the compelled or conscripted self-incriminating statement.[127]

Chief Justice McLachlin had disagreed with this analysis in her *Stillman* dissent. Likewise, in *Grant* she and Charron J. reject it as unsound:

> [A] simple conscription test for the admissibility of bodily evidence under s. 24(2) … wrongly equates bodily evidence with statements taken from the accused. In most situations, statements and bodily samples raise very different considerations from the point of view of the administration of justice. Equating them under the umbrella of conscription risks erasing relevant distinctions and compromising the ultimate analysis of systemic disrepute. As Professor Paciocco has observed, "in equating intimate bodily substances with testimony we are not so much reacting to the compelled participation of the accused as we are to the violation of the privacy and dignity of the person that obtaining such evidence involves".[128] … Nor does the taking of a bodily sample trench on the accused's autonomy in the same way as may the unlawful taking of a statement. The pre-trial right to silence under s. 7, the right against testimonial self-incrimination in s. 11(c), and the right against subsequent use of self-incriminating evidence in s. 13 have informed the treatment of statements under s. 24(2). These concepts do not apply coherently to bodily samples, which are not communicative in nature, weakening self-incrimination as the sole criterion for determining their admissibility.[129]

Accordingly, the *Grant* majority directs courts to determine the admissibility of seized bodily substances under its new analytical framework by examining, under the second branch, "the degree to which the search and seizure intruded upon the privacy, bodily integrity and human dignity of the accused". The majority concludes:

> While each case must be considered on its own facts, it may be ventured in general that where an intrusion on bodily integrity is deliberately inflicted and the impact on the accused's privacy, bodily integrity and dignity is high, bodily evidence will be excluded,

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[127] *Stillman*, *supra*, note 3, at para. 89.

[128] D. Paciocco, "*Stillman*, Disproportion and the Fair Trial Dichotomy" (1997) 2 Can. Crim. L.R. 163, at 170.

[129] *Grant*, *supra*, note 1, at para. 105

> notwithstanding its relevance and reliability. On the other hand, where the violation is less egregious and the intrusion is less severe in terms of privacy, bodily integrity and dignity, reliable evidence obtained from the accused's body may be admitted. For example, this will often be the case with breath sample evidence, whose method of collection is relatively non-intrusive.[130]

5. Analysis

(a) Grant's *Impact on the Principle against Self-incrimination and* Stare Decisis

The *Grant* majority's repudiation of the *Collins/Stillman* section 24(2) framework has profound practical and theoretical implications. On the level of constitutional theory, *Grant* raises serious questions about the continued validity of the Court's section 7 self-incrimination jurisprudence, which was deliberately crafted to be consistent with the now-abandoned *Collins/Stillman* section 24(2) framework. The underlying premise of the section 7 self-incrimination cases is that it is fundamentally unjust to admit otherwise undiscoverable evidence derived from the accused's compelled statements, and that this evidence must therefore be excluded to avoid the section 7 Charter breach its admission would cause. Although some of the early section 7 cases suggested that the power to exclude derivative evidence was "discretionary", the section 7 jurisprudence as a whole, particularly the more recent cases, makes clear that this "discretion" is limited to the factual issue whether a particular piece of derivative evidence was otherwise discoverable.[131] There is no

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[130] *Id.*, at para. 111.

[131] For example, in his judgment in *Thomson Newspapers Ltd. v. Canada* (*Director of Investigation and Research*), [1990] S.C.J. No. 23, [1990] 1 S.C.R. 425 (S.C.C.), La Forest J. described the power to exclude derivative evidence as "discretionary", but later stated that exclusion was the "price [that] *must* be paid where the use of evidence derived from compelled testimony would undermine the fairness of the trial", adding: "The one thing the power to compel testimony *will never allow* anti-combines investigators to use as evidence, however, is information they could not otherwise have uncovered" (at 555, 558, 561-62, *per* La Forest J.; at 484, *per* Wilson J.) (emphasis added). Similarly, in *R. v. S. (R.J.)*, *supra*, note 93, Iacobucci J. stated that the "derivative-use immunity will generally lead to exclusion" under s. 7 (at para. 200), adding that he would "not try to imagine today the factual circumstances in which derivative-use immunity might not be protected. When, if ever, that might occur, is an issue I leave for another day." The more recent s. 7 self-incrimination cases abandon any suggestion that undiscoverable derivative evidence might sometimes be admissible. For instance, in *Re Application under s. 83.28 of the Criminal Code*, [2004] S.C.J. No. 40, [2004] 2 S.C.R. 248 (S.C.C.), the Court stated that "testimonial compulsion has been *invariably* linked with evidentiary immunity", and described the exclusion of derivative evidence as

suggestion in the section 7 cases that otherwise undiscoverable derivative evidence can be admitted because of the public importance in securing a conviction in a particular prosecution.[132] Rather, the key principle animating the section 7 cases is that a conviction so obtained would be contrary to the principles of fundamental justice. The "principles of fundamental justice" are, by definition, "fundamental": they cannot routinely be overridden by other considerations, including society's interest in punishing wrongdoers.[133] Under the existing section 7 jurisprudence, if Mr. Grant had been lawfully compelled to testify and had revealed that there was an illegal gun in his apartment, the gun plainly could not have been admitted as evidence against him in any subsequent prosecution if it was not independently discoverable. Under the *Collins/Stillman* approach, the gun would also have been excluded when, as here, he revealed its existence and location as a consequence of unlawful and unconstitutional coercion.[134] The majority decision in *Grant* destroys this symmetry, and leads to the perverse result that derivative evidence that is *inadmissible* when it is obtained lawfully now

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a "necessary safeguard" that "provide[s] the parameters within which self-incriminating testimony can be obtained" and that "must necessarily" be granted to a compelled witness (at paras. 70, 71, 79).

[132] The s. 7 self-incrimination cases involve a "balancing" of state and individual interests at the point where the Court considers whether a particular form of lawful testimonial compulsion engages the principle against self-incrimination. In contexts where compulsion is found not to engage the principle against self-incrimination (*e.g.*, as was found to be the case with the fishing reports in *R. v. Fitzpatrick*, [1995] S.C.J. No. 94, [1995] 4 S.C.R. 154 (S.C.C.)), the state is free to use both the statement and any derivative evidence to incriminate the speaker. However, in contexts where the principle against self-incrimination *is* engaged, the accused's s. 7 interests cannot be outweighed by the state's interest in obtaining a conviction in a particular case. For instance, in *R. v. White*, [1999] S.C.J. No. 28, [1999] 2 S.C.R. 417 (S.C.C.) the Court conducted an initial "balancing" analysis to determine whether compelled motor vehicle accident reports *generally* attract s. 7 Charter protection. Once it was decided that they do, Ms White's claim to evidentiary immunity essentially became absolute. There is no suggestion in the majority's judgment that a violation of her individual s. 7 rights could be justified based on the state's interest in obtaining a conviction in her particular case.

[133] The Court has held that violations of s. 7 will only be justifiable under s. 1 in "exceptional circumstances" involving "extraordinary conditions": see, *e.g.*, *Reference re Motor Vehicle Act (British Columbia) S 94(2)*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486, at 518 (S.C.C.); *R. v. Heywood*, [1994] S.C.J. No. 101, [1994] 3 S.C.R. 761, at 802 (S.C.C.); *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] S.C.J. No. 47, [1999] 3 S.C.R. 46, at para. 99 (S.C.C.); *R. v. Ruzic*, [2001] S.C.J. No. 25, [2001] 1 S.C.R. 687, at para. 92 (S.C.C.).

[134] In *R. v. Jones*, [1994] S.C.J. No. 42, [1994] 2 S.C.R. 229, at 248-49 (S.C.C.), Lamer C.J.C. (dissenting in the result) held that: "[a]ny state action that coerces an individual to furnish evidence against him- or herself in a proceeding in which the individual and the state are adversaries violates the principle against self-incrimination. Coercion, it should be noted, means the denial of free and informed consent." This statement was later adopted by a majority of the Supreme Court in *R. v. Fitzpatrick*, *supra*, note 132, and *R. v. White*, *supra*, note 132.

becomes potentially *admissible* when it is obtained in violation of the Charter. This is an incoherent and fundamentally untenable position.

The *Grant* majority does not grapple with the implications its decision has for the Court's existing section 7 self-incrimination jurisprudence. Rather, it avoids addressing the issue squarely by asserting that the impact of admission on "trial fairness" simply need no longer be considered under section 24(2). However, this simply sweeps the issue under the carpet. To adopt the words of Iacobucci J. in *R. v. S. (R.J.)*, quoted previously, the *Grant* majority judgment:

> … suggest[s], inferentially, that the admission of evidence which offends the principles of fundamental justice does not bring the administration of justice into disrepute. How can this be? As L'Heureux-Dubé J. observed in *Thomson Newspapers*, *supra*, "[t]o state the question is to answer it."[135]

If evidence that offends the principle against self-incrimination is now routinely admissible under section 24(2), this principle cannot really be as fundamental as the section 7 self-incrimination cases suppose. Despite the *Grant* majority's assertion that it did not wish to "undermin[e] the principles that animate the jurisprudence to date",[136] its repudiation of the *Collins/Stillman* framework inevitably has this effect. In the coming years, prosecutors, may begin training their sights on the parallel section 7 exclusionary rule established in *R. v. S. (R.J.)*, *British Columbia (Securities Commission) v. Branch*,[137] *R. v. White*[138] and *R. v. Jarvis*[139] and arguing that this Charter doctrine should also now be reconsidered in light of *Grant*.

Even leaving aside *Grant*'s impact on section 7 of the Charter, the Court's decision to sweep away 20 years of settled section 24(2) jurisprudence is virtually unprecedented. The Court has previously stated that "[t]here must be compelling circumstances to justify departure from a prior decision"[140] and declared that it "should be particularly careful before reversing a precedent where the effect is to diminish *Charter* protection".[141] It is therefore surprising for the Court to overturn *Collins* and *Stillman* — both watershed judgments in the history of the Charter

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135 *R. v. S. (R.J.)*, *supra*, note 93, at 533.
136 *Grant*, *supra*, note 1, at para. 3.
137 [1995] S.C.J. No. 32, [1995] 2 S.C.R. 3 (S.C.C.).
138 [1999] S.C.J. No. 28, [1999] 2 S.C.R. 417 (S.C.C.).
139 [2002] S.C.J. No. 76, [2002] 3 S.C.R. 757 (S.C.C.).
140 *R. v. Robinson*, [1996] S.C.J. No. 32, [1996] 1 S.C.R. 683, at para. 16 (S.C.C.).
141 *R. v. Henry*, *supra*, note 100, at para. 44.

— without any mention of the principle of *stare decisis*. The *Grant* majority gives only a perfunctory explanation of what it sees as wrong with the *Stillman* majority's approach, and does not address the broader implications of a majority of the current Court simply substituting their views for those of the *Stillman* majority. Whatever else might be said about *Stillman*, it was an extremely carefully considered decision. When it was decided in 1997, the debate over section 24(2) had been going on for 10 years, and the main criticisms and arguments against the *Collins/Stillman* approach were well known and fully canvassed. All that has changed in the past 10 years is the composition of the Court.

Although the *Grant* majority relies to some degree on pragmatic arguments — such as its contention that the *Collins/Stillman* "discoverability" test has "proved difficult to apply" in practice "because of its hypothetical nature" and "fine-grained distinctions" — its disagreement with the *Stillman* majority is ultimately a dispute over fundamental constitutional principles. The *Stillman* majority's approach to section 24(2) flows directly from its conception of the principle against self-incrimination, and its belief that a conviction obtained by violating this principle would be "unthinkable" and "a travesty of justice".[142] The *Grant* majority evidently sees nothing wrong with allowing at least some convictions to be based on compelled and otherwise undiscoverable self-incriminatory evidence. What is missing from its analysis is a cogent articulation of why something previously declared to be "unthinkable" should now be seen as acceptable. Likewise, the *Grant* majority does not explain why it is appropriate for the Court to suddenly change the foundational principles on which much of its Charter jurisprudence over the past 20 years is based.

(b) Practical Implications of Grant *and* Harrison *in Future Section 24(2) Cases*

(i) Conscriptive Evidence

The most significant and immediate practical implication of *Grant* is that much "conscriptive" evidence that would have been excluded under the *Collins/Stillman* "trial fairness" branch will now be admitted under the Court's new discretionary balancing test. While trial courts

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[142] *R. v. Stillman*, *supra*, note 3, at para. 72.

will likely continue to exclude most unconstitutionally obtained statements, it will now be much easier for prosecutors to obtain admission of derivative evidence. In terms of the sheer number of cases affected, the most significant impact will be on cases involving seized bodily substances, including breath samples.[143] Admission of this type of evidence is likely to become the norm, with exclusion being reserved for cases involving exceptionally invasive searches or especially egregious police misconduct.

The early returns support these predictions. Lower courts have regularly followed *Grant*'s suggestion that breath samples should generally be excluded only when the police misconduct is egregious.[144] On the other hand, unconstitutionally obtained self-incriminatory statements have continued to be excluded under the *Grant* framework.[145] Derivative evidence found as a result of inculpatory statements made by detainees to the police has also been excluded in several post-*Grant* cases, but in cir-

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[143] In the case of breath samples, *Grant* renders moot the post-*Stillman* debate over the meaning of Cory J.'s cryptic *obiter* comments at para. 90 of his majority reasons, which could be read in several different ways: (i) as creating an exception to the general rule in *Stillman* that admitting unconstitutionally obtained bodily substances would render the trial unfair (see, *e.g.*, *R. v. Scott*, [2001] O.J. No. 853, 10 M.V.R. (4th) 302, at para. 28 (Ont. S.C.J.); *R. v. Skuse*, [2004] O.J. No. 2726, 2004 ONCJ 91 (Ont. C.J.)); (ii) as creating an exception to the general rule in *Stillman* that evidence that would render a trial unfair must be excluded (see, *e.g.*, *R. v. Mastromartino*, [2004] O.J. No. 1435, 70 O.R. (3d) 540, at paras. 36-38, 67 (Ont. S.C.J.); *R. v. Soal*, [2005] O.J. No. 319, 2005 CanLII 2323, at paras. 35-36 (Ont. S.C.J.)); or (iii) as an attempt to explain why statutes authorizing the warrantless seizure of breath samples and fingerprints are constitutional (see, *e.g.*, *R. v. Shepherd*, [2007] S.J. No. 119, 2007 SKCA 29, at paras. 68-118 (Sask. C.A.), *per* Smith J.A., dissenting; *R. v. McKenzie*, 1999 CanLII 14904, at paras. 15-17 (Ont. S.C.J.); *R. v. Carroll*, [2002] O.J. No. 1215, 24 M.V.R. (4th) 248, at paras. 16-19 (Ont. C.J.); *R. v. Schaeffer*, [2005] S.J. No. 144, 194 C.C.C. (3d) 517, at paras. 50-58 (Sask. C.A.)).

[144] See, *e.g.*, *R. v. Fildan*, [2009] O.J. No. 3604, 201 C.R.R. (2d) 12 (Ont S.C.J.); *R. v. Bryce*, [2009] O.J. No. 3640, 2009 CanLII 45842 (Ont. S.C.J.); *R. v. Du*, [2009] O.J. No. 3194, 2009 CanLII 39783 (Ont. S.C.J.); *R. v. Neff*, [2009] O.J. No. 3873, 2009 ONCJ 436 (Ont. C.J.); *R. v. Vinoharan*, [2009] O.J. No. 4037 (Ont. S.C.J.); *R. v. White*, [2009] B.C.J. No. 2050, 2009 BCPC 312 (B.C. Prov. Ct.); *R. v. Howell*, [2009] A.J. No. 1042, 2009 ABPC 276 (Alta. Prov. Ct.); *R. v. Rusnak*, [2009] A.J. No. 970, 2009 ABPC 258 (Alta. Prov. Ct.); *R. v. Kimmel*, [2009] A.J. No. 1080, 2009 ABPC 289 (Alta. Prov. Ct.); *R. v. Tooke*, [2009] A.J. No. 1081, 2009 ABPC 292 (Alta. Prov. Ct.); *R. v. Hennigar*, [2009] N.S.J. No. 417, 2009 NSPC 42 (N.S. Prov. Ct.). In some of these cases the court found no Charter breach but indicated that it would have admitted the breath samples under s. 24(2) in any event. However, breath samples were excluded in *R. v. Beattie*, [2009] O.J. No. 4121, 2009 ONCJ 456 (Ont. C.J.), based on the court's concern about the long-term impact of condoning police disregard for the statutory time requirements for conducting roadside screening tests, and in *R. v. Sergalis*, [2009] O.J. No. 4823, 90 M.V.R. (5th) 116 (Ont. S.C.J), based on a finding that the officer knew or should have known that he had no legal basis to initially detain the defendant.

[145] See, *e.g.*, *R. v. Whyte*, [2009] O.J. No. 3557, 2009 ONCJ 389 (Ont. C.J.); *R. v. Comber*, [2009] O.J. No. 3854, 2009 ONCJ 418 (Ont. C.J.).

cumstances where the court characterized the police misconduct as serious.[146]

(ii) Non-Conscriptive Evidence

The impact of *Grant* and *Harrison* on the admissibility of evidence that would previously have been classified as "non-conscriptive" or as "conscriptive but discoverable" is likely to be more subtle. Under the *Collins/Stillman* approach, the admissibility of this type of evidence was determined by balancing the second and third sets of *Collins* factors. The second set of *Collins* factors, relating to the "seriousness of the violation", actually involved two analytically distinct considerations. Some breaches are "serious" because of the gravity of their impact on the suspect's protected Charter interests, while others are "serious" because they demonstrate a blatant police disregard for, or ignorance of, the Charter and the limits on their powers. Breaches are often "serious" in one sense but not the other. The new *Grant* test directs judges to address these two different considerations separately, which should promote analytic clarity.

The *Grant* majority emphasizes that applying its new test to individual cases will be a highly fact-specific exercise. However, the conclusions reached by the Court on the facts of *Grant* and *Harrison* and in a subsequent decision, *R. v. Morelli*,[147] are instructive. As discussed above, in *Grant* the Court ultimately admitted the evidence, but described it as a "close case", in which the uncertainty surrounding the law of detention tipped the balance in favour of admission. Significantly, the Court treats the public safety concerns associated with gun crimes as important, but not necessarily dispositive. *Grant* thus may be helpful in rebutting the suggestion that has sometimes been made in the past that there should be near-automatic inclusion of guns under section 24(2). Further, the Court's shift in focus away from self-incrimination as the predominant section 24(2)

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[146] See, *e.g.*, *R. v. J. (J.A.)*, [2009] O.J. No. 4081 (Ont. C.J.) (excluding knife and t-shirt found following an accused youth's inculpatory statements made in the wake of a "serious" s. 10(b) breach); *R. v. Peacock*, *supra*, note 74 (excluding small quantity of cocaine found as a result of defendant's inculpatory statements following ss. 9 and 10(b) violations which "evinced a pattern of constitutionally bad behaviour" by the police); *R. v. Lee*, *supra*, note 73 (excluding cocaine found after police, with insufficient grounds, detained the defendant in an underground garage, handcuffed him and questioned him about whether he was in possession of drugs, threatening, "Be honest, because if we find it on you you're in bigger trouble," after which the defendant made an inculpatory admission); *R. v. Nguyen*, [2009] O.J. No. 4564 (Ont S.C.J.) (gun and drugs found as a result of defendant's inculpatory utterances following a "deliberate and flagrant" s. 10(b) violation excluded).

[147] [2010] S.C.J. No. 8, 2010 SCC 8 (S.C.C.) [hereinafter "*Morelli*"].

factor, and the renewed emphasis placed on police misconduct, may make it easier to have guns excluded in cases where the police deliberately or negligently disregard the Charter, even when the principle against self-incrimination is not engaged (for instance, when the police unlawfully detain and search a suspect with insufficient grounds, but do not elicit a self-incriminatory statement).

The Court's application of its new test to the facts of *Harrison* is particularly important. The officer in *Harrison* pulled over the accused's rented vehicle for specious reasons,[148] and proceeded to search some sealed boxes in the cargo area, ostensibly in order to look for the accused's driver's licence. The boxes turned out to contain 35 kilograms of cocaine. The trial judge found that the officer had committed "brazen and flagrant" Charter violations, and that his evidence was "contrived and def[ied] credibility". Nevertheless, he admitted the evidence, essentially on the grounds that the Charter breaches "pale in comparison to the criminality involved" in transporting large quantities of cocaine. A 2-1 majority[149] of the Ontario Court of Appeal upheld this decision, emphasizing that the officer's misconduct "was not shown to be systemic in nature"[150] and that the accused's "privacy interest in the car was low".[151]

By a 6-1 majority,[152] the Supreme Court of Canada ruled that the evidence should have been excluded. On the first prong of the new *Grant* test — the "seriousness of the *Charter*-infringing state conduct" — the majority agreed with the trial judge that the breaches were serious, stating:

> The officer's determination to turn up incriminating evidence blinded him to constitutional requirements of reasonable grounds. While the violations may not have been "deliberate", in the sense of setting out to breach the *Charter*, they were reckless and showed an insufficient regard for *Charter* rights. Exacerbating the situation, the departure from

[148] The officer initially activated his lights because the vehicle had no front licence plate, but very quickly realized that the vehicle was registered in Alberta, which requires only a rear plate. He testified that he continued with the stop because he thought "abandoning the detention may have affected the integrity of the police in the eyes of observers" (*Harrison*, *supra*, note 1, at para. 5).

[149] *R. v. Harrison*, [2008] O.J. No. 427, 231 C.C.C. (3d) 118 (Ont. C.A.) [hereinafter "*Harrison* (C.A.)"]. The majority opinion was written jointly by O'Connor A.C.J.O. and McPherson J.A., while Cronk J.A. dissented.

[150] *Id.*, at para. 60.

[151] *Id.*, at para. 5.

[152] The majority reasons were written by McLachlin C.J.C. and concurred in by Binnie, LeBel, Fish, Abella and Charron JJ., with Deschamps J. dissenting.

> *Charter* standards was major in degree, since reasonable grounds for the initial stop were entirely non-existent.[153]

Chief Justice McLachlin noted that "while evidence of a systemic problem can properly aggravate the seriousness of the breach and weigh in favour of exclusion, the absence of such a problem is hardly a mitigating factor".[154] She also held that the officer's misleading testimony (as found by the trial judge):

> While not part of the Charter breach itself … is properly a factor to consider as part of the first inquiry under the s. 24(2) analysis given the need for a court to dissociate itself from such behaviour. As Cronk J.A. observed [in her dissent in the Ontario Court of Appeal] "the integrity of the judicial system and the truth-seeking function of the courts lie at the heart of the admissibility inquiry envisaged under s. 24(2) of the Charter. Few actions more directly undermine both of these goals than misleading testimony in court from persons in authority".[155]

The *Harrison* majority's confirmation that police misconduct on the witness stand can strengthen the case for exclusion is an important development in the section 24(2) jurisprudence. The Chief Justice concluded:

> In sum, the conduct of the police that led to the Charter breaches in this case represented a blatant disregard for Charter rights. This disregard for Charter rights was aggravated by the officer's misleading testimony at trial. The police conduct was serious, and not lightly to be condoned.[156]

Turning to the second branch of the new *Grant* test — the impact of the Charter breach on the accused's Charter-protected interests — the majority disagreed with the Court of Appeal majority's holding "that the effects of the breaches on [Harrison's] rights … were relatively minor". Rather, McLachlin C.J.C. stated:

> [B]eing stopped and subjected to a search by the police without justification impacts on the motorist's rightful expectation of liberty and privacy in a way that is much more than trivial.[157]

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[153] *Harrison*, *supra*, note 1, at para. 24.

[154] *Id.*, at para. 25.

[155] *Id.*, at para. 26, quoting from the dissenting reasons of Cronk J.A. in *Harrison* (C.A.), *supra*, note 149, at para. 160.

[156] *Id.*, at para. 27.

[157] *Id.*, at paras. 31 and 63.

She concluded that "the deprivation of liberty and privacy represented by the unconstitutional detention and search was therefore a significant, although not egregious, intrusion on the appellant's Charter-protected interests." This holding may help to counter the troubling tendency in some lower courts to treat motorists' privacy interest in their vehicles as not merely "reduced" in comparison to the high privacy interest associated with a home or office, but as insignificant and unworthy of much consideration.[158]

On the third branch of the *Grant* test — "society's interest in an adjudication on the merits" — the Chief Justice noted that the charges were serious, that the seized cocaine was reliable evidence that was essential to the Crown's case. However, she cautioned that the seriousness of the offence "must not take on disproportionate significance" in the balancing analysis.[159]

Chief Justice McLachlin concluded:

> 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. The Charter infringements had a significant, although not egregious, impact on the Charter-protected interests of the appellant. These factors favour exclusion, the former more strongly than the latter. On the other hand, the drugs seized constitute highly reliable evidence tendered on a very serious charge, albeit not one of the most serious known to our criminal law. This factor weighs in favour of admission.
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> The balancing exercise mandated by s. 24(2) is a qualitative one, not capable of mathematical precision. It is not simply a question of whether the majority of the relevant factors favour exclusion in a particular case. The evidence on each line of inquiry must be weighed in the balance, to determine whether, having regard to all the circumstances, admission of the evidence would bring the administration of justice into disrepute. Dissociation of the justice system from police misconduct does not always trump the truth-seeking interests of the criminal justice system. Nor is the converse true. In all cases, it is the long-term repute of the administration of justice that must be assessed.[160]

In her opinion, the trial judge had erred by overemphasizing the third set of *Grant* factors and underemphasizing the first set, thereby "trans-

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158 See, *e.g.*, *R. v. Alkins*, [2007] O.J. No. 1348, 218 C.C.C. (3d) 97, at para. 40 (Ont. C.A.).
159 *Harrison*, *supra*, note 1, at para. 34.
160 *Id.*, at paras. 35-36.

form[ing] the s. 24(2) analysis into a simple contest between the degree of the police misconduct and the seriousness of the offence". She concluded:

> The police misconduct [in *Harrison*] was serious; indeed, the trial judge found that it represented a "brazen and flagrant" disregard of the Charter. To appear to condone wilful and flagrant Charter breaches that constituted a significant incursion on the appellant's rights does not enhance the long-term repute of the administration of justice; on the contrary, it undermines it. In this case, the seriousness of the offence and the reliability of the evidence, while important, do not outweigh the factors pointing to exclusion.
>
> As Cronk J.A. put it [in her dissent in the Court of Appeal], allowing the seriousness of the offence and the reliability of the evidence to overwhelm the s. 24(2) analysis "would deprive those charged with serious crimes of the protection of the individual freedoms afforded to all Canadians under the Charter and, in effect, declare that in the administration of the criminal law 'the ends justify the means'"(para. 150). Charter protections must be construed so as to apply to everyone, even those alleged to have committed the most serious criminal offences. … [T]he trial judge seemed to imply that where the evidence is reliable and the charge is serious, admission will always be the result. As *Grant* makes clear, this is not the law.
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> 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. The fact that a Charter breach is less heinous than the offence charged does not advance the inquiry mandated by s. 24(2). We expect police to adhere to higher standards than alleged criminals.
>
> In summary, the price paid by society for an acquittal in these circumstances is outweighed by the importance of maintaining Charter standards. That being the case, the admission of the cocaine into evidence would bring the administration of justice into disrepute. It should have been excluded.[161]

The Court had a further occasion to apply its new section 24(2) framework in *R. v. Morelli*, decided in March 2010, eight months after the release of *Grant* and *Harrison*. The police in *Morelli* obtained a search warrant to enter the defendant's home and seize his computer in

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[161] *Id.*, at paras. 39-42.

order to search for child pornography images. Writing for the majority,[162] Fish J. found that the information to obtain the search warrant contained a number of false and misleading assertions and material omissions, and that the "amplified" record did not provide sufficient grounds to support the issuance of the warrant. Accordingly, the search executed pursuant to the invalid warrant violated section 8 of the Charter. Turning to section 24(2), Fish J. accepted the trial judge's finding that the drafting errors in the search warrant information were unintentional. He noted further that the executing officers believed they were acting pursuant to a valid warrant and thus "did not wilfully or even negligently breach the Charter", which "favour[ed] admission of the evidence".[163] On the other hand, he found that "the officer who prepared the ITO was neither reasonably diligent nor mindful of his duty to make full and frank disclosure. At best, the ITO was improvidently and carelessly drafted".[164] On balance, Fish J. concluded that the first set of *Grant* factors favoured exclusion:

> The repute of the administration of justice is jeopardized by judicial indifference to unacceptable police conduct. Police officers seeking search warrants are bound to act with diligence and integrity, taking care to discharge the special duties of candour and full disclosure that attach in *ex parte* proceedings. In discharging those duties responsibly, they must guard against making statements that are likely to mislead the justice of the peace. They must refrain from concealing or omitting relevant facts. And they must take care not to otherwise exaggerate the information upon which they rely to establish reasonable and probable grounds for issuance of a search warrant.
>
> We are bound to accept the trial judge's finding that there was no deliberate misconduct on the part of the officer who swore the Information. The repute of the administration of justice would nonetheless be significantly eroded, particularly in the long term, if such unacceptable police conduct were permitted to form the basis for so intrusive an invasion of privacy as the search of our homes and the seizure and scrutiny of our personal computers.[165]

Turning to the second set of *Grant* factors, Fish J. emphasized the extremely high privacy interest attaching to the contents of one's personal computer, stating:

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[162] Chief Justice McLachlin and Binnie and Abella JJ. concurred in Fish J.'s majority reasons. The dissenters (Deschamps J., joined by Charron and Rothstein JJ.) would have found no Charter breach and thus did not address s. 24(2).

[163] *Morelli*, *supra*, note 147, at para. 99.

[164] *Id.*

[165] *Id.*, at paras. 102-103.

> [I]t is difficult to imagine a more intrusive invasion of privacy than the search of one's home and personal computer. Computers often contain our most intimate correspondence. They contain the details of our financial, medical, and personal situations. They even reveal our specific interests, likes, and propensities, recording in the browsing history and cache files the information we seek out and read, watch, or listen to on the Internet.
>
> It is therefore difficult to conceive a s. 8 breach with a greater impact on the Charter-protected privacy interests of the accused than occurred in this case.[166]

With respect to the third set of *Grant* factors, Fish J. noted that excluding the seized evidence would leave the Crown with no case and would "seriously undermine the truth-seeking function of the trial" — a factor favouring admission.[167] Nevertheless, he concluded:

> [W]e are required by *Grant* 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.
>
> In my view, the repute of the administration of justice will be significantly undermined if criminal trials are permitted to proceed on the strength of evidence obtained from the most private "place" in the home on the basis of misleading, inaccurate, and incomplete Informations upon which a search warrant was issued.
>
> Justice is blind in the sense that it pays no heed to the social status or personal characteristics of the litigants. But justice receives a black eye when it turns a blind eye to unconstitutional searches and seizures as a result of unacceptable police conduct or practices.
>
> The public must have confidence that invasions of privacy are justified, in advance, by a genuine showing of probable cause. To admit the evidence in this case and similar cases in the future would undermine that confidence in the long term.[168]

Accordingly, the evidence was excluded and Morelli was acquitted.

A review of post-*Grant* lower court section 24(2) decisions suggests that although the new *Grant* test does not radically change the substance of the second and third branches of the *Collins/Stillman* framework, the

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166 *Id.*, at paras. 105-106.
167 *Id.*, at para. 107.
168 *Id.*, at paras. 108-111.

reorganization of the relevant factors is encouraging courts to place renewed emphasis on the egregiousness of the police misconduct when deciding whether or not to exclude evidence. In a significant Ontario post-*Grant* decision, *R. v. Blake*, the Ontario Court of Appeal described *Grant* as having "[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".[169] Nevertheless, the Court concluded that "in the circumstances of this case the application of *Grant* yields the same result as did the application of *Collins*"[170] (namely, admission of the evidence). The police in *Blake* obtained a warrant to search a dwelling house, primarily on the strength of a tip from a confidential informant. Drugs were seized during the search. At trial (conducted prior to the release of *Grant*) the Crown invoked confidential informant privilege and elected to defend the search on the basis of a heavily redacted version of the search warrant information. The defence did not challenge the Crown's assertion of privilege, but argued that the redacted information disclosed insufficient grounds to support the issuance of the warrant. The trial judge agreed and found a section 8 Charter breach, but admitted the seized evidence under section 24(2). The Ontario Court of Appeal upheld this decision,[171] emphasizing that the police had acted in good faith throughout. Writing for the Court, Doherty J.A. stated:

> Not only do I agree with the trial judge's finding of good faith on the part of the investigators, I can see no possible criticism of the police conduct on this trial record. Throughout the process that culminated in the seizure of the evidence, they acted exactly as they were obligated to under the law. They were required to obtain a warrant before entering the residence. They did so. They were required to make full disclosure to the justice of the peace. There is no suggestion that they did not do so. The police, and later the Crown, were legally obligated to protect the identity of the confidential informants by removing all material from the information that could identify the informants before making that material available to the defence. They did that. Given the manner in which the s. 8 claim was litigated, the police acted not only in good faith, but as required by the law. The police conduct in this case does

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[169] *R. v. Blake*, [2010] O.J. No. 48, 2010 ONCA 1, at para. 21 (Ont. C.A.) [hereinafter "*Blake*"].

[170] *Id.*, at para. 2. Similar conclusions have been reached in a number of other cases where pre-*Grant* s. 24(2) decisions have been reviewed in light of *Grant*: see, *e.g.*, *R. v. Lucas*, [2009] O.J. No. 3514, 196 C.R.R. (2d) 1 (Ont. S.C.J.); *R. v. Mahmood*, [2009] O.J. No. 3192, 194 C.R.R. (2d) 180 (Ont. S.C.J.).

[171] The Crown in *Blake* did not contest the trial judge's finding of a s. 8 violation.

> not fit anywhere on the misconduct continuum described in *Grant*, at para. 74.[172]

Although the interference with the defendant's Charter rights occasioned by the search of his home was "very serious",[173] the seized evidence "was entirely reliable and essential to the Crown's case".[174] On balance, Doherty J.A. concluded that the three *Grant* factors favoured admitting the evidence:

> Having conducted the inquiries mandated by *Grant*, examined the application of those inquiries to non-bodily physical evidence in *Grant* (paras. 112-115) and its companion case, *R. v. Harrison* … I would hold that the nature of the state conduct and society's interest in an adjudication on the merits militate strongly in favour of admitting the evidence. The impact on the appellant's s. 8 rights points strongly toward exclusion. How does one balance these directly conflicting assessments? Without diminishing the important negative impact on the appellant's legitimate privacy interests occasioned by the unreasonable search, I find compelling the argument that the exclusion of reliable crucial evidence in circumstances where the propriety of the police conduct stands unchallenged would, viewed reasonably and from a long-term perspective, have a negative effect on the repute of the administration of justice.
>
> Absent any claim of police misconduct or negligence in the obtaining of the initial search warrant, and absent any attempt to go behind the redacted information, it would be inappropriate to proceed on any basis other than that the police conducted themselves in accordance with the applicable legal rules. If there were a taint of impropriety, or even inattention to constitutional standards, to be found in the police conduct, that might well be enough to tip the scales in favour of exclusion, given the very deleterious effect on the accused's legitimate privacy interests. I can see none. The evidence is admissible under the approach to s. 24(2) set out in *Grant*.[175]

Blake suggests that even when a privilege-redacted search warrant information is vulnerable to a facial attack, defence counsel will now be well advised to attempt a further sub-facial attack in order to rebut the inference of police good faith, even though it will often be extremely difficult to identify any concrete basis for such an attack in a case where

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172 *Blake*, *supra*, note 169, at para. 25.
173 *Id.*, at para. 28.
174 *Id.*, at para. 31.
175 *Id.*, at paras. 32-33.

the underlying facts are shielded behind a virtually impregnable wall of confidential informant privilege.[176] When the good faith of the police cannot be impugned, courts are likely to treat the second and third *Grant* factors as balancing out and decide cases on the basis that the first *Grant* factor favours admission.

Although post-*Grant* decisions in which the police are found to have acted in good faith have generally resulted in unconstitutionally obtained "real" evidence being admitted[177] (with some exceptions[178]), evidence has often been excluded when the police have been found to have violated the Charter deliberately or negligently, or displayed an unreasonable ignorance of their Charter obligations.[179] *Morelli*, discussed above, is one such case. A further example is *R. v. Sandhu*,[180] where Quigley J. of the Ontario Superior Court excluded a very large amount of cocaine seized from a tractor-trailer — 205 kilograms, almost six times larger than the quantity at issue in *Harrison* — after finding that the police knew they were violating the Charter but went ahead and searched the truck anyway. In several other cases courts have followed *Morelli* and excluded evidence when a search warrant has been obtained on the strength of a carelessly drafted, misleading or materially incomplete information to obtain, even when the errors and omissions are not found to have been deliberate.[181]

However, the *Grant* section 24(2) test gives trial judges considerable discretion, and the *Grant* majority repeatedly emphasizes that trial deci-

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[176] See, *e.g.*, *R. v. Leipert*, [1997] S.C.J. No. 14, [1997] 1 S.C.R. 281 (S.C.C.).

[177] See, *e.g.*, *R. v. Hines*, [2009] O.J. No. 4097, 2009 ONCA 703 (Ont. C.A.); *R. v. Hanson*, 2009 CanLII 55288 (Ont. S.C.J.) (court found no Charter breach, but found evidence admissible in any event under *Grant*); *Crocker*, *supra*, note 73.

[178] See, *e.g.*, *R. v. Campbell*, [2009] O.J. No. 4132, 70 C.R. (6th) 66 (Ont. S.C.J.). Justice Marrocco concluded that the police had been "careless", but not "reckless" in failing to obtain corroboration of a tipster's account, which he concluded provided insufficient grounds to support the issuance of the warrant. The impact on the defendant's Charter rights was "significant" (the warrant was executed on the defendant's home in the small hours of the morning by a police tactical squad using smoke-emitting "distraction devices"). Justice Marrocco ultimately split the difference based on the relative seriousness of the offences, admitting the seized guns needed to support the more serious firearms charges, but excluding drugs, currency and a knife that were central to the prosecution of the less serious charges.

[179] See, *e.g.*, *R. v. Osolky*, [2009] O.J. No. 3962, 2009 ONCJ 445 (Ont. C.J.) (drugs and other evidence excluded after police detained, handcuffed and searched the defendant based on "generalized police suspicion", displaying "reckless[ness as] to the state of the law, on critical aspects of street policing"); *R. v. Sandypoint*, [2009] S.J. No. 581, 2009 SKPC 108 (Sask. Prov. Ct.) (marijuana excluded following "conscious action" by the police which "undermin[ed] the accused's right to a lawyer" and resulted in "serious and unexplained" Charter breach).

[180] [2009] O.J. No. 4106, 69 C.R. (6th) 137 (Ont. S.C.J.).

[181] See, *e.g.*, *R. v. Nguyen*, [2010] O.J. No. 1866, 2010 ONSC 1520 (Ont. S.C.J.); *R. v. Pham*, [2010] A.J. No. 478, 2010 ABQB 278 (Alta. Q.B.).

sions should be given "considerable" appellate deference.[182] The *Grant* framework is sufficiently flexible to permit trial judges to admit evidence even in the face of police carelessness, or worse. This point is well illustrated by a recent Ontario trial decision, *R. v. Little*.[183] The defendant's employer gave the police permission to go to the defendant's workplace desk and seize his work computer. While doing so, however, they looked in a closed envelope on the defendant's desk and seized personal photographs. They subsequently obtained a warrant to search the computer hard drive, but delayed actually conducting the search until after the warrant had expired, and searched for items not covered by the warrant. Justice Fuerst of the Ontario Superior Court excluded the seized photographs, finding that the police had acted "recklessly" by opening the envelope with neither a search warrant nor Little's consent. However, she admitted the evidence from the computer, even though she found that the police had acted "carelessly" and "recklessly" when conducting the computer search. She distinguished the photographs from the computer evidence on the grounds that the defendant's privacy interest in the hard drive of his workplace computer was "at the lowest end of the scale".[184] Further, she relied on the fact that the excluded photographs were not central to the Crown's case, whereas the computer evidence was "critical" to the prosecution, which involved extremely serious charges (two counts of first degree murder).[185]

While it is impossible to be certain how these cases would have been decided under the old *Collins/Stillman* framework, the post-*Grant* jurisprudence suggests that renewed emphasis is being placed on the significance of police misconduct, and that courts are refraining from treating the seriousness of the offence as a trump card guaranteeing admission. The Supreme Court of Canada's decision in *Morelli* reaffirms that even when there is no deliberate misconduct, police carelessness can sometime tip the first set of *Grant* factors to favour exclusion. However, *Little* serves as a reminder that the absence of police good faith will not always serve as an automatic ticket to exclusion if the other *Grant* factors are found to support admission, and that the seriousness of the underlying offence has not dropped entirely out of the analysis.[186]

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[182] *R. v. Grant*, *supra*, note 1, at paras. 86, 127.

[183] 2009 CanLII 42594 (Ont. S.C.J.) [hereinafter "*Little*"].

[184] *Id.*, at para. 44.

[185] *Id.*, at para. 45.

[186] See also *R. v. Cook*, [2009] O.J. No. 3428, 198 C.R.R. (2d) 156 (Ont. S.C.J.) (evidence improperly seized during the execution of an otherwise lawful search warrant admitted on the basis

(c) Conclusions

In summary, while the new *Grant* section 24(2) framework allows the Crown to secure the admission of much "conscriptive" evidence that would have been excluded under the first branch of the *Collins/Stillman* test, it also may help defence counsel to persuade trial judges to exclude evidence when the police have demonstrated flagrant disregard for, or ignorance of, the Charter. By trading certainty and predictability for "flexibility", the Court's new test will have the practical effect of making it more difficult for counsel on either side to predict the outcome of section 24(2) applications. This may lead to more Charter issues being litigated, exacerbating the problem of overburdened trial lists and delay. Finally, by placing even more discretionary power in the hands of trial judges and emphasizing appellate deference, the Supreme Court's new test is likely to increase the disparity of outcomes between similar cases. "Luck of the draw" at trial will become even more important.

The Court's new section 24(2) test can also be criticized for downplaying the significance of exclusion as a *remedy* for a Charter violation. According to the *Grant* majority, excluding evidence under section 24(2) serves a purely societal purpose and is "not aimed at … providing compensation to the accused".[187] However, section 24 is expressly framed as a remedial provision, suggesting that it has at least some corrective justice function.[188] Indeed, the Court's "standing" jurisprudence insists that evidence can be excluded under section 24(2) only at the request of a person who has suffered an infringement of his or her own personal Charter rights, a restriction that makes no sense if exclusion is viewed as entirely unrelated to the harm suffered by the claimant.[189] Excluding unconstitutionally obtained evidence undeniably has compensatory *effects* — in many cases, it restores the individual and the state to a position approximating that they would have occupied if the Charter had been respected.[190] Recognizing this effect as one of section 24(2)'s purposes is

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that the degree of police misconduct outweighed by the minimal intrusiveness of the breach and the reliability of the evidence).

[187] *Grant*, *supra*, note 1, at para. 70.

[188] Section 24(1) authorizes courts to grant to persons whose Charter rights have been infringed "such remedy as the court considers appropriate and just in the circumstances". Section 24(2) provides for the exclusion of evidence "in proceedings under subsection (1)".

[189] See, *e.g.*, *R. v. Edwards*, [1996] S.C.J. No. 11, [1996] 1 S.C.R. 128 (S.C.C.); *R. v. Belnavis*, [1997] S.C.J. No. 81, [1997] 3 S.C.R. 341 (S.C.C.).

[190] The position is only approximate, because in many cases the state retains the benefit of having removed contraband items from circulation. Even if excluding evidence results in an acquittal, the defendant still loses the contraband (in the case at bar, worth several million dollars).

entirely consistent with the *Grant* majority's wish to avoid "send[ing] the message that individual rights count for little". The practical reality in the vast majority of criminal cases is that when section 24(2) exclusion is refused, the violation of the accused's Charter rights goes entirely unremedied. As McLachlin J. (as she then was) observed in *R. v. Williams*, "[a] *Charter* right is meaningless, unless the accused is able to enforce it".[191] If the justice system routinely denies persons whose rights have been breached any compensation for the infringement, this must surely send the message that "rights count for little". It is unfortunate that the *Grant* majority did not recognize this link and instead denied that section 24(2) serves any corrective justice purpose.

[191] [1998] S.C.J. No. 49, [1998] 1 S.C.R. 1128, at para. 45 (S.C.C.).