

ARTICLE

IMPAIRED EXCLUSION: EXPLORING THE POSSIBILITY OF A NEW BRIGHT LINE RULE OF GOOD FAITH IN IMPAIRED DRIVING OFFENCES

By **Brian Eberdt***

CITED: (2011) 16 Appeal 65-83

I. INTRODUCTION

The success of a defendant's application to have inculpatory evidence excluded under s. 24(2) of the *Canadian Charter of Rights and Freedoms* ("Charter")¹ can easily be characterized as one of the most determinative events in the outcome of a criminal trial. In light of the fact that most successful applications eliminate the Crown's ability to sustain a prosecution, the exclusion of evidence may be the most formidable means of upholding *Charter* rights within the criminal justice system. In the absence of a meaningful test with which to exclude evidence, the breach of a defendant's *Charter* rights becomes a breach without any other means of recourse. At the same time, imposing a test that weighs too heavily in favour of exclusion can give rise to negative perceptions of the administration of justice. It is for these reasons that s. 24(2) balances the importance of *Charter* rights against the repute of the administration of justice.

On July 17, 2009, the Supreme Court of Canada released the decisions of *R. v. Grant*,² *R. v. Harrison*,³ and *R. v. Suberu*.⁴ Together, these three decisions establish a new approach to the exclusion of evidence. The event has had a significant impact throughout the world of

* Brian Eberdt completed his J.D. at the University of Victoria Faculty of Law in the fall of 2010. He has Bachelor of Arts degree in Psychology from York University (Glendon College) and McGill University. While completing his J.D., Brian completed co-op work terms at the criminal law firms of Claus and Company in Victoria and Lockyer Campbell Posner in Toronto. He will be returning to the latter for his articles in May 2011. He would like to thank his major paper supervisor, Professor Lee Seshagiri, for his insight and enthusiasm throughout the research and editing process. He would also like to thank Appeal staff editor Meaghan McWhinnie for her careful and patient eye. Finally, Brian would like to thank his wife, Sarah Facini, for her unwavering support.

1. *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the *Canada Act 1982* (UK) (1982), c 11 at s 15 [*Charter*].
2. *R v Grant*, 2009 SCC 32, [2009] SCJ No 32 [*Grant*].
3. *R v Harrison*, 2009 SCC 34, [2009] SCJ No 34 [*Harrison*].
4. *R v Suberu*, 2009 SCC 33, [2009] SCJ No 33.

criminal law because these are the first decisions to fundamentally change the framework created by *R. v. Collins*⁵ over 20 years earlier. The initial reaction to the decisions has been positive. This is perhaps unsurprising given the accumulation of legal commentary denouncing the uncertainty of the pre-existing framework created by *Collins* and further exacerbated by *R. v. Stillman*⁶ in 1997.

At the time of publication, there were approximately 700 reported decisions referencing the new framework. In light of the fact that the majority of these decisions have dealt with impaired driving offences, the trends that have emerged in the post-*Grant* case law are most apparent within that context. This article surveys the post-*Grant* jurisprudence in the area of impaired driving to illustrate that the consideration of “good faith” now threatens to singularly determine the analysis in a manner that resembles the conscription bright line rule articulated in *Stillman*.

Part one provides a review of the historical context that gave rise to *Grant* and its companion decisions. Commencing with the pre-*Charter* position to exclusion of evidence established in *R. v. Begin*⁷ and *R. v. Wray*⁸, the section describes the struggle involved in giving effect to the words that appear at s. 24 of the *Charter*. This is followed by an outline of the post-*Charter* interpretations of s. 24(2), including the confusion and inconsistency that arose out of the decision of *R. v. Stillman*.

Part two provides a brief explanation of the *Grant* decision, highlighting the elements of the framework to which the Supreme Court sought to bring new certainty. It devotes particular focus to the discussion of bodily evidence in *Grant* and its direct treatment of breath samples. It also notes the ambiguous nature with which the majority has dealt with the consideration of the seriousness of the offence. This is supported by a discussion of Justice Deschamps’ separate reasons as she addresses her disagreement with the majority’s focus on the factor of good faith.

Part three provides a discussion of the post-*Grant* jurisprudence, focussing on the distinct effect that the decision has had within the area of impaired driving offences. The section includes the argument that the removal of the automatic exclusion of conscriptive evidence, established in *Stillman*, has reintroduced significant legal barriers for defendants seeking to exclude breath sample evidence. This is followed by an illustration of how the treatment of this type of evidence as articulated by the majority in *Grant* creates the risk that the second and third branches of the framework will be pre-determined. The section proceeds to show how the manner in which trial judges have interpreted the seriousness of the offence further contributes to the likelihood that the exclusion of breath sample evidence is most likely to occur under the first branch of the framework.

II. PART ONE: DEVELOPING CANADA'S EXCLUSION OF EVIDENCE REGIME

Due to the fact that the exclusion of evidence is one of the most regularly adjudicated issues in a criminal trial, the history of this area of the law is especially dense. The brief overview that follows devotes particular attention to how the evolving exclusion of evi-

5. *R v Collins*, 1987 SCC 11, [1987] 1 SCR 265 [Collins].

6. *R v Stillman*, [1997] 1 SCR 607, [1997] SCJ No 34 [Stillman].

7. *Québec (AG) v Begin*, [1955] SCR 593 [Begin].

8. *R v Wray*, (1970), 11 DLR (3d) 673 (SCC), [1970] 4 CCC 1 [Wray].

dence regime has affected the prosecution of impaired driving offences in order to provide a better illustration of the current legal context.

A. Pre-Charter Exclusion of Evidence

The pre-*Charter* jurisprudence regarding exclusion of evidence had established that there was little remedy for excluding evidence beyond appealing one's conviction or pursuing civil action against the impugned officers.⁹ Once it became clear that there was unlikely to be any broadening of the trial judge's discretion by the courts, the Trudeau government decided to include s. 24(2) when it enacted the *Charter* in 1982.¹⁰ Section 24(2) reads as follows:

Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.¹¹

The initial cases that applied s. 24(2) did so in a limited fashion, reluctant to move beyond the long-held resistance to exclusion. When the new provision was applied, it was in an inconsistent fashion. This was largely because the words contained in s. 24(2) provide little in the way of prescribed criteria to consider.¹² It was not until 1987 that the Supreme Court released *Collins*, which sought to create a uniform approach to exclusion with the establishment of a three-part test for determining admissibility. An outline of the test is provided here, as a significant portion of it has been retained in *Grant*.

The first factor in *Collins* required the trial judge to consider the nature of the evidence and the effect that its admission would have on the fairness of the trial. There were three elements to consider under this heading: the reliability of the evidence, whether the evidence was obtained independently of the *Charter* violation, and whether the evidence was discoverable.¹³ The second factor required the judge to consider the seriousness of the violation. Under this heading, Lamer J., (as he then was), instructed trial judges to consider: whether the determination was serious or merely technical; whether it was wilful and deliberate or inadvertent and made in good faith; and whether there were other, less infringing, investigatory techniques available.¹⁴ The third factor required the trial judge to consider what the effect of excluding the evidence would be. This included a consideration of the likelihood of sustaining a prosecution without the evidence and the serious-

9. See *Begin*, *supra* note 7 and *Wray*, *supra* note 8.

10. Although the provision merely provided Canadians with a protection that was already afforded by citizens of most commonwealth countries at the time, the inclusion was the subject of intense debate amongst those who drafted the *Charter*. While the United States had adopted the most expansive regime at the time, it was more frequently referenced by opponents to the introduction of section 24(2). Both within and outside of the American judiciary, there had been significant criticism of this "absolute exclusion" model, alleging that it resulted in too many exclusions of evidence, with insufficient consideration of the results. See *Stone v. Powell*, 428 US 465 (1976) for strongly worded judicial activism to this effect. For extensive coverage on the drafting of s. 24(2) and its initial reaction in the Courts of Appeal, see Don Stuart, *Charter Justice in Canadian Criminal Law*, 4th ed (Toronto: Thomson Carswell, 2005) at 531-537 [Stuart].

11. *Supra* note 1 at s 24(2).

12. See Stuart, *supra* note 10 at 476-480 for discussion of the initial judicial application of section 24(2).

13. *Collins*, *supra* note 5 at paras 36-37.

14. *Ibid* at para 38.

ness of the offence.¹⁵ These three factors were to be considered in a manner that upheld the aim of s. 24(2): the maintenance of repute of the administration of justice.

The three branches of Justice Lamer's framework remained in place for nearly 12 years until the introduction of the conscription bright line rule in *Stillman*. There, Cory J. modified the structure of the test, creating a virtually automatic exclusion for evidence that was deemed to be conscriptive. In defining what would constitute conscriptive evidence he gave the following broad instructions, "Evidence will be conscriptive when an accused, in violation of his *Charter* rights, is compelled to incriminate himself at the behest of the state by means of a statement, the use of the body or the production of bodily samples."¹⁶ The breadth of this definition was the catalyst for a snowball effect of confusion and uncertainty with respect to the proper application of the exclusion of evidence framework.

While this modification of the framework helped to ensure the exclusion of conscriptive evidence, it diminished the opportunity for judicial consideration of the circumstances involved in the obtainment of the evidence. This resulted in trial judges being forced to distort their analysis in order to ensure that certain evidence was admitted.¹⁷ It is this confusion that led to the Supreme Court's decision to revisit the s. 24(2) framework in *Grant*.

B. An Approach Without Confidence

While the majority's aim in *Stillman* was to bring some order to the exclusion of evidence framework, it has become the primary target of the criticisms directed at the *Collins/Stillman* exclusion of evidence regime.¹⁸ The overarching criticism of this aspect of the framework is encapsulated by McLachlin C.J. and Charron J. in *Grant*:

Despite reminders that "all the circumstances" must always be considered under s. 24(2) ... *Stillman* has generally been read as creating an all-but-automatic exclusionary rule for non-discoverable conscriptive evidence, broadening the category of conscriptive evidence and increasing its importance to the ultimate decision on admissibility.¹⁹

In other words, *Stillman* reduced the trial judge's ability to consider the full set of circumstances associated with the obtainment of the impugned evidence. The inquiry was driven almost exclusively by a determination of whether or not a *Charter* breach had occurred. The rigidity of the conscription bright line rule introduced the risk that trial judges might arrive at questionable characterizations of those circumstances in order to avoid categorizing evidence as conscriptive and non-discoverable.²⁰

In the absence of an all-encompassing framework, courts were forced to make highly fact-specific determinations that were difficult to reconcile with one another as opposed to carefully balancing interests as prescribed by the *Charter*. Constitutional expert, Professor Peter

15. *Ibid* at para 39.

16. *Stillman*, *supra* note 6 at para 80.

17. Stuart, *supra* note 10 at 578-582.

18. For examples of common critiques of the *Collins/Stillman* approach see Steven Penney, "Taking Deterrence Seriously: Excluding Unconstitutionally Obtained Evidence Under Section 24(2) of the Charter" (2004) 49 McGill LJ 105 – 144 [Penney]; and Stuart, *supra* note 11 at 516-520 (Professor Stuart entitles this section "Stillman Approach Should Be Reconsidered").

19. *Grant*, *supra* note 2 at para 64.

20. See Penney, *supra* note 18 at paras 38-43.

Hogg, felt it necessary to depart from his characteristically reserved tone in describing the framework:

It is worth commenting that the Court's balancing approach provides little certainty, and ... those rules that the Court has developed to constrain its discretion are highly complicated. These are serious infirmities in a body of doctrine that should have the effect of deterring unconstitutional behaviour by police. The Court has lost sight of the common-sense proposition that "the more complex and uncertain the rules the less likely it is that the police will obey them."²¹

The approach was described as being "a highly rigid and technical grid, divorced from the social realities of what would actually bring the administration of justice [into] disrepute."²² In order to conduct exclusions of evidence in line with its legislated purpose, a broad consideration of all the circumstances relating to the offence and the obtainment of evidence was necessary.

III. PART TWO: A NEW REGIME

The release of the *Grant*-trilogy had been long anticipated by both academics and practitioners.²³ While the focus of this article is to argue that the first branch of the *Grant* framework has adopted a determinative role in the exclusion of evidence in impaired driving offences, a brief summary of the framework is required in order to better understand their subsequent application.

A. An Overview of *R. v. Grant*

In the *Grant* decision, McLachlin C.J. and Charron J. set out a three-part test to guide trial judges in responding to the inquiry posed by s. 24(2) of the *Charter*: whether the admission of the impugned evidence could²⁴ bring the admission of justice into disrepute. Firstly, they must consider the seriousness of the *Charter* violation. Secondly, they must consider the impact of the violation on the *Charter* rights of the accused. Thirdly and finally, they must consider society's interest in adjudication on the merits.

When comparing the new and old frameworks, one could make the argument that the factors have merely been rearranged, and not rewritten. Even McLachlin C.J. and Charron J. concede the similarities when introducing the three branches of their framework:

21. Peter Hogg, *Constitutional Law of Canada*, 2007 Student Edition (Toronto: Thomson Carswell, 2007) at 908.

22. David Milward, "Why we can't Take Exclusions of Evidence for Grant-Ed" *Lawyers Weekly* (23 October 2009) 11.

23. While the decisions of *Harrison* and *Suberu* provide useful applications of the new framework, *Grant* is the decision that establishes the new framework for the exclusion of evidence. Although these topics lie beyond the scope of this article, the *Grant*-trilogy also provides significant contributions to the jurisprudence under sections 8, 9, and 10(b) of the *Charter*. For an excellent discussion on the impact of the *Grant*-trilogy on sections 9 and 10(b), see Steve Coughlan, "Great Strides in Section 9 Jurisprudence" (August 2009), 66 *Criminal Reports* (6th) 75.

24. While the English words of the *Charter* ask whether the admission of the evidence "would" bring the administration of justice into disrepute, the French equivalent of the section asks whether it "could" (*est susceptible de*) bring the administration of justice into disrepute. *Collins* adopts the French interpretation of the provision, which is upheld in *Grant*. See *Collins*, *supra* note 5 at para 43.

These concerns, while not precisely tracking the categories of considerations set out in *Collins*, capture the factors relevant to the s. 24(2) determination as enunciated in *Collins* and subsequent jurisprudence.²⁵

Ostensibly, their efforts to refine the approach leave us with a framework that seems capable of better realizing the aim of s. 24(2). The following paragraphs outline the three new branches of the exclusion of evidence framework, drawing attention to the manner in which they modify the approach in *Collins/Stillman*.

i. Branch One: The Seriousness of the *Charter* Violation

The first branch of the *Grant* framework asks the trial judge to consider the circumstances that surround the obtainment of the impugned evidence. In determining whether or not the evidence was obtained in a manner that would “preserve public confidence in the rule of law and its processes”;²⁶ the court must consider whether or not the officer was acting in good faith. To help instruct judges in making this determination, the majority articulates a wide spectrum of circumstances in which a *Charter* violation may occur, from an error made in good faith to a wilful disregard of applicable law.²⁷

The content of the first branch of the *Grant* framework does not differ significantly from the second factor in the *Collins* test. However, what is significant about this branch in *Grant* is that it will still be considered where it seems clear that a *Charter* violation has occurred. This represents the most significant innovation of the *Grant* framework. The *Stillman* conscription bright line rule effectively precluded trial judges from considering all the circumstances of the obtainment of the evidence; it follows that the removal of this bright line has reinvigorated the trial judge’s ability to broadly consider the circumstances as required by s. 24(2). As discussed in Part three, however, the manner in which *Grant* has been interpreted suggests that the trial judge’s discretion may not be as broad as the majority suggests.

ii. Branch Two: The Impact of the Infringement on the Rights of the Accused

The second branch requires the trial judge to consider that not all *Charter* violations will impact the accused equally. For example, a roadside stop of a motorist will have a much smaller impact than a search of an individual’s home. While the constituent parts of the second branch of the *Grant* framework were largely present within the *Collins* framework, their consideration as a discrete factor is new. Under the *Collins* test, this was an inquiry that was conducted under the first factor: the effect of admission on the fairness of the trial. As noted before, however, the consideration of this factor would be precluded by a positive finding that the evidence was conscriptive and non-discoverable. While the first factor of the *Collins* framework was more directly concerned with interests of the accused at trial, the second branch in *Grant* shifts the focus to the interests of the accused at the time the time of the infringement. The prior absence of a direct consideration of the rights of the accused at the time when their rights were infringed had put trial judges in the awkward position of being forced to distort the earlier framework in order to account for this fac-

25. See *Grant*, *supra* note 2 at para 71.

26. *Ibid* at para 72.

27. *Ibid* at para 74.

tor.²⁸ The reduction of the number of areas in which a judge is required to distort the analysis increases both its transparency and legal certainty.

iii. Branch Three: Society's Interest in an Adjudication on the Merits

The third branch of the framework requires the trial judge to consider society's interest in an adjudication on the merits. The majority effectively summarizes the purpose of this inquiry as “[asking] whether the truth-seeking function of the criminal trial process would be better served by admission of the evidence or by its exclusion.”²⁹ Under this heading, the reliability of the evidence and the importance of that evidence to the prosecution's case are the predominant considerations. As with the other branches, the majority has not embarked on a complete departure from the *Collins* approach. What is unclear is whether or not the trial judge is permitted to consider the seriousness of the offence under this heading. The rationale underlying this consideration is that society will be more concerned in admitting evidence in trials for more serious offences than they would for less serious offences. While this was a permissible inquiry under the *Collins/Stillman* framework, the majority in *Grant* cautions the use of this consideration, yet stops short of expressly prohibiting it.³⁰ Part three of this article includes an examination of the troubling effect that this ambiguous instruction has in the area of impaired driving.

B. The Unique Effect on Bodily Evidence and Impaired Driving

The primary impact of *Grant* on the exclusion of evidence in impaired driving offences is the elimination of the conscription bright line rule created in *Stillman*. However, this has less to do with *Grant* than it does with the manner in which these offences are prosecuted. In nearly all impaired driving cases it is necessary for the officer to have obtained a sample from the accused, demonstrating that the concentration of alcohol in their blood is in excess of 80 milligrams per one hundred millilitres of blood.³¹ In most cases of impaired driving, this involves the obtainment of a breath sample into an approved breath analysis instrument. There are many elements of this transaction that carry a strong potential for the arresting officer to violate the motorist's *Charter* rights. In order to avoid a violation, a long history of jurisprudence imposes exacting requirements on the officer to obtain the required evidence in a lawful manner.³² While there are many requirements, examples of those which are frequently adjudicated include: the requirement that the detention of the motorist is not arbitrary; the requirement that a police officer have reasonable and probable grounds to make a breath demand; informing the motorist of his or her rights to coun-

28. Under the earlier *Collins/Stillman* framework, it would be unlikely that a trial judge would have the opportunity to directly address the impact on the rights of the accused. Instead, the relevant factors that arise under this branch of the *Grant* framework would be folded into the judge's analysis of whether or not the evidence was conscripted. This created the undesirable affect of judge's distorting the analysis in order to ensure that all the necessary factors could be considered within the rigid confines of the *Stillman* conscription bright line rule. See Hamish Stewart, “The *Grant* Trilogy and the Right Against Self-Incrimination” (2009) 66 CR (6th) 97 at 100 for further explanation on why the *Collins/Stillman* approach was deemed “controversial”.

29. *Grant*, *supra* note 2 at para 79.

30. *Ibid* at para 84.

31. *Criminal Code*, RSC 1985, c C-46 at s 253(1)(b).

32. Due to the relatively strong accuracy and reliability of breath sample evidence, there has been little success in defending an impaired driving show unless it could be shown that the arresting officer either violated the statutory requirements or infringed the individual's *Charter* rights in a manner that requires exclusion of the evidence. This resulted in a line of jurisprudence that was centered around s 24(2). As will be discussed later in the paper, the first category of defences has now been merged into the second.

sel once a breath demand has been made; making counsel available to the motorist upon request; and obtaining a breath sample from the motorist “as soon as practicable”.³³

Under *Stillman*, if an impaired driver were successful in showing that a police officer’s obtainment of a breath sample resulted in an infringement of their *Charter* rights, then the evidence would likely be excluded. While *Stillman* allowed for an exception to the rule of automatic exclusion where the evidence would have been otherwise discoverable, this exception rarely arose in impaired driving.³⁴ As discussed in part one, the primary disadvantage to this approach is that it significantly reduced the ability of trial judges to consider “all the circumstances” in deciding whether the admission of the evidence would bring the administration of justice into disrepute. In recognizing that a significant increase in the exclusion of breath sample evidence would likely bring the administration of justice into disrepute, trial judges were then forced to distort their analyses in order to circumvent the automatic exclusion required by *Stillman*.³⁵ Thus, the elimination of the bright line rule in *Grant* brings the prospect of restoring certainty and transparency to the framework. Moreover, it provides for the rare circumstances in which conscriptive, non-discoverable evidence should be admitted.

While the changes outlined above would, on their own, have a substantial impact on the application of the framework in the area of impaired driving offences, McLachlin C.J. and Charron J. went further by discussing bodily evidence and *Charter* violations in the impaired driving context directly.³⁶ They point out that the conscription rule from *Stillman* was particularly ill-suited to bodily evidence, noting that the expansive definition that *Stillman* established for conscriptive evidence resulted in a “near-automatic exclusionary rule for bodily evidence obtained contrary to the *Charter*”.³⁷ They also provide clear instructions on how the obtainment of breath samples should be characterized in reference to the impact on the rights of the accused:

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.³⁸

This makes it clear that the majority sees the obtainment of a breath sample to have a minimal impact on the *Charter* rights of the accused. It is also supported by the majority’s affirmation in *Harrison* that a motorist will have a relatively low expectation of privacy while

33. *Supra* note 31 at s 254(3)(a).

34. *R. v Farrell*, 2009 NSCA 3, [2009] NSJ No 15, is an example of one of the few cases in which conscriptive evidence was admitted on the grounds that it would have been discoverable. The officer obtained a blood sample from the accused after they had been involved in an accident, thinking it would have been impracticable to obtain a breath sample at the hospital. At trial, the sample was excluded upon a finding that the officer lacked reasonable grounds for the belief that he could not obtain a breath sample. At the Court of Appeal, it was held that a breath sample could have been obtained (i.e. the necessary evidence was discoverable), allowing the evidence to be admitted.

35. *R. v Farrell*, *Ibid* also provides an illustration of the manner in which the *Collins/Stillman* approach required judges to distort the analysis in order to ensure that they maintained public confidence in the justice system. The Court of Appeal repeatedly refers to the hypothetical breath sample as “probably” being discoverable. The ambivalence of this assertion coupled with the weighty consequence of a finding that the evidence was discoverable creates some concern.

36. See *Grant*, *supra* note 2 at paras. 99-111.

37. *Ibid* at para 100.

38. *Ibid* at para 111.

in their cars.³⁹ In reference to society's interest in adjudication on the merits, the majority clarifies that the reliability of bodily evidence in addition to the "error inherent in depriving the trier of fact of evidence" will generally result in the third branch favouring admission of the evidence.⁴⁰ These dicta have the effect of creating a presumption that the second and third branches will favour the admission of breath sample evidence.

C. The Emerging Significance of Good Faith

Although there has been some dispute with respect to role it plays within the framework,⁴¹ the consideration of whether or not the police have acted with good faith has factored into judicial analysis of whether or not to exclude evidence since the enactment of s. 24(2) of the *Charter*. This factor has existed within the framework ever since *R. v. Therens*,⁴² the first case in which the Supreme Court applied s. 24(2). It has been noted that, since that initial decision, the consideration has been accompanied by a presumption that the police did act in good faith, despite substantial empirical evidence to suggest that they often do not.⁴³ Irrespective of the extent to which such a presumption exists within the application of the s. 24(2) framework, the good faith consideration is well-entrenched within the exclusion of evidence jurisprudence. While there has also been a continued debate regarding the proper relationship between the judiciary and the law enforcement branch of the state,⁴⁴ the good faith consideration is a vital component to determining whether or not admission of evidence would bring the administration of justice into disrepute. It requires the trial judge to consider whether a police officer was acting within the confines of their legal duty in a given situation. It would be difficult to conceive of another element of the framework that touches more closely upon the purpose of s. 24(2).

Under the *Grant* framework, the good faith consideration falls under the third branch, the seriousness of the violation. Although the majority does not discuss this branch specifically within the context of impaired driving offences, the treatment of this factor across the *Grant* trilogy is instructive. In particular, a comparison of the *Grant* and *Harrison* decisions reveals the substantial weight that can be accorded to the determination of whether the impugned state officials were acting in good faith. In both cases, this determination appears to play a central role. In *Grant*, the majority devotes significant attention to the factors that suggested the police officers' conduct was in good faith. These include the lack of evidence of racial profiling and their finding that the breach was neither egregious nor deliberate.⁴⁵ What is interesting about their consideration of the first branch is the majority's significant reliance on the uncertainty in the law of detention that existed at the time. While this factor certainly provides an explanation for the conduct of the police, the fact that it is treated as a justification for the conduct is difficult to reconcile with the explana-

39. *Harrison*, *supra* note 3 at para 30.

40. *Grant*, *supra* note 2 at para 110.

41. See Jordan Hauschildt. "Blind Faith: The Supreme Court of Canada, s. 24(2) and the Presumption of Good Faith Police Conduct" (2010) 56 *Criminal Law Quarterly* 469 [Hauschildt].

42. *R. v. Therens*, [1985] 1 SCR 613, 18 CCC (3d) 481.

43. See Hauschildt, *supra* note 41 at 473.

44. This has also been an issue upon which the Supreme Court has provided inconsistent guidance. This has ranged from a view that s. 24(2) should be viewed as remedying police misconduct in *R. v. Collins*, to the more detached position espoused by Iacobucci J. in *R. v. Burlingham*, [1995] 2 SCR 206 at 283, wherein s. 24(2) should be seen to "oblige law enforcement authorities to respect the exigencies of the *Charter*". Wisely, the majority in *Grant* adopts a compromise between these two extremes, characterizing the purpose of s 24(2) as being one of "dissociation" from unlawful conduct. See *supra* note 2 at para 72.

45. *Grant*, *supra* note 2 at para 133.

tion of the analysis that appears earlier in the decision.⁴⁶ This approach seems to create unwanted flexibility and uncertainty in how to correctly assess good faith. Trial judges are left with difficult questions regarding the degree and types of uncertainty that can support a positive showing of good faith on behalf of police officers. Given the seriousness of the *Charter* breach in *Grant*,⁴⁷ the fact that this relatively precarious finding of good faith resulted in admission speaks to the strong role that it plays within the framework.⁴⁸

Harrison is useful as a companion case to *Grant* as it provides an example of the inverse scenario: while the second factor was neutral and the third factor favoured the admission of the evidence, the Court found that the lack of good faith on behalf of the police officers was sufficient to necessitate exclusion of the evidence. In accordance with their judicial role, the majority shows significant deference to the trial judge who characterized the conduct as “brazen”, “flagrant”, and “very serious”.⁴⁹ While these characterizations might have been sufficient to require that the evidence be excluded, McLachlin C.J. proceeds further with the analysis, finding the police officer’s in-court testimony to be misleading. In recognizing that this consideration goes beyond the breach itself, she holds it to be a factor that reinforces the finding of bad faith on behalf of the police even further.⁵⁰

The fact that these findings led to the exclusion of highly reliable evidence (32kg of cocaine) obtained in a situation where the individual had a low expectation of privacy (driving a rental car on the highway), helps to illustrate the weight that was accorded to the first branch of the framework. When contrasted with the treatment of this factor in *Grant*, its pivotal role within the framework becomes clear. The broadened consideration of police conduct in *Harrison* increases the potential that the first factor of the *Grant* framework might determine the result.

D. The Seriousness of the Offence

The summary of the new exclusion of evidence framework above notes how the majority discussed the appropriate consideration of the seriousness of the offence with relative ambiguity. While this factor was validly considered under the framework created in *Collins*,⁵¹ the majority in *Grant* seems to dissuade trial judges from adopting it as a consideration. The lack of clarity in this section of the judgment has particular relevance to the argument that good faith is emerging as the determinative factor, particularly in the area of impaired driving offences. As discussed earlier, there is substantial direction within the *Grant* decision regarding the appropriate treatment of breath samples in reference to the second and third branches of the framework. The decision makes clear that these branches will regularly militate in favour of admission. With this established, it is unnecessary to rely on the factor of the seriousness of the offence in impaired driving offences, irrespective of whether it is legitimate to do so. As discussed in part three, many post-*Grant* impaired driving cases

46. Admittedly, *R. v Kokesch*, [1990] 3 SCR 3 at 32-33 stands for the proposition that, once a particular area of law has been settled by the courts, police officers are expected to act in conformity with that resolution. It is the majority’s reliance on the inverse proposition that highlights the extent to which they sought to demonstrate the good faith of the officers in *Grant*.

47. The police officers violated the accused’s ss. 9 and 10(b) rights. The evidence that was obtained was deemed to be non-discoverable leading the majority to conclude that the impact of the infringement was “significant”. See *Grant*, *supra* note 2 at paras 136-138.

48. The third *Grant* factor was held to have a neutral effect in the analysis. See *supra* note 2 at para 139.

49. *Harrison*, *supra* note 3 at para. 23.

50. *Ibid* at para 26.

51. See *Collins*, *supra* note 5 at paras 35, 39, and 45.

do consider this factor. In most of these cases, it is deemed to favour the admission of the evidence. This interpretation by the courts further reinforces the presumption that breath samples will be admitted. This has the effect of reducing the likelihood of successful arguments for exclusion under the first branch of the framework, the branch under which the decision of admission or exclusion is most likely to occur.

Prior to evaluating the interpretation of this consideration in the post-*Grant* jurisprudence, it is necessary to determine the correct interpretation of the factor as established by the *Grant* trilogy. In *Grant*, McLachlin C.J. and Charron J. do not encourage reliance on the seriousness of the offence, yet they do not expressly prohibit trial judges from considering it either. Instead, we are left with the following vague statement: “In our view, while the seriousness of the alleged offence may be a valid consideration, it has the potential to cut both ways.”⁵² The Justices explain this by highlighting how the public will have a great interest in seeing that evidence is admitted in the case of a serious offence however it is necessary to balance this interest against the long-term repute of the administration of justice. While acknowledging Deschamps J.’s disagreement on this point (she believes that the seriousness of the offence is a valid consideration), they canvas the authorities that suggest that the reliance on this factor runs contrary to the principles of s. 24(2). McLachlin C.J. and Charron J. then highlight the most frequently repeated principle of the judgment: that s. 24(2) is concerned with the *long-term* repute of the justice system. They then apply this principal in context: “The short-term public clamour for a conviction in a particular case must not deafen the s. 24(2) judge to the longer-term repute of the administration of justice.”⁵³ Thus, it appears from *Grant* that if any permissible reliance on the seriousness of the offence exists, it will be slight. Unfortunately, the interpretation of this aspect of the decision has not been consistent.

The companion decision of *Harrison* provides some additional guidance. There, McLachlin C.J. explicitly overrules the dictum of the Ontario Court of Appeal on this issue in which the seriousness of the offence had been considered in the analysis. She holds that the majority had incorrectly compared the seriousness of the *Charter* violation with the seriousness of the criminality involved.⁵⁴ In her words, “The fact that a Charter breach is less heinous than the offence charged does not advance the inquiry mandated by s. 24(2).”⁵⁵ McLachlin C.J. seems to endorse the view of Cronk J.A. who, in dissent at the Court of Appeal, warned against the risks of over-reliance on the seriousness of the offence.⁵⁶ Thus, it would seem that, while the seriousness of the offence may continue to be a relevant consideration, it should not weigh heavily in the analysis.⁵⁷

While the Supreme Court has created a warning against over-reliance on the seriousness of the offence in *Grant* and *Harrison*, trial judges are left with little instruction as to what degree of reliance is permissible.⁵⁸ This lacuna stands in the face of intense pressure for

52. *Grant*, *supra* note 2 at para 84.

53. *Ibid.*

54. *Harrison*, *supra* note 3 at para 41.

55. *Ibid.*

56. *R v Harrison*, 2008 ONCA 85, [2008] OJ No 427 (QL) at para 83.

57. Several commentators believe that any reliance on the seriousness of the offence should be prohibited for the fear that it might create a two-tiered justice system in which those charged of less serious offences might be subjected to a less stringent exclusion of evidence regime. See Don Stuart, “Welcome Flexibility and Better Criteria for Section 24 (2)” (2009), 66 CR (6th) 82 at 84.

58. For further interpretation of the majority’s discussion of this factor in *Grant*, see Tim Quigley, “Was it Worth the Wait?: the Supreme Court’s New Approaches to Detention and Exclusion of Evidence” (2009) 66 CR (6th) 88 at 93.

trial judges to bow to the “public clamour” to ensure that the truth-finding function of the courts is not obstructed. When one considers that in 2005, 33% of the motor-vehicle accident fatalities in Canada involved intoxicated drivers,⁵⁹ it is understandable that trial judges might feel pressured to admit evidence in these offences in order to maintain the repute of the justice system. While it is impossible to reveal the precise weighing of the factors in each decision, the post-*Grant* jurisprudence suggests that many trial judges continue to accede to the short-term interests of the public in ensuring convictions by according significant weight to this factor. This is of particular concern in the area of impaired driving because the factor is repeatedly interpreted in favour of admitting evidence against the accused. This further increases the likelihood that good faith becomes the only section of the framework under which breath samples may be excluded.

E. Justice Deschamps' Reasons

Justice Deschamps' partially concurring reasons in *Grant* help to add further depth to both the determinative role of good faith and the proper consideration of the seriousness of the offence. Her primary disagreement with the majority's new framework is best described by her proposed alternative. She argues that the three branches proposed by McLachlin C.J. and Charron J. stray too far from the purpose of s. 24(2): to balance the societal interest in protecting constitutional rights against the societal interest in an adjudication of the case on the merits. In her view, by positioning the inquiry into state conduct as the first branch of the framework, the majority is giving it a particular significance that is not shared by the second and third branches.⁶⁰ Deschamps J. argues that this gives the appearance that the primary concern of the majority is to deter police misconduct. In her words, “The need for the courts to dissociate themselves from state conduct is at most one factor to be considered in relation to the overall purpose.”⁶¹ With respect to this element of the framework, she argues that the preceding *Collins/Stillman* framework more faithfully embraced the true purpose of s. 24(2), wherein both the state conduct and the seriousness of the infringement were considered under the review of the seriousness of the violation. Whether or not its position within the framework is the cause for this added significance, Deschamps J.'s contention that the first branch has taken on a disproportionate role within the framework supports the contention that the new exclusion of evidence framework faces the risk of being pre-determined by the determination of good faith.

While the target of Justice Deschamps' concern regarding the role of good faith may be the sequence of the framework, her disagreement with the correct treatment of the seriousness of the offence is entirely in regard to its substance. She devotes significant attention to this consideration in her partially concurring reasons, arguing that society will have a greater interest in adjudication on the merits when it involves a serious crime.⁶² Where the majority seems to be striking a balance between the public concern for sustaining prosecutions and the principle that all stand equal before the law,⁶³ Deschamps J. argues that the former un-

59. P. Gutoskie, *Road Safety Vision 2010: 2006 Update* (Ottawa: Canadian Council of Motor Transport Administrators, 2008) at 13 as cited in R Solomon et al “Alcohol, Trauma, and Impaired Driving” 4th ed (2009) Madd Canada, CAMH, CCSA, online: <http://www.madd.ca/english/research/real_facts.pdf> at 87.

60. *Ibid* at para 195. This is a view that is shared strongly by Benjy Radcliffe, see “R. v. Grant: A Work in Progress” (16 December 2009), online: The Court <<http://www.thecourt.ca/2009/12/16/r-v-grant-a-work-in-progress/>>.

61. *Grant*, *supra* note 2 at para 214.

62. *Ibid* at paras 217-222.

63. See *R v Johnson* (1971), 5 CCC (2d) 541 (NSCA) at 543, *aff'd* in *R v Craig*, 2009 SCC 23, [2009] SCJ No 23.

questionably outweighs the latter. She supports this contention by noting that the rights of the accused have already been considered under the first and second branches of the framework; to import this concern into the third branch of the framework would be illogical as it is concerned with *society's* interest in adjudication on the merits. Her view on this topic is expressed more emphatically in her decision in *Harrison* where she argues that the evidence would have been admitted, had the proper weight been accorded to the seriousness of the offence.⁶⁴ Justice Deschamps' dissent on this issue provides some explanation for the manner in which this factor has been applied in the post-*Grant* jurisprudence.

IV. PART THREE: IMPAIRED EXCLUSION

It will not be possible to comprehensively assess the impact of the Supreme Court's reformulation of the approach to the exclusion of illegally obtained evidence without several more years of judicial interpretation. However, in the nine months between the release of *Grant* and the publication of this article, there have been nearly 700 reported cases that have referenced the new framework. A quick survey reveals that impaired driving offences comprise the subject matter of more of these decisions than any other type of offence in the *Criminal Code*. Due to the unique difficulties of obtaining this evidence in a manner that conforms with the *Charter*, there is a large body of law concerning *Charter* breaches that arise from this setting. Because there is such a large proportion of exclusion of evidence cases in impaired driving that precede and follow *Grant*, this context provides a useful lens through which to assess the impact of the new framework. This section will draw upon post-*Grant* jurisprudence to illustrate how both the direct treatment of bodily evidence in *Grant* and the ambiguous treatment of the seriousness of the offence have caused the second and third branches of the *Grant* framework to favour the admission of breath samples. This is followed by an illustration of how these trends have caused good faith to emerge as the determining factor in the framework.

A. Applying the New Approach to Breath Samples

As outlined in part two, the removal of the bright line conscription rule has a particularly significant impact on the exclusion of evidence in impaired driving cases. Nevertheless, the majority in *Grant* go further by dealing with bodily evidence, breath samples in particular, directly.⁶⁵ In the same way that the automatic exclusion of conscriptive evidence was quickly adopted by defence counsel seeking to ensure that more breath samples would be excluded, the developments in *Grant* have been quickly adopted by the Crown to demonstrate why they should be admitted. This has resulted in a relatively predictable assessment of the second and third branches of the framework. The cases discussed below highlight both the consistency and willingness of trial judges to apply the instructions articulated in *Grant*.

In many senses, *R. v. Skuce*⁶⁶ provides a prototypical example of the manner in which the trial judge's application of the facts occurs primarily under the first branch of the framework, while the second and third branches are predominated by an importation of the

64. *Harrison*, *supra* note 3 at para 44.

65. Note that *R v Shepherd*, 2009 SCC 35, [2009] SCJ No 35, a case that deals with the exclusion of breath samples, was one of the companion judgments to *Grant*. While the application of section 24(2) was argued at trial and the appeal, the Supreme Court ultimately found that no *Charter* violation occurred. It is for this reason that their discussion of this type of evidence appears in *Grant* and not *Shepherd*.

66. *R v Skuce*, 2009 BCPC 333, [2009] BCJ No 2289.

principles articulated in *Grant*. The case involves breath samples that were obtained in violation of the accused's rights under ss. 8 and 9. With regard to the arbitrary detention, the officer had little other reason to detain the accused than her observation that the driver making an illegal "u-turn" on an overpass.⁶⁷ It was determined that the officer's opinion to detain and obtain breath samples was based on the officer's professional experience in observing the behaviour of impaired drivers.

In applying the *Grant* framework, Skilnick J., of the British Columbia Provincial Court, devotes significant attention to the interpretation and application of the first branch of the framework. In doing so, he highlights that the officer was merely exercising her judgement in detaining and searching the accused. Moreover, he finds that the search was conducted both professionally and courteously. Accordingly, he arrived at the conclusion that the seriousness of the breach was minimal.⁶⁸ Skilnick J.'s analysis of the second branch is highly similar to the analysis conducted by trial judges in most impaired driving cases. The facts considered here are common: his liberty was restricted when he had to wait for a test with an approved screening device and he was deprived of the privilege to drive during the period after the offence.⁶⁹ Skilnick J. proceeded to apply the dicta from *Grant* in concluding that these infringements represented a small impact on his rights.⁷⁰ Finally, he dealt with the third branch in a summary fashion, finding the reliability of the samples to be the "strongest argument in favour of the inclusion of the evidence in cases of this nature".⁷¹ In balancing the three branches, Skilnick J. concluded that the breath samples should be admitted. *Skuce* provides a strong illustration of the manner in which most impaired driving cases will not require a judge to devote significant consideration to the second and third branches of the framework.

*R. v. Haut*⁷² is a member of the minority of cases for which the exclusion of evidence analysis differs significantly from the template demonstrated in *Skuce*. While it does not detract from the argument that the seriousness of the violation is the probable branch of the framework under which most breath samples will be excluded, it demonstrates the manner in which this branch will usually affect the trial judge's determination of the second branch. *Haut* involves a detention and request for breath samples that were made in the absence of good faith. Allen J., of the Alberta Provincial Court, found that the officers involved used excessive force in arresting the accused, the passenger of vehicle was unnecessarily arrested, and there was a lack of reasonable grounds for requesting a breath sample.⁷³ In light of the finding that the breaches under ss. 8 and 9 were made in the absence of good faith, it seemed nearly inevitable that the impact on the rights of the accused would be viewed in a manner that favoured exclusion. Allen J. recognizes the holding in *Grant* that the collection of breath samples will generally be deemed an unobtrusive procedure, yet he stresses that "all the circumstances must be considered, including the circumstances leading to the breach, and any detention necessary to obtain the breach samples".⁷⁴ In this case, the facts considered under the first branch of the framework reveal that such circumstances are sig-

67. *Ibid* at para 7; The video of the accused, as captured by the camera mounted in the officer's cruiser, at the subsequent roadside sobriety test did not indicate anything irregular in the accused's behaviour.

68. *Ibid* at para 35.

69. *Ibid* at para 40.

70. *Ibid* at para 41.

71. *Ibid* at para 42.

72. *R v Haut*, 2010 ABPC 2, [2010] AJ No 113 [*Haut*].

73. *Ibid* at paras 36-53.

74. *Ibid* at para 65.

nificant and favour exclusion. Although the third branch was found to favour inclusion,⁷⁵ as is generally the case with breath samples, Allen J. held that the exclusion of the evidence, in light of all three branches, was necessary in order to maintain the long-term repute of the administration of justice.⁷⁶ Although *Haut* demonstrates that a finding of the absence of good faith will often be accompanied by a finding that the impact on the rights of the accused was significant, this does not detract from the argument that the origin of most successful arguments for the exclusion of evidence will fall under the first branch of the framework. The interconnectedness of the two branches is also supported by Justice Deschamps' dissenting proposal in *Grant* for a two-branch framework under which the first two branches of the majority's framework would effectively be combined.

In *R. v. Usher*,⁷⁷ a recent decision from the British Columbia Supreme Court, defence counsel sought to question the direct treatment of breath samples by the majority in *Grant*. Acting for the appellant, H. Rubin Q.C. argued that the consideration of the second branch of the framework extends beyond the application of the majority's ruling that the obtaining of breath samples does not result in a serious violation of an individual's privacy, bodily integrity, or dignity. He argued that the related liberty-interests of the individual are engaged: taking the individual to a police detachment, detaining them, and towing their car.⁷⁸ Barrow J. rejected this argument and found that the post-*Grant* law has correctly applied the approach to the second branch as instructed by *Grant*.⁷⁹ *Usher* acts as a counterpoint to *Haut* in that it suggests that findings in favour of exclusion under the second branch of the framework are best restricted to consideration under the first branch. Thus, where *Haut* appears to provide discretion to the trial judge in their consideration of the second branch, *Usher* suggests that it is better exercised under the first.

While most of the post-*Grant* impaired driving jurisprudence emanates from lower courts, *Forsythe*⁸⁰ and *McCorriston*⁸¹ are two instructive decisions from the Manitoba Court of Appeal. These cases help to provide definition regarding the proper application of the *Grant* principles in relation to the second and third branches of the framework. Both cases deal with the issue of whether or not it is necessary to resort to a s. 24(2) analysis where it has been shown that a police officer has failed to adhere to the statutory requirements of s. 254(3). The defence had attempted to advance the argument that the failure of the police to demand the sample "as soon as practicable" resulted in an automatic exclusion, irrespective of a s. 24(2) analysis, on the grounds that there had been a failure by the officer to abide by the statutory requirements. The appeal judges followed the earlier line of jurisprudence, established in *Rilling*⁸² and *Bernshaw*,⁸³ to support the contention that an automatic exclusion will not occur. While a failure to abide by the statutory requirements for obtaining samples from a motorist will inevitably influence a judge's s. 24(2) analysis in favour of the accused, *Forsythe* and *McCorriston* both articulate the proposition that it will generally be necessary for the trial judge to consider whether or not a s. 8 violation has occurred. Whether or not they proceed with a s. 24(2) analysis would depend on that result. Since the result of the second and third branches of the framework will likely be presumed,

75. *Ibid* at para 72.

76. *Ibid* at para 81.

77. *R v Usher*, 2010 BCSC 1745, [2010] BCJ No 2432.

78. *Ibid* at para 39.

79. *Ibid* at para 43.

80. *R v Forsythe*, 2009 MBCA 123, [2009] MJ No 438.

81. *R v McCorriston*, 2010 MBCA 3, [2010] MJ No 2.

82. *Rilling v The Queen*, [1976] 2 SCR 183.

83. *R v Bernshaw*, [1995] 1 SCR 254, [1994] SCJ No 87.

these cases support the argument that cases such as these that involve a police officer's failure to uphold the relevant statutory requirements will also turn on the trial judge's determination of good faith.

B. Questionable Reliance on the Seriousness of the Offence

An additional factor of the framework that has tended towards admission in impaired driving offences is the seriousness of the offence. As established in part two, the majority in *Grant* cautioned against relying upon this factor in considering society's interest in adjudication on the merits, although they have not expressly prohibited it from the framework. The interpretations of this element in impaired driving jurisprudence have been markedly inconsistent. At one end of the spectrum, trial judges have interpreted *Grant* to have held that the seriousness of the offence "is not to be considered because s. 24(2) is concerned with the long-term repute of the administration of justice".⁸⁴ At the other end, trial judges have devoted considerable attention to the seriousness of impaired driving, referring to it as "a scourge of modern society".⁸⁵

This uncertainty in the law is relevant to this article because most of these decisions have interpreted the seriousness of the offence in a manner that favours admission of the evidence. With the majority's discussion of how breath samples should be considered under the third branch of the framework, there is already a *de facto* presumption against the exclusion of breath sample evidence. It is unnecessary to resort to a consideration of the seriousness of the offence to further support findings of exclusion, particularly when impaired driving cannot accurately be characterized as a serious criminal offence. In light of the limited field in which to argue for the exclusion of breath samples under the second and third branches of the framework, the consideration of the seriousness of the offence further constrains the debate over exclusion to the first branch, and the determination of good faith in particular.

R. v. Srokosz,⁸⁶ an impaired driving case from the Ontario Provincial Court, provides an example of the reliance on the seriousness of the offence in a manner that favours admission. Although Judge O'Dea recognizes that impaired driving is not generally considered a serious offence, he proceeds by noting the potential for harm that these offences create in order to show why society would wish to have the impugned breath samples admitted.⁸⁷ While the harm that may be inflicted on innocent individuals is an important consideration, it does not seem to be provided for by the majority in *Grant*. The reliance on the seriousness of the offence was significant in this case because the determination of good faith fell somewhere within the middle of the spectrum considered by the majority in *Grant*.⁸⁸ Without a clear finding in either direction on the first branch of the framework, the additional weight placed on the seriousness of the offence appears to have swayed the framework towards admitting the evidence.

84. *Haut*, *supra* note 72 at para 69.

85. *R v Pinchak*, 2010 ABPC 44, [2010] AJ No 156 at para 61.

86. *R v Srokosz*, 2009 ONCJ 559, [2009] OJ No 4953 (QL) at para 88.

87. *Ibid*; See *R v Mudryk*, 2009 ABPC 253, [2009] AJ No 1072 at para 33 for similar reasoning.

88. The officer had failed to communicate the accused's right to counsel per s. 10(b) because of background noise coming from both the car radio and police communications radio in the police cruiser. Justice O'Dea found that this error demonstrated "a lack of consideration for the importance of the duty being undertaken and the importance to the person in his custody to hear what he had to say". *Ibid* at para 68.

*R. v. Winter*⁸⁹ illustrates another manner in which trial judges have considered the seriousness of the offence in a way that causes the third branch of the framework to lean further in favour of admission. In considering the factor, Justice Brown characterizes the offence of impaired driving as a serious one. However, he then quotes the section from *Grant* that deals with this factor so as to indicate that it must not heavily influence the analysis, if at all.⁹⁰ He then proceeds to consider the circumstances of the particular offence, drawing attention to the high blood alcohol content of the accused. In doing so, he finds that these circumstances favour inclusion.⁹¹ This reasoning demonstrates the breadth with which the factor is considered.⁹² Moreover, it shows the manner in which trial judges seem to be broadening the purpose of the third branch of the inquiry. While *Grant* is clear that this branch should consider society's interest in adjudication on the merits, these decisions appear to import into the framework the broader societal concern that crimes that are easily preventable and often involve innocent victims should be punished in order for the repute of the justice system to be maintained.

What is concerning about the reliance on this factor in the impaired driving context is the fact that, in most cases, it is an unnecessary consideration. The majority in *Grant* made clear the fact that breath sample evidence is highly reliable and, in most cases, it will be virtually impossible for the Crown to successfully prosecute the offence without it. The certainty and strength of these two factors make it unnecessary to consider the seriousness of the offence. Even if the relative non-seriousness of impaired driving is addressed, *Grant* makes sufficiently clear that the third branch will tend towards the admission of breath samples.⁹³ Regardless of the legitimacy of the current trend of trial judges to interpret the seriousness of the offence in favour of admission, it reinforces the fact that the majority of the analysis, that is not predetermined by *Grant*, will occur under the first branch of the framework.

C. The Narrowing Effect of Good Faith

The developments considered above make it clear that the new *Grant* framework and its subsequent interpretation establish large obstacles in seeking the exclusion of breath samples. However, this is unlikely to have an effect on the number of defendants who seek a remedy under s. 24(2). Thus, it is essential to develop a clear understanding of what scope of argument remains in this arena. Thus far, the discussion of the post-*Grant* jurisprudence has pertained to the second and third branches of the framework. It seems clear that there is a small likelihood of a trial judge basing a decision for exclusion under either of these branches. While the purpose of the *Grant* framework is to ensure that a trial judge consider all of the relevant circumstances in order to arrive at a conclusion regarding the exclusion of the evidence, the treatment of breath sample evidence in *Grant* and the subsequent interpretation of the seriousness of the offence suggest that both the second and third branches will generally favour admission of breath samples. Thus, it becomes apparent that in most cases the scope of argument for defence counsel will be limited to a consideration

89. *R v Winter*, 2010 ONCJ 147, [2010] OJ No 1733.

90. *Ibid* at para 61.

91. *Ibid* at para 64.

92. *R v Leonardo*, 2009 ONCJ 507, [2009] OJ No 5082 at para 35 provides an example of where a low blood alcohol content was considered under the factor of the seriousness of the offence. The case is part of a small minority of cases where this factor has influenced the analysis towards excluding the evidence. Notably, the first two branches of the framework were also considered to favour exclusion.

93. *Grant*, *supra* note 2 at paras 110-111.

of the seriousness of the *Charter*-infringing state conduct, under the first branch of the framework.

As discussed in part two, Justice Deschamps' primary disagreement with the majority in *Grant* is their excessive consideration that the framework places on state conduct. The question of whether or not trial judges are, in fact, basing their decisions on a finding of good faith is difficult to answer from the jurisprudence interpreting *Grant*. Even in the most comprehensive decisions, it is difficult to assess the weight placed on each branch of the framework. As stated by the majority, "The balancing mandated by s. 24(2) is qualitative in nature and therefore not capable of mathematical precision."⁹⁴ As established above, however, it seems that most decisions involving impaired driving offences turn on the absence or presence of good faith displayed by the police officer because of the challenge in overcoming the presumed results of the second and third branches of the framework. Thus, while *Grant* may have improved the framework by restoring trial judges' ability to consider all the circumstances by removing the automatic exclusion of conscriptive evidence, the manner in which the framework applies in impaired driving offences suggests that a judge's discretion might not have been expanded by *Grant*, but merely diverted to the consideration of good faith.

In *R. v. Booth*,⁹⁵ a recent decision from the Alberta Court of Queen's Bench, Clackson J. provides a unique stance on the concept of good faith. He proposes that the majority in *Grant* might not have adopted the best-suited language with good and bad faith. He suggests the concept of good faith is insufficiently concrete to attach or exclude itself from "inadvertence, minor violations, or an honest but mistaken belief."⁹⁶ A survey of the applications of the s. 24(2) framework that have been made since *Grant* confirms this ambiguity. Clackson J. suggests that, with respect to the mental intent of police officer in question, the egregiousness of the state conduct should be considered objectively:

The analysis is not defined by faith, or intent, but by the egregiousness of the state conduct. There is no added requirement to consider the mental processes of the authorities engaged in the breach, rather, intention is a part of the process of determining how egregious the conduct was. It is a factor, not the answer.⁹⁷

While the process of extricating good faith from this branch of the framework may pose a practical challenge to trial judges, this suggestion might assist in controlling good faith such that it does not override the s. 24(2) analysis.

While Clackson J. advocates for a form of control with regard to the correct analysis of the first branch of the *Grant* framework, *R. v. Synkiw*,⁹⁸ a decision of the Saskatchewan Provincial Court, represents an example of the influence that *Harrison* has had on the subsequent application of the first branch of the framework. In *Harrison*, Charron J. made particular note of the trial judge's assessment of the arresting officer's in-court testimony in considering the first branch of the s. 24(2) framework. In *Synkiw*, Labach J.'s analysis under the first branch seems to be guided by his assessment of the arresting officer's testimony. It begins with the words, "I did not believe Constable Comley's testimony that he stopped the

94. *Grant*, *supra* note 2 at para 140.

95. *R v Booth*, 2010 ABQB 797, [2010] AJ No 1476.

96. *Ibid* at para 11.

97. *Ibid*.

98. *R v Synkiw*, 2010 SKPC 152, [2010] SJ No 730.

accused for a Traffic Safety Act infraction.”⁹⁹ While it is not explicitly stated in his judgment, it appears as if the officer’s dishonesty in court acts as a further aggravating factor under the first branch; as if the officer’s failure to tell the truth, as perceived by the trial judge, is a perpetuation of the misconduct that was exhibited during the incident in question. In this manner *Synkiw* provides an important illustration of the breadth and shape of judicial discretion with respect to the first branch of the framework.¹⁰⁰

V. CONCLUSION

Clearly, the intent of the majority in *Grant* in their direct treatment of bodily evidence was to restore certainty to how this category of evidence was considered. Unfortunately, due to the relatively uniform nature in which this treatment has been applied, there is a risk that trial judges will fail to genuinely engage in each of the three branches of the framework as prescribed by *Grant*. This is exacerbated by the prevailing interpretation of the seriousness of the offence, which acts to further pre-determine the third branch of the analysis. While the proportion of cases in which breath samples should be excluded solely on the second and third branches of the analysis may be small, if the seriousness of the state conduct continues to be the only inquiry that can lead to exclusion, there is a risk that trial judges will be less willing to look elsewhere.

The concern with over-reliance on the first branch of the *Grant* framework is not without remedy. The critiques that have been expressed in this article pertain primarily to its application, not its composition. In the months and years that follow, courts will likely be confronted with breath samples that are unreliable or obtained in a manner that significantly infringes the rights of the accused, in the absence of any state misconduct. Similarly, the inconsistent interpretations of the seriousness of the offence by trial judges can easily be brought into line by a clearer treatment of this issue by the Supreme Court. In light of the emphasis with which this factor is considered by trial judges, it is essential that they receive further guidance on how to properly integrate this consideration into the framework.

99. *Ibid* at para 83.

100. For further assessment of the broadened scope of trial judges in conducting the s 24(2) in the post-*Grant* era see Kent Roach “The Future of Exclusion of Evidence after *Grant* and *Bjelland*” (2009) 55 *Criminal Law Quarterly* 285 at 286.