ABSTRACT

ASSESSING TRENDS IN THE APPLICATION OF THE EXCLUSIONARY RULE AT THE PROVINCIAL APPELLATE LEVEL: RETRENCHMENT OF RIGHTS AT THE O. C. A.

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Although debates surrounding the exclusionary rule are as old (or older) than the rule itself, the Supreme Court’s recent decision in *Grant* has renewed debates over the principle and application of the rule. This thesis empirically assesses trends in the admission of improperly obtained evidence at the Ontario Court of Appeal (O.C.A.) with the aim of drawing some preliminary conclusions about the nature of judicial decision-making. Utilizing all O.C.A. cases involving consideration of s. 24(2) from the enactment of the *Charter* in 1982 to December 31st 2010, this study aims to reveal and understand trends in the exclusion of evidence in terms of the characteristics of the evidence, type of rights found to be violated, individual judicial characteristics and deference to lower courts while paying particular attention to the effect of precedent on the outcome.
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INTRODUCTION

Achieving a balance between the interest of society in convicting the guilty and the rights of the accused is a notoriously difficult pursuit, both in theory and in practice. In Canada, the protections guaranteed to the criminally accused in the *Charter of Rights and Freedoms* are supported by the remedial provision of section 24(2), also known as the ‘exclusionary rule’. This rule attempts to balance these competing interests by requiring courts to exclude evidence where it is concluded that the evidence was obtained in violation of the rights of the accused, *so long as* “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” (*Canadian Charter of Rights and Freedoms*, s. 24(2), 1982). Debates surrounding the application of the exclusionary rule are as old (indeed, older) than the rule itself, but the Supreme Court’s recent reformulation of the judicial test for admissibility under section 24(2) in *R. v. Grant*, 2009 SCC 32 has renewed debates over both the principle and application of the rule. These debates have been engaged with very little empirical study on either side.

Utilizing all Ontario Court of Appeal cases involving s. 24(2) from the enactment of the *Charter* in 1982 to December 31st 2010, this study aims to reveal and understand trends in the exclusion of evidence in terms of the characteristics of the evidence, type of rights found to be violated, individual judicial characteristics and deference to lower courts while paying particular attention to the effect of precedent on the outcome. In this way, the study is able to evaluate and contextualize recent developments within a broader historical framework. In addition to
highlighting the practical effect of judicial doctrine, this study aims to further theoretical debates by using the exclusion data as an empirical case to evaluate competing philosophies of judicial decision-making.

The results of the study indicate that, overall, the Ontario Court of Appeal admits more evidence than it excludes. Some of the most significant findings of this study reveal “pocket trends” in section 24(2) jurisprudence based on Supreme Court precedent, which lend support to an understanding of judicial decision-making as rooted in doctrine and constrained by precedent. Taken together, the findings of this study indicate that the Ontario Court of Appeal has become increasingly reluctant to exclude improperly obtained evidence.

Chapter One charts the evolution of the Canadian exclusionary rule. Beginning with a look at the pre-Charter common law approach to exclusion, this chapter examines the conspicuous absence of an exclusionary remedial provision in early drafts of the Charter as well as Parliament’s intent in the eventual inclusion of section 24(2). The judicial evolution of the doctrine is traced from the original framework for its application in R. v. Collins, [1987] 1 S.C.R. 265 through the controversial R. v. Stillman, [1997] 1 S.C.R. 607 restatement and ends with an in-depth examination of the Court’s most recent reformulation of the rule in Grant.

Chapter Two delves further into the academic arguments, debates and research regarding the rule in each of the aforementioned eras established by those key precedents. The objective of this chapter is to illustrate the impetus behind the changing jurisprudence by highlighting key commentary and criticism.
The commentary explored in Chapter Two suggests that the Court’s recent decision in *Grant* will lead to the increased admission of improperly obtained evidence; thus, there is the tacit acknowledgement that law ‘matters’ in judicial decision-making (at least to some extent). Yet, some scholars emphasize the importance of individual or extra-legal factors in guiding judicial decision-making over doctrinal considerations. In this light, Chapter Three explores and evaluates competing theories of judicial decision-making: the doctrinal model, the attitudinal model, and judicial pragmatism. These theories are evaluated further in subsequent chapters through the use of the exclusion data. While it is acknowledged that no model can be said to exclusively manifest itself in the real world, certain models have more relative explanatory power.

Chapter Four outlines the methodology employed in the current study including a description of the data collection techniques, definitions of the variables and summaries of the four analytical models. Each of the analytical models are outlined before being expanded upon in the following chapter. Chapter Five presents the findings of the current study, organized within the four analytical models: 1) Predicting outcome based on rights violated, type of evidence and category of evidence; 2) Effect of precedent on outcome; 3) Deference to lower courts; 4) Measuring influences on judicial decision-making.

Chapter Six highlights some of the most significant findings of the current study and discusses both theoretical and practical implications. This chapter also presents suggestions for avenues of further study. Finally, the thesis concludes by situating the study’s findings within the context of recent
developments in legal rights jurisprudence and the broader context of the role of
the courts as a check against majoritarian pressures.
CHAPTER ONE: JUDICIAL EVOLUTION OF THE EXCLUSIONARY RULE

In the twenty-seven years since the enactment of the Charter, the Supreme Court has developed a number of tests to guide courts in the application of the s.24(2) exclusionary rule. Yet, despite decades of decisions in this area, jurisprudence is confusing and, at times, conflicting. Not only are courts confused regarding whether or not to admit evidence obtained in violation of an accused’s rights, but they also disagree with respect to what constitutes a rights violation: Are breath samples taken in violation of s. 10(b) admissible? When does the good faith of the police compensate for the seriousness of a violation? If evidence is conscriptive will this always impact the fairness of the trial? Is trial fairness determinative? These are some of the many questions that the courts have been grappling with for almost thirty years.

This chapter will begin by briefly overviewing the Supreme Court’s pre-Charter approach to improperly obtained evidence and reviewing Parliament’s legislative intent in drafting s. 24(2). This will be followed first by an examination of the Collins test and later by an overview and discussion of the Stillman test, which attempted to clarify the approach to trial fairness. Finally, this chapter will take an in-depth look at the Court’s recent decision in Grant, which reformulates the test for exclusion to address criticisms of the former approach in an effort by the Court to better reflect Parliament’s intent in drafting this remedial provision. Is this new test a revolution in the development of the rule or simply a return to Collins or even Wray? It will be argued that we have...
now come full-circle in terms of the test for determining admissibility under s. 24(2).

**The Pre-Charter Approach**

Prior to the entrenchment of the *Charter* in 1982 there existed no statutory or constitutional rule in Canada governing the admission of improperly obtained evidence and common law generally favoured the admission of any evidence which was deemed relevant and reliable (Skinnider, 2005). In *R. v. Wray*, [1971] S.C.R. 272, the Supreme Court overturned the decision of the lower courts and ruled in favour of admitting evidence derived from an involuntary confession. In a 5:3 ruling, the Court held that “evidence which is relevant is admissible no matter how it is obtained” (*Wray*, 1971, p. 673 as cited in Nasheri, 1996). That police misconduct should not necessarily result in the exclusion of evidence was reiterated by the Court in the 1975 case of *Hogan v. R.*, [1975] 2 S.C.R. 574 wherein evidence of a breathalyzer test was admitted despite the violation of the accused’s right to counsel as “guaranteed” by the Canada’s statutory Bill of Rights.

In 1975 the Law Reform Commission of Canada advocated for an amendment to the *Evidence Act* that would require the exclusion of ill-obtained evidence where its admission would bring the administration of justice into disrepute (Parachin, 2000). Similar recommendations came from Ontario Law Reform Commission in 1976 and, as Parachin (2000) and Skinnider (2005) note, in 1981, the McDonald Commission stated:

It can now be said, at least in this country and in regard to the RCMP, that the attitude of members of the Force, as expounded by its most senior officers, is to regard the absence of critical comment by the judiciary as tacit approval of forms of conduct that might be unlawful (Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police (McDonald Commission Report), 1981: 1039-1041).
Despite these recommendations and findings, in drafting the Charter, the Framers initially declined to include a provision for the exclusion of evidence as a remedy to rights violations (MacDougall, 1985). As of October 1980, the proposed wording reflected the majority decisions in Wray and Hogan; section 26 of the proposed draft of the Charter read:

No provision of this Charter, other than section 13 [self-incrimination], affects the laws respecting the admissibility of evidence in any proceedings or the authority of Parliament or a legislature to make laws in relation thereto (Proposed Resolution for a Joint address to Her Majesty the Queen Respecting the Constitution of Canada Oct. 2, 1980).

Were this draft to have been enacted it would have reinforced the status quo and sent a message to the courts that Canadians did not support the exclusion of relevant and reliable evidence. As MacDougall (1985) notes, in 1981 the Canadian Federal/Provincial Task Force on Evidence, after four years of studying evidentiary rules, recommended that there be no provision for the exclusion of illegally or improperly obtained evidence and no such rule was incorporated into the first drafts of the Charter.

It was at the hearings of the Special Joint Committee of the Senate and House of Commons on the Constitution of Canada (hereafter the Special Joint Committee) that the necessity of entrenching a remedy to constitutional violations was advanced, leading to the creation of s. 24 (Kelly, 2007). Yet, this last-minute addition to the Charter was not intended to replicate the “absolutist” exclusionary rule then found in American jurisprudence and popularized by American movies and TV shows. Indeed, the framers of s.24 were well aware of the controversial nature of the U.S. rule and designed s.24 to avoid the wholesale importation of the U.S. doctrine. In the landmark case of Mapp v. Ohio, 367 U.S. 643 (1961), the United States Supreme
Court ruled that the exclusionary rule for federal prosecutions (adopted in *Weeks v. United States*, 232 U.S. 383 (1914)) should be applied nationwide and thus a constitutional right against the admission of illegally obtained evidence was established in all criminal proceedings. The core reasoning of *Mapp* suggested that it was not the ‘truth and fairness’ of the trial that was at issue but rather the state’s improper actions to obtain the evidence. According to Justice Clark’s majority judgement, “[n]othing can destroy a government more quickly than its failure to observe its own laws” (*Mapp*, 1961 at para. 367). As such, the *Mapp* rule was sharply at odds with the Canadian jurisprudence at the time.

By the time the *Charter* was being framed, however, Americans themselves were revisiting the ‘bright lines’ approach and several judgments had already started to limit the exclusion of improperly obtained evidence. In *Bivens v. Six Unknown Narcotics Agents*, 403 U.S 338 (1971), Chief Justice Burger’s dissent marked a watershed in the history of the rule by questioning “the high price it [the rule] extracts from society -- the release of countless guilty criminals” (*Bivens*, 1971 at p. 403 U.S. 416; quoted in Schlesinger, 1977, p. 100). Following this ruling a series of cases began to chip away at the application of the rule. In *United States v. Calandra*, 414 U.S. 338 (1974), the Court allowed ill-obtained evidence to be used in questioning a witness at the grand jury stage (Schlesinger, 1977). By 1984, the Burger Court had clearly established several broad exceptions to the exclusionary rule, finding that the rule does not apply to evidence that would have “inevitably” been discovered without the violation (*Nix v. Williams*, 467 U.S. 431 (1984)) or evidence that was obtained

Thus, by the time of the Special Joint Committee hearings, both the ‘automatic’ *Mapp* rule (now appearing problematic in its domestic context) and the restrictive *Wray* rule (the Canadian status quo) seemed unattractive. Even civil liberties associations, who were critical of *Wray*, did not advocate the ‘bright lines’ American-style approach but rather an approach which balanced competing interests and allowed judges discretion to admit or exclude (Kelly, 2007). The creation of section 24 can be seen as a typically Canadian effort to balance the English tradition (wherein most relevant evidence was admitted) with the American tradition (wherein illegally obtained evidence was almost automatically excluded). As drafted, this compromise read:

> 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 (*Canadian Charter of Rights and Freedoms*, s. 24(2)).

Once drafted and entrenched, however, it would become the Supreme Court of Canada’s responsibility to achieve this balance in practice.

**Collins: Balance and Flexibility Under the Charter**

In *R. v. Collins*, [1987] 1 S.C.R. 265, the Supreme Court created a three-pronged test for determining whether or not to exclude evidence under s.24(2). In *Collins*, the Court emphasized “all the circumstances” and guided courts in making assessments regarding admission by grouping the factors that trial judges must consider. The *Collins* test provided that in determining whether or not to exclude evidence courts must consider three sets of factors: 1) those relating to the
fairness of the trial (e.g., was the evidence obtained by conscripting the accused against himself?), 2) those relating to the seriousness of the Charter violation (e.g., how egregious was the police misconduct?) and 3) those factors relating to the effect of exclusion on the repute of the administration of justice (e.g., how does the seriousness of the charge weigh against severity of the rights violation?).

The standard by which to determine whether the administration of justice would be brought into disrepute was paid much attention in both the majority and minority decisions. This issue of perspective is important because while the public is generally thought to favour admission, legal scholars and the judiciary are believed to be more inclined to favour exclusion. If these assumptions are accurate, then the perspective a court chooses to adopt in examining the impact of admission on the repute of the administration of justice would significantly impact s. 24(2) determinations.

What then is the standard by which courts are to determine whether the administration of justice would be better served by admission versus exclusion? In Collins, the Court rejects the application of the community shock standard (which is community centered and is often referred to in regard to obscenity law) to the Charter, yet acknowledges that judicial opinion alone should not be determinative.

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1 Indeed, a study by Bryant, Gold, Stevenson, Northrup (1990) found that members of the public were less inclined to exclude improperly obtained evidence than their judicial counterparts. Utilizing national public survey data, the study found that although the public and judges consider many of the same factors in determining admissibility, the public is significantly less likely to conclude that the repute of the administration of justice would be better served by exclusion (Bryant et al., 1990). Similarly, a study by Fletcher and Howe (2000) posed questions to the public based on scenarios similar to those in R. v. Therens, [1985] 1 S.C.R. 613 and R. v. Feeney, [1997] 2 S.C.R. 13 to assess public opinion on key Charter decisions. The results of the latter study further reinforce the notion that the public’s determination of the effect of admission/exclusion on the repute of justice is often divergent from what the Court determines it would or should be.
Instead, it is suggested that the decision be left to the “reasonable man”. According to the Court, “The reasonable person is usually the average person in the community, but only when that community's current mood is reasonable” (Collins, 1987 at para. 33, emphasis added). The Court continues: “The Charter is designed to protect the accused from the majority, so the enforcement of the Charter must not be left to that majority” (para. 32). Essentially, while the Court concedes that the prevailing sentiment of the public has a role to play in determining whether the admission of evidence in a given case would bring the administration of justice into disrepute, the Court rejects the notion that public opinion - which generally favours admission - should be supplanted in favour of the judicial opinion. As Paciocco (1989) notes, this test is a “reasonable judge” test since the judiciary gets to determine what the mood or opinion of the public should be, and in doing so, “they themselves get to define what conduct of theirs will bring them into disrepute” (p. 343).

In addition to formulating a test for admission the Court took this opportunity to discuss the purpose of the exclusionary rule. In Collins the Court provided its understanding of the purpose of s. 24(2) at paragraph 31 where it notes that a) the rule is not to be used as a remedy for police misconduct but rather to prevent the administration of justice from being brought into further disrepute, b) it is necessary to consider the effect of exclusion on the repute of the administration of justice, and c) the concern should be for the “long-term consequences of regular admission or exclusion” on the repute of the administration of justice.

Justice Lamar, writing for the majority in Collins, stated: “Members of the public generally become conscious of the importance of protecting the rights and freedoms of accused only when they are in some way brought closer to the system either personally or through the experience of friends or family. Professor Gibson recognized the danger of leaving the exclusion of evidence to uninformed members of the public when he stated at p. 246: The ultimate determination must be with the courts, because they provide what is often the only effective shelter for individuals and unpopular minorities from the shifting winds of public passion” (Collins, para, 32).
The Court’s decision in *Collins* was not unanimous; Justice McIntyre dissented from Justice Lamer’s majority opinion and Justice LeDain concurred only in part. McIntyre sided with the provincial appellate Court and preferred a “less formulated” test for admission than the one proposed by the majority (*Collins*, para. 49). LeDain offered a concurring opinion in which he gently questioned the majority’s approach to trial fairness. In short, LeDain notes his concern regarding the potential implications of the majority’s approach under the first set of factors to be considered (those relating to the fairness of the trial). He wonders (without deciding) whether these factors should necessarily (i.e., in general) lead to exclusion under a proper interpretation of s. 24(2) (see *Collins*, para. 53).

The actual words of the Court are sometimes forgotten or obscured in later cases and controversies. With respect to *Collins*, subsequent decisions of the High Court and lower courts have questioned, for example, the appropriateness of examining the effect of exclusion on the repute of the administration of justice, either forgetting or ignoring that this basic principle has already been decided - first by Parliament and then by the Supreme Court itself. The essential purpose of the rule was obscured by the Court’s decision in *R. v. Stillman, [1997] 1 S.C.R. 607*, to which this chapter now turns its attention.

**Stillman: Wayward Precedent**

Following *Collins*, a pattern of exclusion emerged in the decisions of the Supreme Court when trial fairness was at issue. In *R. v. Hebert, [1990] 2 S.C.R. 151* the Court suggested that if the admission of evidence would call into question the fairness of the trial it should be excluded and there need not be an
examination of the other sets of factors - that is, fairness alone could be
determinative (Hebert, 1990, p. 61; Skinnider, 2005). This decision was
reaffirmed by the Court in R. v. Elshaw, [1991] 3 S.C.R. 24 and restated more
explicitly in R. v. Mellenthin, [1992] 3 S.C.R. 863 (which also served to extend a
reasonable expectation of privacy to one’s vehicle) and, yet again, in R. v.
Burlingham, [1995] 2 S.C.R. 206 (which extended the rule to encompass all
evidence which was derived from a self-incriminating statement obtained in
violation of the accused’s rights) (Skinnider, 2005; Stillman at paras. 244 - 249).

In R. v. Stillman, [1997] 1 S.C.R. 607, the Court was presented with a
particularly difficult set of facts. At the age of seventeen William Stillman was
arrested for the rape and murder of a fourteen year old girl. At the police station, the
accused’s lawyers informed the police - in writing - that their client was not
consenting to provide any bodily samples, including hair and teeth imprints, or to
give any statements. Nevertheless, police officers, under threat of force, took scalp
and pubic hair samples as well as plasticine teeth impressions and buccal swabs.
Additionally, the police interviewed the accused for an hour without the presence of
the accused’s counsel or parents – in direct violation of the Young Offender’s Act.
The Court ruled the above evidence (obtained in violation of the accused’s s. 7 and s.
8 rights) was inadmissible pursuant to s. 24(2). However, in addition to the bodily
samples listed above, the police had also obtained a discarded tissue containing DNA
from the accused while he was in custody. Although the Court ruled that the evidence
of the tissue was obtained in violation of the accused’s s. 8 rights, it was held to be
admissible as the violation in this instance was not serious and the evidence was discoverable through legal means (see Stillman, para. 128).

A decade after Collins, in Stillman, a majority of the Court revisited the first set of Collins factors by creating what Mahoney (1999, p. 443) aptly refers to as an “undeniably convoluted restatement of the initial “fair trial” inquiry”. The Court’s two-step test to determine the effect of the admission of evidence on trial fairness asks: 1) Was the evidence conscriptive? That is, was the accused compelled to participate in the discovery or creation of evidence? and 2) Was the evidence discoverable through non-conscriptive means (or lawful conscription)? Under this test, if the evidence in question is non-conscriptive (or conscriptive but discoverable through lawful means) then the court should move on to consider the other two Collins factors. If, however, the evidence is conscriptive and was not discoverable through other non-conscriptive means, then it is a matter of trial fairness and should, as a general rule, be excluded\(^3\); in practice, this would come to mean automatic exclusion for conscriptive evidence and for this reason Stillman marked a significant move toward a ‘quasi-automatic exclusionary rule’.\(^4\)

The majority opinion in Stillman has been subject to considerable criticism, perhaps none more pointed than that expressed by the dissenters. The Court was

\(^{3}\) At paragraph 72, the majority of the Court states: “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” (R. v. Stillman, [1997] 1 S.C.R. 607).

\(^{4}\) Following Stillman, in both R. v. Buhay, [2003] 1 S.C.R. 631 and R. v. Mann, [2004] 3 S.C.R. 59 the Court excluded non-conscriptive evidence based on the belief that it would bring the administration of justice into disrepute if admitted. This marked a further expansion of the rule since in neither case was the accused conscripted against himself and the Charter violations involved were, arguably, minor (Skinnider, 2005).
sharply divided on the scope of the common law right against self-incrimination and the appropriate test for determining exclusion with three of the nine justices emphatically rejecting the quasi-automatic categorical approach taken by the majority. The central criticisms of the ruling question a) the approach to trial fairness and the discoverability doctrine and b) the expansion of the rule against self incrimination to include bodily evidence.

Justices McLachlin, L’Heureux-Dubé and Gonthier each took issue with the majority’s characterization of the proper approach to evaluating trial fairness (and its impact) in the context of a s. 24(2) inquiry. McLachlin and L’Heureux-Dubé (in separate opinions) held that the majority’s new test, which in their view called for the automatic exclusion of non-discoverable conscriptive evidence, was contrary to both the spirit and plain wording of s. 24(2) (see, Stillman, para. 250). They argued that a conception of trial fairness as determinative of admissibility fails to adhere to the text and purpose of the remedial provision which demands consideration of “all circumstances”. This is perhaps one of the strongest criticisms of the “automatic” rule – especially in light of the legislative history of the rule – and one which has been echoed by jurists and legal scholars alike (see Parachin 2000; Paciocco, 1990; Mahoney, 1999). For example, Paciocco (1989) states, “Uncategorical judicial statements by the Supreme Court of Canada have produced a rule which bears little relationship to the text of the section” (p. 326).

Justice McLachlin’s dissent articulated another central criticism of the majority’s approach to trial fairness. McLachlin noted that such an approach conflates
“unfair aspects of a trial and a fundamentally unfair trial” (Stillman, para. 257). As she states,

… the accused is entitled to a fundamentally fair trial. That does not mean that it must be perfect. Even the best-run trials may have aspects of unfairness. On the other hand, the unfairness may be so great that it leaves doubt as to whether the verdict is safe. When this occurs, the trial may be said to be fundamentally unfair.

McLachlin’s view allows for some unfairness and would instead focus attention on the reliability of the verdict. If, in sum, the trial was so unfair the verdict was ‘unsafe’ then there would be stronger grounds for the exclusion of the evidence.

In short, the Supreme Court’s reformulation of the rule in Stillman reduced the robust examination of the effect of admission on the repute of the administration of justice and simplified it into an examination of trial fairness; as Mahoney (1999) suggests, the two are not synonymous. In addition to the above arguments, others have even gone so far as to question the premise that improperly obtained evidence affects trial fairness to any extent. For example, Paciocco (1997) states, “It is not readily apparent how the admission of relevant and probative evidence will make unfair a trial that is intended to test the truth of the Crown’s allegation that the accused committed the offense” (p. 168). This assumes, however, the contestable premise that the sole or primary objective of a trial is truth seeking.

In her dissenting opinion, McLachlin also took issue with the majority’s expansion of the common law right against self-incrimination to include real evidence as opposed to conscriptive testimony (such as a forced confession). In her view, the principle against self-incrimination was never intended to encompass anything more than testimonial evidence or evidence derived as a result of involuntary or compelled testimony. In support of this notion she refers to the work of
several constitutional scholars as well as jurisprudence from the U.S., Great Britain
and Australia to support her position (see, Stillman, paras. 198-216). Further
commentary (see Skinnider, 2005) highlights the fact that in some cases an
accused can be legally forced to give a DNA sample (which is considered
conscriptive), which implies that the admission of conscriptive evidence at trial
is not inherently unfair.

Justice L’Heureux-Dubé advanced a broad interpretation of powers incident to
arrest and failed to find that Stillman’s rights were violated by the seizure of the
bodily samples. Additionally, L’Heureux-Dubé suggested the focus on the categorical
nature of the evidence as conscriptive or non-conscriptive is unnecessary and distracts
from more important and relevant factors for consideration. Justice Gonthier
concurred with L’Heureux Dubé’s analysis of the case and agreed with McLachlin
with respect to the scope of the principle of self-incrimination and the appropriate
approach to s. 24(2) analysis.

The Court’s ruling in Stillman, though intended to provide additional guidance
to lower courts in making s. 24(2) determinations, in effect created more confusion.

As L’Heureux Dube predicted in Stillman (para. 184):

The framework set out in Collins, in my opinion, represents the proper approach to s. 24(2)
and efforts since then to explain, clarify, refine, extend, add to or distinguish Collins, have
only served to further muddy the waters. See, for instance, R. v. Ross, [1989] 1 S.C.R. 3; R. v.
2 S.C.R. 206. The inquiry has now become such a complicated exercise that I wonder how
trial judges will ever be able to resolve the issues arising under s. 24(2) in order to ensure that
justice is done.

I am strongly of the view, in particular, that the classification of evidence proposed by my
colleague Cory J., under the trial fairness aspect of the s. 24(2) analysis, in terms of “non-
conscriptive ‘real’ evidence” and “conscriptive evidence” (which includes “derivative
evidence”), with their possible extension to all kinds of unforeseen situations, is, in my view,
an unfortunate development. [emphasis added]
Despite clear guidance from the Supreme Court that some conscriptive evidence, such as breath samples and fingerprints, is obtained so routinely and in such an unobtrusive manner that it will generally be admissible under s. 24(2) (see, Stillman at para. 90, per Cory J.), lower courts have often excluded such evidence (for recent evidence of this phenomenon see, Madden, 2010). Justice Cory added to this confusion when he made extra-judicial remarks which seemed to conflict with the Court’s decision. In a conference paper presented several months after the Court’s ruling in Stillman, Justice Cory stated the following:

Not all evidence compelled from the accused in violation of the Charter will be classified as "conscriptive" evidence. This label attaches only to three very specific kinds of evidence: statements, the use as [sic] evidence of the body, and bodily samples. ....An alternative approach to "conscriptive" evidence would be to classify any evidence discovered as a result of the forced participation of the accused as "conscriptive". Thus, if the police force the accused to produce the contents of his pocket, the items seized would be classified as "conscriptive" simply because they could not have been seized without the forced participation of the accused. This approach is not the one followed in Stillman. On the authority of Stillman, the items seized from the accused's pocket would not be classified as "conscriptive" evidence. Although these items may well have been compelled from the accused in violation of the Charter, they do not consist of statements, bodily samples or the use of the body as evidence, and hence are not conscriptive. Of course, whether they would be admitted in evidence would depend upon the other Collins factors. (from, P. Cory, “General Principles of Charter Exclusion” (National Criminal Law Program, July 1997, Halifax) [unpublished] as cited in Maric, 1999, p. 104)

This statement would seem to contradict the language in Stillman, especially with regard to derivative evidence (at paras. 78, 99-100 and 108, Cory J.). Maric (1999) points out that Cory’s extra-judicial remarks were relied upon in several cases at the provincial appellate level to support a more narrow interpretation of Stillman.

Nevertheless, Stillman has generally been read as mandating almost automatic exclusion for all conscriptive evidence.

The Aftermath of Stillman: Confusing and Conflicting Jurisprudence

L’Heureux-Dubé’s prediction that Stillman would “muddy the waters” proved accurate. Following the Court’s ruling, confusion reigned at the lower court level and
a wealth of academic criticism echoing the concerns of the minority opinions quickly amassed. The impact of the admission of real conscriptive evidence on trial fairness remained highly controversial. For example, following Stillman, the Supreme Court automatically excluded fingerprint evidence in R. v. Feeney, [1997] 2 S.C.R. 13 due to its effect on the fairness of the trial and similarly, in Burlingham, [1995] 2 S.C.R. 206, the Court ruled to exclude evidence of a gun which was categorized as both real and conscriptive. In contrast, the Ontario Court of Appeal ruled to admit a gun which was both real and conscriptive in R v. Grant, [2006] 213 O.A.C. 127 – a decision which was later upheld by the Supreme Court on appeal. Of particular note is the case of R. v. Richfield, [2003] 175 O.C.A. 54 in which the Ontario Court of Appeal (hereafter OCA) directly questioned the supposed automatic exclusionary rule. Justice Weiler (Richfield, para. 18), writing for the majority stated:

The general rule that conscripted evidence obtained in violation of an accused’s s. 10(b) Charter rights should automatically be excluded because it impacts on trial fairness has the advantage of predictability. This general rule may, however, provide a disproportionate remedy when the resulting Charter violation is minimal... In Stillman, Cory J. also commented, at p. 351, that although the admission of conscriptive evidence would generally render a trial unfair, “[t]hat general rule, like all rules, may be subject to rare exceptions.” Other obiter comments by the Supreme Court, in R. v. Fliss (2002), 161 C.C.C. (3d) 225 at 247-8 and R. v. Law (2002), 160 C.C.C. (3d) 449 at 465, suggest that the Supreme Court may be prepared to modify its approach to the automatic exclusion of conscriptive evidence obtained through a minor breach of Charter rights.

Indeed, it was not long before the Supreme Court began to take a step back from its earlier decision and attempted to remind jurists that all factors need to be considered in making s. 24(2) determinations. Rumours that the Supreme Court was preparing to review the test for exclusion and offer clarification were bolstered after its decision in R. v. Orbanski, [2005] 2 S. C. R. 3. In Orbanski, the Court admitted breathalyser evidence obtained in violation of the appellant’s s. 10(b) rights and
approved limits on these rights under s. 1 of the *Charter*. Justice LeBel’s concurrence (joined by Justice Fish) argued that the “Court has never adopted such a rule [an automatic exclusionary rule with respect to trial fairness], which could not be reconciled with the structure and the wording of s. 24(2)” (para. 98). Justice LeBel’s opinion was subsequently cited in several lower court cases to support the admission of improperly or illegally obtained evidence and effectively set the stage for further clarification of the rule by the Court (Stuart, 2007).

Reinforcing the need for further clarification by the Court were developments at the provincial appellate court level that continued to question the quasi-automatic *Stillman* approach. In 2007, the OCA heard the case of *R. v. L. B.*, 2007 ONCA 596 wherein B, a minor, was charged with possession of a loaded firearm as well as several other gun-related offences. Previously, in a pre-trial voir dire, a trial judge acquitted B of all charges on the basis that his ss. 8, 9 and 10(b) rights had been violated. On appeal, the OCA found that the trial judge had erred in his analysis and there were, in fact, no *Charter* violations; the appellate court overturned the ruling of the trial court and ordered that the evidence of the gun be admitted in a new trial. Likely encouraged by the decisions in *Richfield* and *Orbanski*, Justice Moldaver, writing for the OCA, went further to state that, even upon a s. 24(2) analysis (which he held was technically unnecessary in this case), the evidence should still have been admitted (*L.B.*, at paras. 74-82).

Don Stuart, a professor of criminal law at Queen's University and proponent of a broad interpretation of legal rights, called the ruling deeply disturbing and an example of a growing tendency by courts “to be forgetting they are supposed to be
guardians of the Constitution rather than concerned just about guilt” (Tyler, 2007). According to Stuart, the OCA had appeared to have “adopted this idea that if the evidence is reliable and the offence is serious ... then the Charter simply won't apply at all” (Tyler, 2007). In sharp contrast, Justice Moldaver was quoted in the Toronto Star (Feb. 2009) as stating, “...[due to the exclusion of evidence under s. 24(2)] I worry about the public loss of respect for the Charter” (Tyler, 2009).

The conception of s. 24(2) as mandating automatic exclusion was also challenged by the OCA earlier that same year in R v. Grant, [2006] 213 O.A.C. 127. In Grant the court admitted evidence of a gun collected in what the Court agreed was a violation of the accused’s s. 9 right to be free from arbitrary detention. For many proponents of the ‘absolutist’ version of the rule this case was particularly troubling since Grant’s gun could be considered conscriptive evidence (in the sense that the accused produced it during questioning) and might thereby have been entitled to the stronger protection discussed in Stillman. In his ruling for the OCA, Justice Laskin referred to the minority (concurring) opinion in Orbanski (2005) which, as previously noted, rejected the notion of an automatic exclusionary rule for conscriptive evidence. Justice Laskin went even further in emphasizing the reliability of the evidence and in undertaking an examination of the degree of trial fairness - suggesting that neither trial fairness nor the conscriptive nature of the evidence should be determinative, especially when the evidence is reliable and relevant. In this respect, the OCA’s decision in Grant was more akin to pre-Charter decisions. In R. v. Harrison, 2008 ONCA 85, the Ontario Court of Appeal followed their own precedent: there the court admitted evidence of a substantial amount of hard drugs
collected in violation of the accused’s s. 8 and s. 9 rights through what the trial judge referred to as “brazen and flagrant” police misconduct.

As anticipated, L.B., Grant, and Harrison were granted leave to appeal to the Supreme Court and its decisions were anxiously awaited by the legal community.

**Grant: Overturning Stillman and the Retrenchment of the Exclusionary Rule**

Grant’s appeal to the Supreme Court sparked much speculation over the outcome and implications of the appeal. Stribopoulos (2008, as quoted by Makin, 2009) predicted in an interview that if Grant were to lose his appeal, police would feel free to stop and search people at a whim, suggesting that “it would signal to lower court judges that the due process revolution has come to an end and that our concern for civil liberties must be tempered by more pressing and less idealistic concerns about combating gun violence”.

The case also caught the attention of the mainstream media. An article from the Globe & Mail (Makin, 2009) noted that: “Under the leadership of Chief Justice McLachlin - who dissented in the Stillman decision - that willingness [to stand up for the rights of the accused] appeared to be on the wane.” Indeed, as previously mentioned, the McLachlin court had arguably sent signals that it was prepared to reconsider Stillman to allow trial judges more leeway in admitting evidence even when a constitutional violation had been found.

Finally, in July of 2009, the Court released a quartet of rulings on s. 24(2) cases: *R. v. Grant*, 2009 SCC 32; *R. v. Harrison*, 2009 SCC 34; *R. v. Shepherd*, 2009 SCC 35; *R. v. Suberu*, 2009 SCC 33. Of the four rulings, Grant was the key decision and yet another landmark in the evolution of the exclusionary rule. In Grant the
Supreme Court sought to clarify jurisprudence surrounding the issue of detention (under ss. 9 and 10) and the framework governing the exclusion of evidence (under s. 24(2)). *Grant* provides a new test to assist judges in balancing the effect of admitting or excluding improperly or illegally obtained evidence on the repute of the administration of justice. In short, the test requires a court to consider the following factors: 1) the seriousness of the *Charter*-infringing state conduct 2) the impact of the breach on the *Charter*-protected interests of the accused and 3) society’s interest in the adjudication of the case on its merits.

In elucidating the first set of considerations Justices McLachlin and Charron (writing for the Court) note that the good faith of the police may “reduce the need for the court to disassociate itself from the police misconduct” while evidence that the police behaviour was part of a “pattern of abuse” would likely favour exclusion (see, *Grant*, para. 75). With regard to the second set of factors the Court acknowledges that some rights violations are more egregious than others. Courts are urged to take a purposive approach to rights in determining the extent to which the violation impacted the interests of the accused; the greater impact on the protected interests of the accused, the greater the risk that the administration of justice would suffer by admission (see, *Grant*, paras. 76-78). Finally, in elucidating the third set of factors, the Court reminds jurists of the importance of considering the potential negative effect of the *exclusion* of evidence on the repute of the administration of justice (see, *Grant*, para. 79). Under this line of inquiry, courts are instructed to consider the relevance and reliability of the evidence in question as well as the importance of the evidence to prosecution’s case. Additionally, it is noted that the seriousness of the
offence with which the accused has been charged should factor into s. 24(2) considerations under the third branch of factors and reiterates that this consideration can favour either admission or exclusion.5

This test - like any jurisprudential balancing test - is not a precise tool that offers complete guidance. As always, it is left to the discretion of the deciding judge to determine how to balance the above considerations. However, in an effort to establish more consistency, the Court highlights patterns with respect to the admission/exclusion of certain types of evidence. In doing so the Court provides a comprehensive guide for jurists with respect to certain types of evidence. The following outlines the patterns and guidelines provided by the Court with respect to various types of evidence.

a) **Statements by the accused:** With regard to statements made by the accused, the Court notes that there is (and should be) a “presumptive general, although not automatic, exclusion of statements obtained in breach of the Charter” (*Grant*, para. 92).

b) **Bodily evidence:** With respect to bodily evidence, the Court states that the categorical (conscriptive/non-conscriptive) test mandated by *Stillman* should be replaced by a flexible test based on “all the circumstances” as required by s. 24(2) (*Grant*, para. 107). This “new” approach addresses criticism that the *Stillman* approach resulted in inconsistencies and anomalies such as the

5 In her partially concurring opinion, Justice Deschamps takes issue with the majority’s characterization of the seriousness of the offence as cutting both ways and downplaying its significance (paras. 220, 221, 226). Deschamps proposes a two factor test to better reflect the purpose of the remedial provision. Her test would balance: a) the societal interest in protecting constitutional rights and b) the societal interest in the adjudication of the case on its merits (see *Grant*, paras. 195 and 223).
exclusion of conscriptive evidence (particularly breath evidence) in cases of minor infringements and, conversely, the admission of evidence in cases of more serious breaches based simply on the conscriptive or non-conscriptive nature of the evidence (Grant, para. 106). This flexible approach is perhaps more accurately characterized as a return to the “old” (pre-Stillman) method of balancing factors related to the repute of the administration of justice. In discussing problems with the categorical Stillman test, the Court takes the opportunity to note that breath samples obtained in the investigation of impaired driving cases should usually be admitted (Grant, para. 111).

c) **Non-bodily physical evidence**: The Court notes that the admissibility of non-bodily physical evidence essentially depends on the seriousness of the police misconduct and the resulting effect on the accused’s rights as, in this context, the third set of considerations will generally favour admission (Grant, para. 112).

d) **Derivative evidence**: Derivative evidence can be explained as physical evidence derived from an illegally obtained statement (Grant, para. 116).

Historically, the common law did not extend the protection from self-incrimination to derivative evidence since reliability was the focus; however, post-Charter jurisprudence has generally held that derivative evidence which would not otherwise have been discoverable is generally inadmissible. In Grant, it is noted that this “discoverability” doctrine, like the categorical Stillman test, has been criticized for being “highly speculative” and “producing anomalous results”. The Court now holds that, like trial fairness,
discoverability should not be determinative of admissibility (Grant, para. 121). Yet, although discoverability should not be determinative, the Court points out that discoverability is an important consideration under the new test’s second line of inquiry, which concerns the impact of the police misconduct on the Charter protected interests of the accused.

In addition to providing the above guidelines the Court has once again tackled the highly contentious issue of trial fairness. In Grant, the Court addresses two key questions regarding trial fairness which have been debated at length by jurists and legal commentators alike: a) does the admission of non-discoverable conscriptive evidence necessarily render a trial unfair? b) can trial fairness alone generally be determinative of admissibility (i.e., is such an absolute approach consistent with the provisions of s. 24(2) which mandates a consideration of “all circumstances”)? The Court has now answered with a resounding “no” on both counts. In determining the impact of evidence on trial fairness courts must now consider more than the categorical nature of the evidence. Furthermore, the impact of evidence on trial fairness must be balanced with other factors in considering “all the circumstances”. This is not to say that trial fairness can never be determinative (e.g., if there were to be a question about the reliability of a confession the evidence would likely be excluded on those grounds); rather, it is possible that evidence may adversely impact the fairness of the trial but nevertheless be admissible under s. 24(2). In this way, the Court’s decision in Grant effectively overturns the highly criticized and problematic precedent set in Stillman with respect to the treatment of trial fairness in reference to conscriptive and derivative evidence. At paragraph 65 the Court states:
The general rule of inadmissibility of all non-discoverable conscriptive evidence, whether intended by Stillman or not, seems to go against the requirement of s. 24(2) that the court determining admissibility must consider “all the circumstances”.

... 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.

In applying the new test to the case at bar, the Court found that although Grant’s ss. 9 and 10(b) rights had been violated and the evidence obtained as a result should be considered as “real-conscriptive evidence” - non-discoverable were it not for the breach - the repute of the administration of justice would be better served by admitting the evidence in question.

Although the Court in Grant does not state it outright, it implies that Stillman should be characterized as wayward precedent – a bad decision that led to 10 years of confused s. 24(2) analysis. Indeed, a proper application of the Stillman test to the facts in Grant would have resulted in automatic exclusion. As the Court notes in Grant (para. 64):

Despite reminders that “all the circumstances” must always be considered under s. 24(2) (see R. v. Burlingham, [1995] 2 S.C.R. 206, per Sopinka J., R. v. Orbanski, 2005 SCC 37, [2005] 2 S.C.R. 3, per LeBel J.), Stillman has generally been read as creating an all-but-automatic exclusionary rule for non-discoverable conscriptive evidence...

Indeed, careful reading of cases both pre- and post-Stillman makes clear that the notion of automatic exclusion is not only at odds with the Framers’ intent but inconsistent with much of the jurisprudence.

However, as Stuart (2007A) observes, the treatment of trial fairness as determinative of admissibility was “of the Supreme Court's making in their overinflated use of the phrase "fairness of the trial" to reflect their often disputed view that Charter breaches involving conscripting the accused against himself are always
more serious than non-conscription Charter breaches” (p. 3). Simply because one breach is more serious than another does not necessarily imply that it is so serious as to warrant exclusion. Essentially the problem has arisen from conflating trial fairness as an important factor with one that is determinative.

Although Grant may not definitively settle the controversy over s.24(2), the decision advances several old debates by ruling that a) deterrence of police misconduct is not the purpose of excluding evidence\(^6\) and b) the categorical nature of evidence does not alone determine the impact on trial fairness and trial fairness is not always determinative of admissibility. Additionally, the Court, in its purposive analysis of s. 24(2), reminds jurists that, as stated in Collins, in determining the impact on the repute of justice the effect of both the admission and exclusion of evidence must be considered. Overall, what the decision may lack in terms of clarity (after all, it is up to each judge to attempt to balance the factors within the Grant framework) it makes up for in flexibility. What jurists have done and will do with this increased flexibility and freedom is the topic of the following discussion.

**Post-Grant: Implications**

In essence, the Court in Grant has, as Justice Doherty in R. v. Blake, 2010 ONCA 1 (para. 21) illustrates, taken a “judicial wire brush” to s. 24 (2) jurisprudence. Grant marks a concerted effort to return to the intent of the exclusionary provision and remain true to the wording of s. 24(2) which requires an examination of “all

\(^6\) The U.S. Supreme Court has explicitly noted the principle of deterrence as inherent in the common law exclusionary rule and a considerable amount of academic work in the American context has debated and/or endeavoured to measure the deterrent effect of the rule. The Canadian Supreme Court, in explaining the new test for determining the admissibility of improperly obtained evidence, notes that “The concern of this inquiry is not to punish the police or to deter Charter breaches... The main concern is to preserve public confidence in the rule of law and its processes” (R. v. Grant, 2009 SCC 32, para. 73).
circumstances” in determining the effect of admission on the repute of the administration of justice.

At the outset, it appears that the Court may have pleased both due process and crime control advocates alike with their ruling in *Grant* – a formidable task. Stuart (2009) provides a useful analysis of the ways in which the decision could be read as either leading to more exclusion or increased admission of evidence (yet, he acknowledges that at the time of his writing it is too early to make such a determination). Although the Court’s rhetoric in *Grant* and certainly their ruling in *Harrison* would suggest that more evidence may be excluded, in practice, the more flexible test for admission and the revised approach to conscriptive and derivative evidence combined with the consideration of the third prong of the new test, to this reader, implies we will see an increase in the admission of improperly obtained evidence.

In fact, one year after the Court’s ruling in *Grant*, Radcliffe (2010) from Osgoode Hall’s “The Court” Blog, undertook an examination of cases decided under *Grant* in its first year at the provincial appellate level. The study found that in the majority of cases where the trial court ruling was upheld, the result was the admission of evidence. Conversely, in the majority of cases wherein the trial court ruling was overturned, the initial ruling was to exclude (i.e., ultimately, the result was to admit). Radcliffe (2010) concluded that post-*Grant* there was a “seemingly increased willingness” to admit evidence.

A study conducted by Madden (2010) of the first 100 cases decided under *Grant*, reveals only a 5% difference in exclusion rates between real and testimonial
evidence (69% versus 74% respectively). Because Madden’s (2010) study did not look at any cases pre-Grant for comparison, it is difficult to know which conclusions to draw from these results. This could be interpreted to suggest that perhaps courts are still implementing a categorical approach to admissibility despite the Court’s step away from such an approach in Grant. Alternatively, if one were to assume that the rate of exclusion for testimonial evidence was much higher pre-Grant this could be interpreted to mean that courts are now putting less weight on the categorical nature of evidence. Additionally, Madden (2010) found that breathalyser evidence was excluded at a rate very close to the general exclusion rate (68% versus 70% respectively) which was somewhat surprising considering the Court has explicitly indicated such evidence should generally be admissible.

In any event, while the Stillman test allegedly favoured exclusion in many cases, the new test mandated by Grant appears to swing the balance in favour of admission when the third set of factors (the public interest in having the case tried on its merits) is considered. It would appear that this third prong of the test will almost always favour admission since, as Justice Zubar in Duguay (1985, as cited in Mahoney (1999)) illustrates, in pre-Charter days Canadians did not lament the routine admission of improperly obtained evidence. Additionally, as Roach (1986, p. 252) observes, “judicial lawlessness will never seem as dangerous as crime on the street.” Thus, the other factors being equal, the third set of factors will almost always mitigate in favour of admission (assuming that the public would generally wish the case to be decided on its merits). In creating the third prong of the Grant test the Court has taken a yet another step back from Stillman and what was criticized as
being a “reasonable judge” test by emphasizing the importance of public opinion in
determining the repute of the administration. As Mahoney (1999) points out,

Such an approach [as Stillman] may well allay the fears of those who assume that a court that
is prepared to undertake the actual inquiry directed by s. 24(2) will necessarily assume that
the Canadian public are intent on convicting the guilty at any cost. In any event, such
speculations are somewhat beside the point. Section 24(2) must be applied with the integrity
that comes from an adherence to the intent of Parliament as opposed to some hidden agenda
based on a fear that Parliament drafted s. 24(2) in error, or that the views of Canadian public
are an unworthy reference point.(p. 452, emphasis added).

In Grant, the Court has offered a flexible test which, in its “new” treatment of
trial fairness and the increased focus on the interests of the public, reflects the fact
that s. 24(2) was intended to be a social remedy – not an individual remedy.

**Conclusion**

The Supreme Court in Grant has reformulated the test for exclusion and gone
to great lengths to provide comprehensive guidance on the application of the
exclusionary rule. The purposive approach adopted by the Court cuts through many
misguided assumptions and confused jurisprudence to remind jurists of the intent of
the s. 24(2) provision and to facilitate the consideration of “all the circumstances” as
required by the Charter. On the whole, the Grant test is similar to the Collins test
and, as always, its application will depend upon judicial interpretation. In its return to
the totality of the circumstances, though, it appears as if we have come full-circle
(from Collins to Stillman, and back with Grant). As Morton (2010) notes, the
Supreme Court’s decision in R. v. Beaulieu, 2010 SCC 7 suggests that a proper
application of the Collins test would produce results consistent with Grant. To this
author it would appear that, due to a) the third set of factors which require the
interests of the public be considered, b) the increased focus on the reliability of the
evidence, and c) the fact that trial fairness and discoverability are no longer to be
considered determinative, we will see more admission of evidence than in the period between Collins and Stillman.
CHAPTER TWO:
OVERVIEW OF SECTION 24(2) SCHOLARSHIP

The preceding chapter has discussed the jurisprudential history and development of the Canadian exclusionary rule. However, the development of the rule must be viewed in light of an appropriate historical context. The development of the jurisprudence - especially the Court’s decision to overturn the problematic Stillman precedent - may have been the result of a significant amount of academic criticism, only briefly mentioned in the previous chapter. This chapter will delve further into some of the academic arguments, debates and research to illustrate this potential impetus behind the changing jurisprudence. The chapter is not designed to be an exhaustive account of academic work on section 24(2) but rather an overview of some of the key Canadian works to provide context for the development of the jurisprudence.

At the outset it should be noted that there are both ideological and practical concerns that animate criticisms of the exclusionary rule. All evaluations of the rule appear to be largely contingent upon an author’s normative assumptions regarding the purpose of trial and the comparative value of due process versus crime control. It is important to be conscious of these normative assumptions (even if the authors in question do not identify them explicitly).

One defensible (but hardly incontrovertible) interpretation of s.24(2) holds that evidence obtained by unconstitutional means may never be admitted, since the use of any such evidence would always be considered disreputable. Proponents of such an ‘absolutist’ rule support a conception of justice that strongly emphasizes
due process. From this perspective, the rights of the accused are paramount because the Charter is primarily understood as protecting the few from the many (Skinnider, 2005). Those who support this model (see, for example, Stuart, 1998, 2004 & 2007) conceive criminal trials as a contest wherein evidence is tested against a knowable and concrete legal standard - it is the legal process that is paramount, not the search for ‘truth’. Other scholars, supporters of the crime control model, take the opposing view and see trials as essentially truth-seeking ventures; if the goal of the trial is to uncover the reality of what occurred then it follows that any reliable and relevant evidence should be admitted regardless of how it was obtained. For example, Paciocco (1997, p. 168) states, “it is not readily apparent how the admission of relevant and probative evidence will make unfair a trial that is intended to test the truth of the Crown’s allegation that the accused committed the offense.” Indeed, the clause’s key role in ‘giving teeth’ to the legal rights in the Charter has placed it front and centre in many fierce debates over the shape and form of civil liberties in Canada. Thus, debates over the use of the exclusionary rule are not limited to specific cases but instead reflect deeply rooted philosophical disagreements over the appropriate balance between the rights of the accused and the interests of society. Competing ideological conceptions of the purpose of a criminal trial and the comparative value of due process relative to crime control lead to unavoidable tensions between defenders and critics of the rule. This dynamic frames much of the existing literature surrounding s. 24(2).
**Collins Era**

Long before *Stillman* the judicial application of the exclusionary rule was coming under fire. The Supreme Court’s decision in *Collins* created the first judicial test to guide courts in determining admissibility under section 24(2). Despite the Court’s best efforts to guide judges in applying the exclusionary rule in *Collins*, the new test created almost as many questions as it answered. One issue arising from the Court’s ruling concerned Justice Lamer’s translation of the *Charter* provision from French to English. In *Collins* (para. 43) Justice Lamer states:

Indeed, while both the English text of s. 24(2) and *Rothman* use the words "would bring the administration of justice into disrepute", the French versions are very different. The French text of s. 24(2) provides "est susceptible de déconsidérer l'administration de la justice", which I would translate as "could bring the administration of justice into disrepute". This is supportive of a somewhat lower threshold than the English text.

As Lamer states, the substitution of “would” with “could” would effectively lower the threshold for exclusion. Justice Lamer ultimately favoured the less onerous French version of the rule as he believed that it was most consistent with a purposive interpretation of the section which he stated is designed to protect the right to a fair trial. Interestingly, it doesn’t appear as though his translation took hold; in later jurisprudence, the section is generally translated as “would” as opposed to “could”.

Section 24(2) jurisprudence has engendered criticism for considering the effect of exclusion on the repute of the administration of justice since the text of the provision only requires consideration of the effect of admission on the repute of justice (Hannah-Suarez, 2004). In the interest of proportionality, the Court in *Collins* noted that courts may consider the effect of exclusion on the repute of justice. Hannah-Suarez (2004) is critical of this development as it is a departure from the strict text of the provision and because necessarily implies that the result with respect
to admission may vary depending on the crime with which the accused is charged. For example, it would seem more tolerable to permit evidence obtained by a warrantless search of a vehicle in a murder case than in a case of minor theft. In other commentary, this issue is framed as a critique over the consideration of the seriousness of the offence under the third branch of the *Collins* test (see Morissette, 1984). Although a consideration of the effect of exclusion on the repute of justice may be a departure from the text of the provision, it is easily read into a test which itself was designed to be remedial. It must be remembered that the exclusionary rule is not an individual remedy but a societal remedy – a remedy which is not proportional to the violation is no remedy at all.

Additionally, the *Collins* decision has faced criticism for removing the views of the Canadian public from the section 24(2) equation. As was noted in Chapter One, the *Collins* decision has been criticized for the way in which it defined the “reasonable man” (see *Collins* para. 33) – that is, the person through whose eyes courts are to determine whether the of the repute of the administration of justice is best served by admission or exclusion. Parfett (2002, p. 23), following from Paciocco (1990), points out that the Court essentially supplanted judicial opinion for the opinion of the “reasonable man”. Indeed this is true: Justice Lamer explicitly chose to adopt the interpretation of the “reasonable man” proposed by Morissette (1985) who stated at p. 538:

> Judges may disagree among themselves on what the reasonable man would do in any given case, but in the end the courts never disagree *with* the reasonable man. They are, in reality, the reasonable man. The question should be: "Would the admission of the evidence bring the administration of justice into disrepute in the eyes of a reasonable man, dispassionate and fully apprised of the circumstances of the case?" […] [F]or the time being section 24(2) should remain entirely within the control of the courts.
A decade before Stillman, the Court was under fire for creating a sharp distinction between improperly obtained evidence which the accused was forced to participate in producing and that which was obtained without the conscription of the accused. Delisle (1987 at p. 2) criticizes the Collins majority’s distinction between evidence which was discovered as a result of a Charter breach and that which was not (i.e., the discoverability doctrine) and questions the distinction between real and conscriptive evidence in relation to their effect on trial fairness. In his view, both the protection against self-incrimination and the right against unreasonable search and seizure are rooted in the right to privacy; he therefore considers it tenuous to suggest (as the Collins majority did) that conscriptive evidence will automatically affect trial fairness when real evidence will not.

The majority's analysis will produce problems for trial judges. For example, how should a judge approach the admission of evidence when as the result of an unconstitutional denial of right to counsel the accused makes a statement which leads to the discovery of real evidence? What should a judge do if, as the result of an unlawful search of the accused's premises, the accused blurs out an incriminating statement? Suppose that incriminating statement leads to the discovery of real evidence? The distinction fashioned by the majority is unjustifiable and troublesome in its application. (p.2)

Additionally, Delisle (1987) criticizes the decision for showing more concern for the fairness of the trial and the integrity of the courts than it does for impairing the justice system as a whole (through the comparatively lesser protection afforded to real evidence). That is, that the focus on trial fairness eclipses the concern for the repute of the administration of justice to the detriment of the latter.

Similarly, Penney (1994) criticizes the distinction between “real” and “self-incriminatory” evidence in determining the admissibility of improperly obtained evidence. To illustrate his point he compares the cases of R. v. Therens, [1985] 1 S.C.R. 613 (involving an improperly obtained breath sample) and Collins (involving
drugs obtained from the accused by force); in the former case the Court characterized the evidence as conscriptive/self-incriminatory and in the latter the evidence was characterized as non-conscription or “real” evidence. Penney (1994) suggests that in both cases the accused was conscripted (as the evidence did not exist but for the rights violation). He suggests that such inconsistencies would be remedied by eliminating the focus on the nature of the evidence (which can produce conflicting jurisprudence) and instead focusing on the discoverability of the evidence; that is, whether the evidence would have been discovered but for the rights violation. Additionally, he is critical of the Court’s jurisprudence regarding the categorical approach (specifically R. v. Mellenthin, [1992] 3 S.C.R. 615) for failing to consider the other Collins factors once trial fairness has been deemed to be affected by the conscriptive nature of the evidence.

If fairness and privacy are simply variations of the same general theme, it makes little sense to assert that evidence affecting fairness should be automatically or even presumptively excluded, whereas evidence affecting privacy should be prima facie admissible. (Penney, 1994, p.808)

Thus, following Collins, subsequent decisions created concern among commentators regarding the notion of ‘automatic’ exclusion – even before Stillman. For many the Supreme Court’s decision in R. v. Mellenthin, [1992] 3 S.C.R. 615 was read as narrowing the discretion of the courts under the s. 24(2) inquiry. In Mellenthin the Court excluded real evidence of drugs which were obtained with minimal involvement of the accused (i.e., minimal conscription) since they found it would impact trial fairness. Delisle (1996, p.1) states:

I was then worried, and as a result of recent decisions am again worried, that our courts may be departing from the wisdom of the earlier cases where many factors informed the decision to exclude, in favour of blanket rules which cause at least the appearance of automatic exclusion.
Looking backward, Parfett (2002, p. 17) characterizes the Court’s decision in *Mellenthin* as an unreasonable expansion of the protection against self-incrimination. Moreover, Parfett (2002) states that the Court’s ruling in *Burlingham* (which further expanded the protection the against self-incrimination) evidences the fact that, “… the trial is no longer a truth-seeking process” and furthers states, that under the current rules, “The police, and not the accused, are on trial” (p. 33). This sentiment is similar to that expressed by Schlesinger in his 1977 book “*Exclusionary Injustice*” regarding the state of the American rule.

To put the matter in its clearest form, present policy determines that in any case where a criminal court must deal with a possibly guilty criminal and a clearly errant officer who apprehended him, it should acquit its responsibility by punishing or disciplining neither. (p. 6)

Most acknowledge that the exclusionary rule does have *some* costs associated with its application. As Nasheri (1996) observes, even to staunch defenders of the rule, setting a guilty person free is undesirable (although justifiable) and most critics of exclusion see the need for some sort of deterrent against police misconduct. Thus, discussions on the exclusionary rule sometimes boil down to a debate over the viability of alternatives.\(^7\).

One much discussed alternative which has been proposed to remedy rights violations and/or police misconduct is to make the police officers who commit the violations or the agencies they represent responsible though civil suits which would hold the individual officer or police department liable. For example, Dripps (2001), speaking within an American context, has proposed what he has called the

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\(^7\) Schlesinger (1977), speaking in the American context states: “A rule so contrary to reason and sound public policy is an incongruity in the American legal system that warrants examination. We must be prepared to stop clinging to a seemingly unworkable and possibly irrational rule of law when there are alternatives which may succeed in deterring police misconduct at least as well as the rule, without many of its dangerous shortcomings and side effects” (p. 6).
“contingent exclusionary rule”. He suggests that courts (where police have been found to have violated an accused’s rights) allow the police department two choices: to have the evidence excluded or to provide monetary compensation to the victim of the abuse. Dripps contends that this would allow the police to have evidence admitted in the most serious cases while still providing compensation to the victim (Dripps, 2001). Similarly, Perrin et al. (1998) propose a civil administrative remedy (which would involve an administrative judge presiding over the hearing of a civil case against an officer accused of misconduct) and suggest reserving the exclusionary rule for use in egregious cases where police misconduct is intentional.

Unfortunately, both suggestions are plagued by the same problems as all other civil remedies. First, as Stuntz (1997) points out, it would be extremely difficult for the tort system to evaluate a plaintiff’s damages: if damages are too high police would be deterred from actively pursuing evidence in some cases where they are unsure of the scope of their rights as officers; if the damages awarded are too low then legal rights become meaningless. Second, this remedy would be least available to those who would likely need it the most due to economic issues regarding the retention of counsel, distrust of the legal system and fear of retaliation from the police (Schlesinger, 1977). Third, one would be hard pressed to find a jury whose members would be sympathetic to a known or suspected criminal (Kamisar, 2003). Dripps (2001) himself states that would be difficult to find a legislature that would support a proposition which targets police officers and advocates awarding taxpayers’ money to suspected or actual criminals. Furthermore, juries are generally more likely to trust a police officer’s account of events over the testimony of a defendant (Perrin et al,
Another proposed alternative to the exclusionary rule is a different type of direct action against the police: departmental sanctions. Schlesinger (1977), along with many others, has advocated the establishment of an independent review board to examine allegations of police misconduct and to deliver sanctions. Most commentators who offer alternatives to the exclusionary rule recommend a combination of the above measures in an effort to achieve what they see as a better balance between protecting the rights of the accused and safeguarding the interests of the community. That said, most acknowledge that it is highly unlikely that any alternative which involves direct action against police will ever be legislated as the police hold substantial political clout and would certainly resist such proposals (Kamisar, 2003).

Whether the proposed alternatives to the exclusionary rule would actually strike a better balance between the interests of society in punishing the factually guilty and the rights of the accused (in terms of both values and public policy) is a complex question that has no definitive answer as this is largely a normative determination. In addition, it is important to note, as does Kamisar (2003), that the danger that plagues all alternatives to the exclusionary rule is the risk that if such alternative measures were adopted, they would only serve to displace the exclusionary rule and remain unenforced. In fact, Stribopoulos (1999, p. 84) observes that, “… the Canadian experience prior to the Charter reveals that the alternative remedies that critics advocate are ineffective.”
Stillman Era

The proliferation of Canadian scholarship on the rule increased dramatically subsequent to the Supreme Court’s contentious decision in Stillman likely due to the controversial nature of the Court’s ruling. Many of the criticisms of Collins were levelled with renewed vigour at Stillman. As stated in Chapter One, one of the most prevalent criticisms of Canadian jurisprudence surrounding s. 24(2) has been that it creates a “quasi-automatic” exclusionary rule (see Parachin, 2000). Yet, one of the few studies which have empirically measured the effect of the rule in Canada, challenges the emergence of an ‘automatic’ exclusionary rule. Kelly (2005) observes that only 35 (44%) of the 79 cases in which the Supreme Court considered the exclusion of evidence between 1982 and 2003 resulted in the exclusion of evidence. If one looks only at the cases between 1993 and 2003, the percentage of cases in which evidence was excluded drops to 38% (Kelly, 2005). Of the cases wherein evidence was excluded between 1982 and 2003, 74% involved conscriptive evidence. Conversely, of the cases wherein evidence was admitted only 39% involved conscriptive evidence. From Kelly’s perspective, a due process revolution has not done away with the crime control model by instituting an ‘automatic’ rule; instead, he suggests that, following the advent of the Charter, the crime control model which existed pre-Charter has been “stirred but not shaken” (Kelly, 2005, p.133).

Despite the number of Supreme Court cases admitting evidence, the legal scholarship continued to identify an ‘automatic’ or ‘quasi-automatic’ exclusion rule in at least some circumstances. As discussed above, this is the conventional
view dominant in the period following Stillman, until, at least, Orbanski (2005) or Grant (2009); if the evidence in question is conscriptive, then to include the evidence would necessarily call the fairness of the trial into question and thus, it must be excluded. Criticisms of this almost automatic application of the rule are twofold. First, this application of the rule is believed by many to be contrary to the wording and spirit of the section 24(2) which requires that “all circumstances” must be taken into account (see Parachin 2000; Paciocco, 1990; Mahoney, 1999; Parfett, 2002). That is, if factors relating to the fairness of the trial are the only set of factors to be considered, the purpose of the remedial provision is not being upheld. In this vein, Paciocco (1989) states, “Uncategorical judicial statements by the Supreme Court of Canada have produced a rule which bears little relationship to the text of the section” (p. 326). Additionally, it has been argued that this bright-lines approach has the effect of tipping the balance of justice in favour of the accused at the expense of the rights of the victim and the interests of the community (see Parfett, 2002). Those critical of the bright-lines approach often cite the following passage from Justice McLachlin’s decision in R. v. Harrer, [1995] 3 S.C.R. 562:

At base, a fair trial is a trial that appears fair, both from the perspective of the accused and the perspective of the community. A fair trial must not be confused with the most advantageous trial possible from the accused’s point of view: R. v. Lyons, [1987] 2 S.C.R. 309, at p. 362, per La Forest J. Nor must it be conflated with the perfect trial; in the real world, perfection is seldom attained. A fair trial is one which satisfies the public interest in getting at the truth, while preserving basic procedural fairness for the accused.8

However, in response to such criticisms, supporters of a more absolutist rule note that, according to Collins, the other sets of factors to be considered are alternative

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8 This passage had been quoted many times by various courts. See, for example: R. v. Cook, [1998] 2 S.C.R. 597 at para. 101; Orbanski at para 97; R v Bjelland [2009] SCC 38 at para 22; Grant at para. 65.
factors for exclusion rather than inclusion (Skinnider, 2005). It has also been noted that this type of reasoning is at odds with a conception of the Charter as a check on the tyranny of the majority and a restraint on the power of the state (Roach, 1986).

Parfett (2002) is critical of the Supreme Court’s approach to the exclusionary rule in general (especially following Stillman) and suggests that unless the section 24(2) test were to be reframed to better balance individual rights with the interests of society, the rule should be scrapped in favour of alternatives. One of the criticisms Parfett (2002, p.18) levels against the Court’s section 24(2) jurisprudence regards its expansion of the protection against self-incrimination. It is argued that the Court’s extension of the protection against self-incrimination from testimonial evidence to physical evidence (e.g., bodily samples) is inconsistent with the intent of this legal principle (i.e., to ensure the reliability of the evidence) as there is no question as to the reliability of bodily samples. Parfett (2002) states that this expansion is reflective of a misunderstanding of the basis for the enhanced protection afforded to testimonial evidence. The Court in Stillman grounded this expansion in the right to privacy, which Parfett (2002) states is separate from the reliability rationale. Regarding the extension of the protection against self-incrimination from testimonial evidence to “real” evidence, it is important to note that testimonial evidence (mainly confessions) is less vital to the conviction of the accused. Conversely, real evidence is often conclusive of guilt and necessary in order to obtain a conviction. As Oaks (as cited in Schlesinger, 1977, p. 3) notes:

…evidence obtained by a search is likely to be vital to a conviction in most types of crimes where searches are commonly involved (notably gambling, narcotics and weapons). Confessions are generally less vital. Thus the application of the exclusionary rule to evidence obtained by improper search and seizure is specially vulnerable to the criticism of freeing the guilty because it often excludes reliable (and often practically conclusive) evidence of guilt…
Additionally, Parfett (2002, p. 7) criticizes the Court for having turned the right to a fair trial - which she observes was originally a procedural right - into a “quasi-substantive right” noting this adversely affects the truth seeking function of trials. Indeed such a conception of the rule does adversely affect the truth seeking function of a trial (at least, when the special protection against self-incrimination is extended to real evidence) which is problematic if one views this as the primary objective of a trial. Others who would conceive the purpose of a trial to be the testing of evidence against a legal standard would perhaps not be as troubled.

Similarly, Parachin (2000) is generally critical of the section 24(2) jurisprudence up to the time of his writing. He is critical of the ‘automatic’ exclusionary rule developed in Stillman which he contends is contrary to the expressed intent of the provision. On the problematic quasi-automatic test Parachin (2000) makes an interesting point. He suggests that it is not the fact that evidence adversely affecting trial fairness is almost automatically excluded that is inherently problematic; rather, the issue is the Court’s narrow conception of trial fairness. He suggests that if the test to determine whether the fairness of the trial was adversely affected were more robust than a simple two-step categorical and discoverability test, then the quasi-automatic exclusionary rule would not be inconsistent with spirit of section 24(2) (see Parachin, 2000, pp. 42-43).

Furthermore, Parachin (2000) criticizes what is essentially a hierarchy of rights created by the categorical approach to determining admissibility. This hierarchy is created since a s. 10(b) violation will generally result in exclusion, whereas a s. 8 violation is more likely to result in admission. In this vein, Stuart
(1998) is critical of the courts’ application of the Collins/Stillman tests in section 8 cases involving non-conscriptive evidence. Stuart (1998) in Eight Plus Twenty-Four Two Equals Zero examines s. 8 cases at the Supreme Court and provincial appeal level post-Stillman and finds a tendency to admit evidence where it is non-conscriptive. He states, “What appears to be a virtually automatic inclusionary rule is reducing the pronouncement of s. 8 standards to meaningless rhetoric” (p. 1).

Also writing on the categorical approach, Maric (1999) observes that under Stillman some lower courts have taken a narrow approach to trial fairness (narrowly defining what types of evidence warrant ‘automatic’ exclusion) while others have taken a broad approach (broadly defining what types of evidence should be subject to ‘automatic’ exclusion). It was noted in Chapter One that an extra-judicial remark made by Justice Cory following Stillman suggested that the admission only three types of evidence (statements, the body as evidence and bodily samples) would presumptively render a trial unfair. According to Maric (1999) some courts relied on Justice Cory’s remarks to justify the admission of certain types of conscriptive evidence. Maric (1999) is critical of courts which had attempted to “pigeonhole” the types of evidence which are considered to affect trial fairness and advocates for a broad interpretation of the types of evidence which would fall under the increased protection afforded to, for example, bodily samples under Stillman.

**Orbanski and Grant (OCA)**

With criticism of the quasi-automatic exclusionary rule mounting, the Supreme Court in Orbanski signalled that they may be prepared to reconsider the Stillman precedent (Stuart, 2007A). By the time the OCA decided Grant, the calls for
a restatement of the exclusionary rule (from academics and jurists) had turned to shouts. One article by Fraser and Addison (2004) goes so far as to suggest that if the Supreme Court were to fail to reverse their quasi-automatic Stillman approach, Parliament could - and should - rightfully use the notwithstanding clause to reject such an application of the rule. As early as 1999 Mahoney declared, “The artificiality of the Stillman analysis cannot withstand the criticisms it has engendered” (p. 445).

While it was becoming clearer that the Supreme Court was prepared to reconsider the current exclusionary framework, commentary reflected different ideas concerning the ideal approach to determining admissibility. In the United States, for example, the purpose of the exclusionary rule is generally agreed to be the deterrence of police misconduct (Wagner, 1987, p. 78); in Canada the purpose of the rule is said to be the protection of the repute of justice (and deterrence considered a fortunate by-product). Penney (2003), discussing the Canadian rule, argues that the deterrence rationale is the only “worthwhile” justification for excluding evidence under section 24(2) (p. 105). Penney argues his point from a theoretical perspective and advocates for the adoption of an “optimal deterrence” rationale for the exclusionary rule, which essentially boils down to a focus on the seriousness of the violation. Although he is critical of the Court’s current approach he contends that his alternative deterrence-based approach is consistent with much of the Court’s jurisprudence (or would theoretically produce many of the same outcomes) (Penney, 2003, p. 143).

Similarly, Stuart (2007A) urged the Court to “… declare that the seriousness of the violation is the key factor and that taking entrenched Charter rights for accused seriously requires the real risk of exclusion of evidence obtained for serious violations
of the *Charter* even if the evidence is reliable and probative and even if the offence is serious” (p. 9). The seriousness of the violation is clearly an important consideration when making a section 24(2) determination but it is not the only factor and whether it deserves to be considered a “key factor” is debatable. As Morissette (1984 at p. 529) points out, there is no constitutional right to the exclusion of evidence: at the time of a section 24(2) inquiry a right has already been violated and the exclusionary rule is purely remedial. Thus, the seriousness of the violation must be weighed with other factors - for example, the seriousness of the offence - in determining the effect of admission/exclusion on the repute of the administration of justice. Of course, the seriousness of the offence can cut both ways in determining whether to admit or exclude evidence. However, assuming the evidence in question is reliable, the courts should consider proportionality of the offence and the violation. An unreasonable search in the investigation of a minor crime may be less justifiable than the same search conducted in the investigation of a more serious crime (see Morissette, 1984 at p. 530 for a comparative look at treatment of the seriousness of the offence).

It will be remembered that following *Collins* some commentators advocated for an increased emphasis on the discoverability of the evidence as opposed to the categorical approach (see Penney, 1994). In contrast, Mahoney (1999) is opposed to a concept of discoverability that would allow improperly obtained evidence, which would otherwise have been obtained by proper means, to be admitted against the accused. Of course, discoverability can cut both ways: the fact that the police could have obtained the evidence properly may suggest a flagrant disregard for *Charter* rights and thus favour exclusion; conversely, the fact that the police would have
obtain the evidence regardless of the violation raises the question of whether it would actually operate unfairly against the accused. Mahoney (1999) worried that the latter interpretation was being too readily accepted.

As noted in Chapter One, the OCA in Grant essentially ignored the Stillman precedent by admitting real conscriptive evidence and broke new ground by considering the degree of trial unfairness as part of the section 24(2) inquiry (see also Stuart, 2007A). Opposition to the Stillman approach did not, however, necessarily translate into support for Grant. Stuart (2007B), though not a supporter of the categorical Stillman approach, was highly critical of the OCA’s interpretation and application of section 24(2) in Grant and several subsequent cases in which the OCA followed their own Grant precedent. In Stuart’s (2007B) opinion these rulings of the OCA were inconsistent with the Supreme Court jurisprudence and could lead to far less exclusion under section 24(2) (which, in this case, is viewed negatively). Stuart (2007A) goes on to observe that some trial judges had been resistant to apply the OCA’s Grant precedent while others have embraced this ruling (p. 2).

Following the OCA’s decision in Grant there were many concerns regarding the potential impact of the Supreme Court’s decision on the appeal. Legal scholar James Stribopoulos, in an interview with Kirk Makin (Globe and Mail, 2009), predicted that if Grant were to lose his appeal, police would feel free to stop and search people at a whim, suggesting that “it would signal to lower court judges that the due process revolution has come to an end and that our concern for civil liberties must be tempered by more pressing and less idealistic concerns about combating gun violence”. Those supporting a more absolute application of the rule worried that a
failure to overturn the OCA’s decision would render due process rights ineffective and implicitly sanction police non-compliance with the Charter. On the other hand, those decrying an absolutist approach to the application of the rule were concerned that if the Court were to overturn the OCA’s decision, the wayward Stillman precedent would prevail and as a consequence the repute of the administration of justice would suffer.

**Grant Era**

After a decade of criticism, debate and confusion, the Supreme Court reframed the test for admissibility under section 24(2) in Grant, effectively overturning its problematic Stillman precedent. However, commentators were divided as to whether the new Grant test would likely lead to more or less evidence being excluded under s.24(2). Stuart (2009), who had referred to the old test as being “overly complex and arbitrary”, welcomes the newly developed test in seemingly suggesting (without stating) that the new test will likely lead to more exclusion. That said, Stuart (2009) expresses concern that the Court’s definition of detention may adversely affect the right against self-incrimination. He suggests that the Court’s decision in R. v. Suberu, 2009 SCC 33 (a companion case to Grant, decided under the new Grant framework), may set the bar for psychological detention too high to protect suspects against self-incrimination (Stuart, 2009).

Taking a comparative approach, Stuart (2010), suggests that Canada and the United States are “rowing in opposite directions” with respect to the exclusionary
rule. Here Stuart contrasts *Grant* with the American case of *Herring v. United States*, 555 U.S. 1 (2009). In *Herring* the U.S. Supreme Court ruled that the exclusionary rule only applies where the benefits of deterring future police misconduct outweigh the costs to the judicial system (in terms of lost convictions, and presumably the repute of the administration of justice), thereby limiting the applicability of the rule. In contrast, Stuart (2010) interprets *Grant* as leading to increased exclusion. Stuart (2010) observes that a number of lower court cases in which evidence was excluded support this notion. However, although the American Court may have gone further than the Canadian Court in limiting the applicability of the rule, a number of recent Supreme Court cases (see for example *R. v. Singh*, [2007] 3 S.C.R. 405; *R. v. Sinclair*, 2010 SCC 35) have narrowed the legal rights of the criminally accused and thereby would seem to limit applicability of the rule. Additionally, Quigley (2009) observes that since *Grant* rejected the quasi-automatic approach to conscriptive evidence under *Stillman* and noted that breathalyser evidence will likely be admissible and referred to the reliability of bodily samples, post-*Grant* we should expect to see increased admission of bodily samples. The two Courts may not be so much rowing in different directions as taking different routes toward the common goal of limiting the exclusion of relevant and probative evidence.

In reformulating the judicial test for admission/exclusion, *Grant* has prompted several empirical assessments of the rule (see for example, Madden, 2010; Radcliffe,

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9 After conducting a comparative analysis of exclusionary trends in Canadian and the American Supreme Court jurisprudence, Nasheri (1996) made a similar prediction. She concluded that the two nations were on “different and apparently diverging tracks” with respect to the development of the rule: the United States was beginning to limit the rule while Canada was expanding the rule’s application (Nasheri, 1996).
2010). Following *Grant*, Madden (2010) conducted a quantitative analysis of one hundred post-*Grant* s. 24(2) cases. The results of Madden’s study indicate that provincial appellate courts have the lowest exclusion rates when compared with trial courts, summary conviction appeal courts and the Supreme Court of Canada. Additionally, Radcliffe (2010) writing at TheCourt.ca conducted a qualitative analysis of s. 24(2) cases at the provincial appellate level in the year following *Grant* (utilizing ten cases total). The results of his analysis highlighted the impact of *Grant* and suggested that there appeared to be an “increased willingness” to admit evidence post-*Grant*.

Although these studies make a clear contribution to the literature, it is difficult to assess the true impact of the *Grant* decision by exclusively examining cases decided after the Supreme Court’s ruling. Furthermore, almost three years post-*Grant*, there have now been a substantial number of cases decided under the new framework which permits more rigorous analysis. How have lower courts responded to the Court’s ruling in *Grant*? How has the application of the exclusionary rule changed – if at all – under the new *Grant* test?

**Conclusion**

Although debates surrounding the exclusionary rule are as old (or older) than the rule itself, the Supreme Court’s recent decision in *Grant* has renewed debates over the principle and application of the rule. Clearly such academic debates are not without practical value; to a large extent it would appear that the Court’s decision in *Grant* can be viewed as a response to the staggering amount of criticism of the quasi-automatic *Stillman* approach. Indeed, Justice McLachlin, who authored the Court’s
opinion in *Grant*, cited a substantial amount of academic scholarship in her decision. Interestingly, it appears that the Supreme Court is studying legal scholarship in the same way legal scholars are studying the Supreme Court.
CHAPTER THREE: COMPETING PHILOSOPHIES OF JUDICIAL DECISION-MAKING

The previous chapter noted that there was uncertainty among legal academics as to what the impact of the Supreme Court’s *Grant* decision would be on judicial decision-making. In many of those articles, there seemed to be at least an implicit assumption that the law mattered (e.g., the *Grant* precedent, because of the changes the Court made to the s.24(2) test, will make a difference). However, some scholars argue that judges, especially those who sit on appellate courts, often decide according to their preferences rather than the law. Other potential factors that have been implicated in the study of judicial decision making include the personal characteristics of judges (such as gender), the desire for institutional legitimacy, intra-court bargaining, and institutionally generated norms of judicial behaviour. This chapter explores some of the major competing theories of judicial decision-making - the doctrinal model, the attitudinal model and judicial pragmatism - before assessing these theories by studying section 24(2) decisions by the Ontario Court of Appeal in subsequent chapters.

There are essentially three schools of thought regarding the factors which guide judicial decision making: the doctrinal approach, the attitudinal approach and judicial pragmatism. In short, doctrinal approaches (see Dworkin, 2006) would see judicial decisions as guided and constrained by legal rules whereas - in stark contrast - a pragmatic approach (see Posner, 1999) would suggest that judicial decision making is based (and should be based) primarily on factors related to the case at hand and its consequences. In contrast to both of these
approaches, attitudinalists such as Segal (2002) would emphasize the individual preferences of justices as the key determinate of judicial decision making.

**Doctrinal Model**

The doctrinal model is the classical perspective through which judicial decision making was generally understood. The doctrinal approach, sometimes referred to as ‘legal formalism,’ emphasizes the importance of precedent and the objective application of legal facts. From this perspective judges are seen as objective arbiters of fact and unbiased applicators of precedent. Emphasis is put on the principle of *stare decisis*, which requires that courts abide by precedent - especially that of higher courts. This ‘rule of law’ principle is based upon the notion that if the facts of two cases are almost indistinguishable, it would be prima facie unfair for the outcomes to differ greatly (‘treat like cases alike’ in the classic common law formulation).

Perhaps the most well-known present day proponent of the doctrinal perspective for understanding judicial behaviour is Ronald Dworkin. In *Law’s Empire* Dworkin (1986), puts forth his ideal model for judicial decision making which is grounded in the principle of ‘integrity,’ which places a strong emphasis on the adherence to precedent as a constraint on judicial decision-making. Dworkin criticizes other legal scholars for neglecting the role of precedent and exaggerating the extent to which judges create law based on forward looking policy concerns rather than interpreting the existing law. He rejects the “plain-fact” view of law (that the meaning of law is plain for anyone who reads it) as
well as the notion that judges create law in areas where no plain law exists (Dworkin, 1986).

A doctrinal approach would suggest that when, for example, the Court ruled to legalize abortion, they were not creating law per se, but rather correctly interpreting the doctrine that had been incorrectly interpreted before. From Dowrkin’s doctrinal perspective there is only one “right” or “correct” answer to a legal question – only one right resolution for each case – that a perfect (or ‘Herculean,’ in Dworkin’s terms) judge employing the correct reasoning in his infinite wisdom would reach (Dworkin, 1986). This view is hostile to the notion of ‘reasonable disagreements’ when it comes to law; judicial disagreement and judicial mistakes are, for Dworkin, simply part of the struggle to reach the correct legal result.

Such an insular court, focusing always on precedent and not preference or policy, would have certain advantages, namely consistency and predictability. However, in the 20th century the accuracy of the strictest form of the doctrinal model came into question. Scholars have attributed the fall of legal formalism to various social and political factors. Pritchett (1948, as cited in Epstein, Knight & Martin (2003)) observed that 1930s and 1940s the American Supreme Court was beginning to produce more dissents; the increased prevalence of dissents challenged the notion that decisions were made objectively based on precedent (Epstein, et al., 2003). Additionally, Epstein et al. (2003) suggest that shift toward legal realism can be partially ascribed to the expansion of legal studies into the discipline of political science. Prior to the 1930s and 1940s the study of
judicial behaviour was largely restricted to lawyers and legal scholars but following the expansion of the field of legal studies into the political science discipline more normative considerations came into play (Epstein et al., 2003). Furthermore, Clayton (1999) describes how the political realm of the 1940s and 50s which was marked by general consensus turned into a battlefield of warring ideologies in the 1960s and 1970s. This transformation, coupled with the activism of the Warren Court, drew questions about the normative aspects of judicial decision-making.

Currently, the strict doctrinal model of understanding judicial decision-making has fallen out of favour as it is generally acknowledged that there are individual and institutional factors that have been shown to influence judicial decision making. Dworkin’s work was a response to some of these critiques; he attempts to save Hart’s legal positivism by accepting that judges do modify precedents for policy (or other reasons) but, crucially, do so in a manner that respects precedents or underlying principles. This is the crux of the ‘law as integrity’ notion but it is not uncontested and legal realism has influenced other strong competitors for understanding judicial outputs. Even in acknowledging the importance of precedent one can never be certain that the application of precedent is unaffected by outside influences. That is, the application of precedent is not an inherently objective task; rather, precedents can be “cherry picked” in order to advance ideology, political or personal goals. For example, a dissenting judge will often cite as many precedents to support his position as those in the majority (Segal & Spaeth, 1993). Furthermore, Abramowicz and
Tiller (2009) demonstrate that the legislation that a judge chooses to cite can be influenced by both the political makeup of the supervising court and the colleagues sitting on his/her panel. Yet, many of the other models of understanding judicial behaviour (which will be discussed below) seem to go too far in downplaying the influence of precedent and doctrine in judicial decision making.

An important point to note in defence of the doctrinal model is that not all judicial decisions are complex and allow for the insertion of political ideology. While in some areas of law the doctrine is vague and requires some form of interpretation, in other areas of law the text is very clear and its application obvious. Furthermore, even in complex cases, judges do not necessarily overlay their own personal attitudes or political preferences. As Baum (1997, p. 66) notes, “the [United States] federal judges who addressed the issue probably did not have strong feelings about whether brokerage subsidies of national banks could sell annuities (NationsBank of North Carolina v. Variable Annuity Life Insurance Co. 1995).” Like Baum (1997), Sutton (2008), a United States Court of Appeals judge for the Sixth Circuit, suggest that although it is perhaps fair to wonder what may influence judges’ decision making in the most complex and difficult cases, most cases are not “hard” cases. Sutton (2008) implies that to make sweeping statements about the nature of judicial decision making based on aberrant cases not only belies the reality of “day-to-day” judging but endangers

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10 Abramowicz and Tiller (2009) revealed that judges were more likely to cite legislation that they believed was favoured by their colleagues and members of their supervising court.
the repute of the justice system\textsuperscript{11}. This might indeed be true, but it is surely less true for appellate courts, which are more routinely confronted with such ‘hard’ cases.

The contention that doctrine and precedent continue to play a pivotal role in judicial decision making is further supported by the fact that most Supreme Court decisions as well as appellate court decisions are unanimous in both Canada and the United States. Greene, Baar, McCormick, Szablowski and Thomas (1998) note that dissents in decisions of provincial appeal courts have become increasingly rare. Additionally, from 1972-1992 an average of only 9.08% of provincial appeal cases involved dissents (Greene et al., 1998). Furthermore, Ostberg and Wetstein, (2007) demonstrate that from 1984-2003, only 24% of all cases decided by the Supreme Court of Canada were not unanimous. This means that judges of diverse ideological inclinations most often decide in the same way.

**Attitudinal Model**

The attitudinal model suggests that judicial decisions are based mainly on the individual attitudes (i.e., beliefs, preferences and ideology) of judges. Proponents of the attitudinal model argue that judges simply use legislation and precedent to give an air of objectivity and professionalism to their decisions, which are ultimately based more upon normative values or ideology\textsuperscript{12}. This

\textsuperscript{11} Additionally, Posner (2008) notes that “Legalism drives most judicial decisions, although generally they are the less important ones for the development of legal doctrine or the impact on society” (p. 8).

\textsuperscript{12} Segal & Spaeth (1993) refer to what they call the “mythology of judging”: That “It is the law or the Constitution speaking through them [i.e., judges] that dictates the outcome” (p. 18). They further that, “Aided by a mythology insulates them from the hue and cry, judges blithely go about their business, obligated to none but themselves” (p. 18).
approach grew out of the work of legal realists at the beginning of 20\textsuperscript{th} century who questioned the then dominant view that justices objectively apply the law to the case at bar (Ostberg & Wetstein, 2007). More recently the work of Segal and Spaeth (see, for example, Segal & Spaeth, 1993) has been influential in empirically demonstrating the role of ideology in judicial decision-making.

There exists a wealth of American scholarship on the influence of ideology in judicial decision-making\textsuperscript{13}. Due to the nature and historical development of the American legal and political systems, American courts have great power to influence policy and tend to be highly political – a fact which attitudinalists argue is reflected in their judicial decisions (see, Segal & Spaeth, 1993). Indeed, it would seem to make sense that judges do harbour some political goals or preferences. After all, the vast majority of U.S. Supreme Court justices come to the bench after holding political positions and, to be appointed to the Court, one must be noticed by politicians (Epstein & Knight, 1998).

In contrast, to American scholarship, Canadian research on the role of ideology in judicial decision-making generally suggests that ideology plays a minimal role in judicial decisions (Morton, et al., 1994 as cited in Ostberg & Wetstein, 1998, p. 782). It should also be noted that, although the attitudinal model is primarily concerned with political ideology, attitudinal scholarship also examines the effect of other judicial characteristics such as gender and professional background on decision-making (Songer & Johnson, 2007).

Proponents of the attitudinal model often point to dissents as an indicator that the decisions of judges are ideologically based (see Ostberg & Wetstein, 2007; Epstein & Knight, 1998). Clayton (1999), speaking in an American context, states that it is now commonplace to see multiple concurring opinions and several dissents. However, in Canada, the proportion of non-unanimous decisions is still low; in 2003 only 25.6% of all Supreme Court decisions were non-unanimous (Ostberg & Wetstein, 2007, p. 116).

Despite the popularity of the attitudinal model in scholarly circles, the approach has been sharply criticized for failing to appreciate other factors in judicial decision-making. As Abramowicz and Tiller (2009) note, “stated in its strongest form, the [attitudinal] model would appear to deny that legislative history [or, one can assume, case facts] in fact motivates judicial decision making at all” (p. 423). That said, Abramowicz and Tiller (2009) defend the perspective against this criticism, by claiming that this type of attack is based upon an inaccurate representation of attitudinalism. These authors contend that attitudinalists do acknowledge the importance of facts but believe that individual justices’ responses to these facts are based on preconceived attitudes. Indeed, in their earlier work Segal and Spaeth advocated the notion that the decisions of justices were based mainly upon their individual policy goals (i.e., ideology) but they later expanded this ideology driven approach to include “attitudinal responses” to the facts of a given case (Ostberg & Wetstein, 2007; Segal & Spaeth, 1993).

Applying the ideas of Segal & Spaeth (1993) in a Canadian context, Ostberg and Wetstein (1998) attempted to empirically demonstrate that Canadian
Supreme Court justices rely on individual attitudinal schema to decide search and seizure cases. Although this study sets out to provide empirical support for this expansion of the attitudinal model, if one is to take their findings at face value, the contention that judges make decisions based on schema or attitudes they hold regarding certain case specific facts - such as type of evidence and location of seizure - would seem to also support a pragmatic or even doctrinal model of judicial decision-making. After all, we would expect judges concerned with precedent to ensure that the cases are truly ‘alike’ in terms of facts. Similarly, pragmatists are, by definition, going to be concerned with the basic facts as a determinant of what constitutes the best outcome for the case. Ostberg and Wetstein (1998), note that the factors related to ideology and social background seem to have “little impact in the structure of attitudes Canadian justices use to resolve search and seizure disputes” (p. 782). It would seem as though, in stretching the attitudinal model to encompass attitudinal schema (which appears to be nothing more than case facts), one looses the attitudinal focus and is unable to support an ideologically based theory of judicial decision-making. Put another way, it is undoubtedly true that judges hold pre-determined attitudes towards certain facts, but is quite misleading to say that decisions, which are based on facts - such as the location of a search or whether the evidence consisted of blood - are “attitudinalist”. Contrary to the conclusions of Ostberg and Wetstein (1998), the results of their study (i.e., the acknowledgement that case facts are a central concern, coupled with the lack of
support for attitudinal measure) might support a more pragmatic view of judicial
decision-making.

Even if judges are primarily motivated by ideology as the attitudinal
model suggests, in reality, a judge’s discretion to implement these preferences
are constrained by a myriad of intra and inter institutional factors. To name a
few, the preference of other judges, the preferences of Parliament, institutional
norms and regulations, and social climate all constrain the discretion of judges.
The attitudinal model, in its traditional form is unable to address these
constraints and it is for this reason we now turn to the “strategic” or “rational
choice” model.

**Strategic model**

The attitudinal model has given rise to what Gillman (1996) has described
as a “post-attitudinal” perspective. This new perspective is known as the
“strategic” or “rational choice” model. Epstein and Knight (2000) trace the
origins of the strategic perspective back to the 1958 work of Glendon Schubert
who used game theory to explain decision-making among two U.S. Supreme
Court Justices while others date the origins back to Murphy (1964) or Pritchett’s
(1948) work on the Roosevelt Court. More recent conceptualizations of
strategic decision-making grew out of (or were revived) as a response to
deficiencies in the attitudinal perspective. Although Ostberg and Wetstein
(2007) refer to the strategic/rational choice model of judicial decision making as
“rival theory” it certainly follows the attitudinal lineage. Yet, the strategic model

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of judicial decision-making surpasses the former perspective in terms of explanatory power as it is takes a broader perspective than just ideology. Epstein and Knight (2000, p. 626) summarize the strategic model well:

On this account (1) social actors make choices in order to achieve certain goals; (2) social actors act strategically in the sense that their choices depend on their expectations about the choices of other actors; and (3) these choices are structured by the institutional setting in which they are made (see, generally, Elster 1986).

Proponents of this model observe that strategic decision-making occurs at every stage of the court process from the selection of cases and the assignment of the writing of the decisions, to the discussion of and voting on the case (Epstein & Knight, 1998). From this perspective judges are viewed as goal orientated political actors. The strategic model would suggest judges need to compromise their ideal outcome to avoid undesirable outcomes. That is, judges need to take into account the preferences of their fellow judges and the inter-institutional framework within which they are operating. Epstein and Knight (1998) use the American case of Craig v. Boren, 429 U.S. 190 (1976), which revolved around the appropriate standard of scrutiny for sex discrimination, to illustrate this type of bargaining. In addition to strategic bargaining among judges, studies have shown there are myriad of other factors to be considered when understanding judicial decision-making. Epstein and Knight (1998, p. 112) summarize strategic considerations well in noting that judges must consider “three different sets of rules governing three strategic relationships: (1) among the justices themselves, (2) between the Court and the other branches of government, and (3) between the Court and the American people.”
Although the attitudinal model is dominant over the doctrinal model in political science scholarship, overall, most would agree that judges do not make decisions *purely* on attitudinal grounds. The strategic model surpasses both the doctrinal and purely attitudinal models in terms of relative explanatory power, but, nevertheless, this model falls short due to its failure to address the inter- and intra-institutional constraints on judicial decision making. The next perspective to be discussed provides the strongest model for understanding judicial decision-making as it draws from the strengths of each of the previous models.

**Judicial Pragmatism**

A pragmatic approach views judicial decision making as a function of the broader socio-political context within which both the actors and institutions are situated. In contrast to the doctrinal (see Dworkin, 1986), attitudinal (Segal & Spaeth 1993; Ostberg & Wetstein, 2007), and strategic approaches (Epstein & Knight, 1998), the pragmatic approach takes an even broader view of judicial decision-making. A pragmatic approach is a contextual one that appreciates both the attitudinal inclinations of judges as well as their obligation to the doctrine and at the same time acknowledges the many internal and external constraints placed upon judges and the courts. Emphasis is placed on the *consequences* of judicial decisions; in this way judicial decisions are seen to be both consequentialist and constrained (Posner, 2008). In utilizing a more comprehensive approach the pragmatic model is able to better understand both the importance of both individual and socio-political factors relating to judicial decision-making.
The pragmatic approach is further differentiated from the former approaches by its expansion to include the notion that the institutional position of the Court within the broader political system combined with the intra-institutional features of the Court affects judicial decision making (Clayton, 1999). Depending on the level of the court one is examining some factors may be more salient than others. For example, while Supreme Court judges may have to compromise more due to the preferences of their colleagues (see Clayton, 1999), appellate court judges may be more concerned about reversal or, in some U.S. states about pandering to the public due to re-election concerns (see Comparato & McClurg, 2007).

The insights of the attitudinal and strategic perspectives are not lost in this model but the pragmatic approach surpasses the former in terms of relative explanatory power due to its expansion to include consideration of institutional constraints - the key being that this institutional influence can act independently of the personal political preferences of individual judges. For example, Comparato and McClurg (2007) noting the variation in the response of state Supreme Courts to Supreme Court rulings, sought to examine the relationship between these courts. Specifically, the authors examined the extent to which Supreme Court precedent in search and seizure cases affected the decisions of the state supreme courts. The study found that the extent to which state supreme courts implemented the rulings of the Supreme Court was dependant on a number of factors including precedent, ideology and historical conflict between the courts. Most importantly, the study highlighted the importance of judicial
retention methods (e.g., elite, competitive and merit based) among the states (Comparato & McClurg, 2007).

Although the rise of pragmatism in American courts has been widely acknowledged in law journals, it has been largely ignored in the field of political science (Clayton, 1999). Clayton (1999) attributes this oversight to an unyielding commitment to positivistic social science tradition that ignores doctrinal developments and views law as “an empty shell within which judges pursue a priori policy preferences” (p. 152) and is generally “ahistorical and reductionist” (p. 152). Tamanaha (2007), as cited in Posner (2008), contends that most American judges are pragmatists. As he notes: “Judicial decisions today routinely cite policy consideration, consider the purposes behind the law, and pay attention to law’s social consequences” (p. 230). Similarly, Clayton (1999) observes that, in contrast to the Warren and Burger Courts of the past, as an institution, the United States Supreme Court has become “centrist and pragmatic in its constitutional decision making” (p. 151). The decision of the Canadian Supreme Court in *Grant* provides a contemporary example of pragmatic decision-making. In *Grant* the Court clearly referred to policy concerns (e.g., those related to the limiting of police powers), the legislative intent of parliament in drafting s. 24(2) (as well as more specific policy goals such as deterring impaired driving), and considered carefully the consequences of their decision in terms of public policy and institutional arrangements. Additionally, the Court cited a plethora of relevant scholarship and took very seriously the submissions of interveners.
Over the course of the last three decades there has been an ongoing debate between the outspoken proponents of the doctrinal and pragmatic models of judicial decision-making. Any discussion of the pragmatic approach to understanding judicial decision making would be incomplete without reference to the work of Richard Posner, who is perhaps the most prolific proponent of the pragmatic model. Posner would characterize the pragmatic approach as holding the middle ground between legal formalism (doctrinal approach) and legal realism (attitudinal approach) (Posner, 2008). In contrast to the doctrinal model, which emphasizes constraints imposed by precedent, Posner’s pragmatism highlights the “institutional and material constraints” on judicial decision-making (Posner, 2003). One of Dworkin’s main criticisms (see Dworkin, 1986; Smith, 1990) of legal pragmatism is that it is only forward-looking and does not place any value on consistency with past precedent. Were this an accurate characterization, the pragmatic model would indeed be a flawed normative approach and an inaccurate description of judicial decision making. However, this criticism is based upon a flawed understanding of the pragmatic model: pragmatism does appreciate the importance of consistency and stare decisis and acknowledges that judicial decision-making is constrained (rightly so) by precedent (see Posner, 2008; Smith, 1990). Pragmatists acknowledge the importance of adhering to past precedent as failure to do so would bring the law into disrepute and erode public confidence in the law. Although the reasoning is different, both perspectives understand the importance of consistency in the law (if not for its own sake, for the sake of the future). The difference is largely one
of emphasis – Dworkin would place a higher value on consistency (and ‘integrity’) whereas, for Posner, such legal certainty is only one factor among many, even if it is given considerable (but not determinative weight). The difficulty with pragmatism might be that it ‘does too much’ – by incorporating everything, it explains nothing. Some argue that the looseness of the pragmatic framework means that even Dworkin could be a pragmatist; as Smith (1990) argues, Dworkin, “by his own definition” is “really an unconfessed pragmatist.” He observes that, in most cases, Dworkin would come to the same conclusions as the “sophisticated pragmatist” whom Dworkin criticizes for using precedent simply to veil his agenda.

The sharpest forms of pragmatism – and the most useful version for this study – are those that emphasize consequences as the key determinant of judicial decision-making. Not doctrine, not preference but the actual consequences of one judicial rule over another are the focus of true judicial ‘pragmatists.’ So, a search and seizure regime might be favoured over all others because it would strike the best balance between individual liberty and law enforcement (the practical consequences or outcomes) even though it might be contrary to precedent (it could be, for a pragmatist, a completely novel scheme, though a pragmatic judge is also mindful of the costs of legal uncertainty) and even though it might be contrary to a judge’s preference with respect to her tendency to favour police concerns. The pragmatic judge would prefer the best consequential outcome regardless of doctrinal fidelity or personal preference.
Conclusion

At this point it is necessary to place this discussion within the context of the current study. That s. 24(2) jurisprudence is an area of law fraught with uncertainty and contentious political issues has been discussed at length in Chapter One. Yet, in situating the discussion of judicial decision-making within the context of s. 24(2) jurisprudence it becomes possible to reconcile some of the competing claims of the doctrinal, attitudinal, strategic and pragmatic models of judicial decision-making. Some of this reconciliation is textual since the wording of s. 24 (2) allows for the exclusion of evidence where, “having regard to all the circumstances”, its admission “would bring the administration of justice into disrepute.” Thus, the doctrine explicitly requires judges to be somewhat pragmatic in their decision making. In other words, pragmatism is built into the doctrine, as the doctrine is best understood as a directive to the courts to be pragmatic in their decision-making.
CHAPTER FOUR: METHODOLOGY AND RESEARCH DESIGN

There have been many studies examining the Supreme Court’s application of the exclusionary rule but most rely on limited qualitative analysis or examine only the seminal decisions. Historically, research on decisions of appellate courts has been largely absent in academic literature but this trend has begun to change in recent years with increased focus being placed on these lower courts. A notable example is Ian Greene et al.’s *The Final Appeal* (1998), which provides extensive empirical analysis of decisions of the Ontario Court of Appeal. The importance of provincial appellate courts cannot be overstated as these are the courts often provide the final word in a vast majority of appeals. Less than 3% of cases from the OCA are granted appeals to the Supreme Court, making the OCA the court of last resort for hundreds defendants seeking remedies for rights violations (www.ontariocourts.on.ca/coa/en/). Furthermore, studies which generalize from decisions of the Supreme Court may be misleading because they assume that lower courts are simply followers, mechanistically applying the High Court’s decision instead of themselves being a catalyst for future changes in the jurisprudence. Indeed, the OCA has been recognized as a leader among Canadian courts of appeal (see Greene et al., 1998, p. 146). After examining interprovincial citation patterns of Canadian courts, Greene et al. (1998) conclude that due to the great extent to which other provinces cite the decisions of the Ontario Court of Appeal, the OCA could appropriately be considered a “junior Supreme Court”. Furthermore, Friedman once observed that, “…Canadian provincial appeal courts constitute an uneven
chorus, with Ontario booming the antiphon and everyone else whispering in response” (Greene et al., 1998, p. 146).

The central objective of the current study is to empirically assess trends in the admission of improperly obtained evidence at the Ontario Court of Appeal with the aim of drawing some preliminary conclusions about the nature of judicial decision-making. Utilizing all OCA cases involving consideration of s. 24(2) from the entrenchment of the Charter on April 17th 1982 to December 31st 2010, this study aims to reveal and understand trends in the exclusion of evidence in terms of the characteristics of the evidence; the type of rights found to be violated; and various influences on judicial decision making, such as deference to lower courts and the effects of precedent on the outcome. This was accomplished by using both qualitative and quantitative methodology to both describe and explain trends. The precise methodology is discussed further below.

Data collection

The sample consisted of those cases appearing in an electronic search performed by Westlaw eCarswell’s LawSource of all OCA cases involving s.24(2) between 1982 and December 31st 2010. The search terms used were the following: Court = Court of Appeal; Jurisdiction = Ontario; Subject = Criminal or Evidence; Headnote = “s. 24”. The subsection of section 24 was not specified to ensure that all cases were captured even if the subsection was absent in the headnote. Cases involving consideration of s. 24(1) were excluded as were cases wherein the court found no Charter violations (however, later, cases wherein the court proceeded to conduct a s. 24(2) analysis – even where no rights violations
had been found – were later included; see below). The cases were then coded in
terms of outcome (evidence admitted or excluded) as well as by type of evidence
(e.g., confession/handgun/drugs), category (conscription/non-conscription),
Charter section violation (e.g., s.8, s. 9, s. 10(a)(b)), treatment of lower court
decision (upheld/overturned) and by type of decision (split/unanimous).
Additionally, each individual judge was coded along with his/her vote, gender
and, where possible, political affiliation. See the section below for a detailed
description of each of the variables.

The number of cases comprising the original sample was 94. This number
was smaller than originally anticipated as many cases were omitted because the
court failed to find a rights violation. However, it was noticed that in 24 of cases
wherein the OCA failed to find a rights violation, the court explicitly noted that
even if there were a rights violation (i.e., even if they were mistaken in their
characterization of the events) the evidence would still be admissible under s.
24(2). It seemed important to take these cases into account for a number of
reasons: a) to control for confusion surrounding what constitutes a rights
violation in certain circumstances, b) to control for what could possibly be a
tendency of the court to more narrowly define rights in borderline cases.
Therefore, these additional “if, then” cases were added to the sample, bringing
the final number of cases in the sample to 118. It should be noted that these
cases were differentiated within the main sample to allow for independent
analysis at a later time. A list of the cases comprising the sample is provided in
Appendix I.
Definition of the Variables

Case Name:
All cases within the sample are from the Ontario Court of Appeal. When possible, cases were cited utilizing the neutral citation.

Inculpatory/Incriminating Statements:
The terms ‘inculpatory’ and ‘incriminating’ are used interchangeably throughout the literature and hold the same meaning. These types of statements include confessions and various other incriminating statements.

Drug Evidence:
Drug evidence includes evidence of drugs such as marijuana and cocaine. In some cases multiple drugs and drug paraphernalia were discovered by the police and, originally, these were coded separately. However, in the final analysis, this variable was recoded into binary form to allow for more robust statistical analysis. Therefore, this variable does not specify the type of drug found, whether there were multiple drugs or what type of charge (e.g., trafficking, possession, etc.) was laid.

Bodily Samples:
This type of evidence includes, for example, blood samples, DNA samples, saliva samples, urine samples, fingerprints and breath samples. Originally, this variable was coded as “blood sample”, “breath sample”, or “other”; however, this variable was recoded into binary form to allow for statistical analysis. The original coding was saved to allow for a more specific analysis of breath samples.

Evidence of Weapon:
This variable includes all types of weapons such as knives and guns along with any other object deemed by the court to be a weapon in a given case. This variable was originally coded as “weapon”, “gun” and “other” but was recoded into binary form to accommodate the statistical analysis.
Evidence of Other:
This variable accounts for evidence which does not fall into any of the
aforementioned types of evidence, for example, pornographic materials (R. v.
Higginbottom, 2001, 146 O.C.A. 304 83), samples from the scene of a fire (R v.
Persad, 2001, 144 O.C.A. 133), and materials and machines for counterfeiting credit

Category of Evidence:
This variable classifies evidence as either “conscriptive”, “non-conscriptive” or
“mixed”. Prior to Stillman, evidence was categorized as “real” or “conscriptive” – a
categorization which proved to be problematic in cases where evidence was both real
(i.e., physical) and conscriptive (i.e., it would not have been discoverable without the
conscription of the accused against himself). An example of this would be a gun
which would not have been discovered were it not for the police coercing the accused
to reveal its location in violation of his Charter rights. Thus, in Stillman, the Court
ruled that, in determining admissibility, evidence should be categorized as either
“conscriptive” or “non-conscriptive”. In reference to the example above, the evidence
of the gun would be categorized as conscriptive. The “mixed” category exists in the
data set to account for cases where both conscriptive and non-conscriptive evidence
was present and considered by the court (and therefore the evidence – as a whole -
cannot be classified into either of the former categories).

Section of Rights Violated:
The section violated variables refer to the section(s) of the Charter which the OCA
found to be violated. Sections 7, 8, 9 and 10 (a)(b) are provided below. In some cases
there was disagreement among the judges with respect to whether or not a right had
been violated. Such cases were coded according to the findings of the majority.
s. 7: Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

s. 8: Everyone has the right to be secure against unreasonable search or seizure.

s. 9: Everyone has the right not to be arbitrarily detained or imprisoned.

s. 10: Everyone has the right on arrest or detention
(a) to be informed promptly of the reasons therefor;
(b) to retain and instruct counsel without delay and to be informed of that right;

Decision Type:
This variable refers to whether the panel of judges hearing the case were unanimous or split in their decision. In some cases the judges were split on the question of whether a Charter right had been violated but still in agreement on whether to admit or exclude the evidence. Such cases were coded as “unanimous” since the judges were in agreement on the result.

Treatment of Lower Court Decision:
This variable refers to the treatment of the trial court decision. In some cases the trial court decision was appealed to a summary conviction appeal court before the Ontario Court of Appeal. That is, in some cases the appeal comes to the OCA from the summary conviction appeal court. However, in this data set this variable refers to the OCA’s treatment of the trial court decision.

Politics:
This variable refers to the political affiliation of judges. Where possible, data on the political affiliation of the OCA judges was taken from a study by Riddell, Hausegger and Hennigar (2009). In the current study, judges were coded as either “Liberal”, “Conservative” or “Non-Political” where information regarding political affiliation (or lack of political affiliation) was available. These categories were coded as separate variables in an effort to better assess the bivariate relationships with outcome. This variable proved to be somewhat problematic as the information on political affiliation
was not available for the many of the OCA judges in the sample. This variable will be addressed further in Chapter Five under Model 4.

*Vote:*
This variable refers to the vote of the individual judge as to whether or not to exclude the evidence in question. Votes were coded as either “admit” or “exclude”. This variable was necessary as the “outcome” variable does not take into account the individual votes of the judges but rather the decision of the majority.

*Gender:*
The gender variable (“male” or “female”) refers to the gender of each individual judge.

**Quantitative vs. Qualitative Methodology**

The current study employs both quantitative and qualitative research techniques. Generally speaking, much of the work done in the field of law, legal policy, judicial politics and other jurisprudential studies is qualitative in nature – especially in the Canadian context. This stems from both the legal tradition as well as certain practical considerations. Depending on the topic of research there may not be a sufficient number of cases available to compile a representative sample or a sample large enough to allow for a statistical analysis to produce statistically significant results. Often this type of research involves case studies, and although some qualitative work is predictive in nature, much of this type of research is purely descriptive. Qualitative research is valuable for examining smaller samples and analyzing samples which do not lend themselves well to coding or statistical examination. Although some topics do not lend themselves well to quantitative
examination, there are many topics in the field of legal research that are well suited to such examination.

Despite the strengths of qualitative research, especially when dealing with small samples, the lack of quantitative work in the field of legal research – especially in the Canadian context – is becoming increasingly problematic as new developments in law call for more representative samples from which to predict and explain. For example, legal theorists have been debating the value of differential approaches to explaining judicial decision-making for decades while often utilizing only a few legal cases to support their arguments. David Muttart (2007, p. 3-4), observes:

Jurisprudential theories are typically based on anecdote, superficial observation, and the undocumented impressions of individual authors. In jurisprudential writing, single instances are regularly held up as being representative without any evidence being offered in support of their representativeness. … Taken together these shortcomings constitute a serious empirical gap in jurisprudential scholarship.

Jurisprudential writing is too often characterized by allegation without verification, by idiosyncratic impression instead of rigorous research, by small and selective sample instead of systemic study. This approach foments errors and prevents their correction. […] There is thus a gap – what I call the empirical gap – between what judges actually do and what jurisprudential writers say they do.

The above quotation, though perhaps overly critical, describes the problem with relying exclusively on qualitative research to describe and explain. While Muttart’s (2007) point is defensible, this is perhaps explained by the fact that in legal studies there are often too few cases to cite in support of a pattern – even where a clear pattern exists. Furthermore, in some instances it is important to study seminal cases in their own right; however, it is dangerous to draw too many conclusions from such decisions without empirical evidence as to do so would be little more than to speculate. In fact, in recent years there has been a notable growth of quantitative research. As mentioned before, Greene et al.’s (1998) empirical study of Canadian
provincial appellate courts marks a concerted effort to statistically analyze and quantitatively support a number of normative arguments.

Certainly quantitative study has an essential role to play in supporting or refuting normative prescriptions and informing theoretical debates. However, as with any empirical approach, the application of quantitative methodology to the study of law and politics can pose several problems. First, and foremost, especially in the field of legal research, quantitative research can overlook key facts. Quantitative research often requires the coding of data and because not all data can be coded (it would not be possible or useful to attempt this) there is the chance that important trends or factors could be overlooked in such an analysis. Furthermore, simply because a study is quantitative in nature does not necessarily make it less subjective than a qualitative case study of, for example, a few seminal cases. For example, in Chapter Three it was discussed how Ostberg & Wetstein’s (2004) use of factor analysis in their study of judicial decision making was inherently subjective and, additionally, that their interpretation of their own statistical results was debatable. On some level - whether it be the statistical methodology one chooses, the way in which one chooses to interpret the results or even the question one chooses to ask - every study has some aspect of subjectivity and the most important step a research can take in the pursuit of objectivity is to acknowledge these factors and address them head-on. Nevertheless, quantitative methodology does have some advantages. Qualitative research allows for the examination of large groups at one time and permits researchers to assess the impact of independent variables relative to each other.
To minimize the limitations of both types of research and capitalize on their respective strengths the current study will employ both quantitative and qualitative analyses. The quantitative analysis of the aggregate data will be supplemented by a qualitative analysis which will expand upon the statistical results. Because it would be impossible (and unhelpful) to code every conceivable variable in each case the qualitative component of this analysis will, through a textual analysis of certain cases, be valuable in revealing similarities and differences among cases which the quantitative analysis is unable to capture.

**Analytical Models**

The analysis will be organized into four analytical models. In the first three models “outcome” (i.e., the admission or exclusion of evidence) forms the dependant variable while the independent variables consider the effect of: type of evidence, category of evidence, section violated, time period and treatment of lower court decision. In the fourth model which explores individual judicial characteristics, ‘vote’ formed the dependant variable.

*Model 1: Predicting outcome based on rights violated, type of evidence and category of evidence*

This model is concerned with addressing the impact of the type of rights violated by police misconduct as well as the type and category of evidence on exclusion. That is, does the frequency of evidence being admitted vary significantly depending on the type of rights violated and/or the type or category of evidence being considered?

It is acknowledged that each of these variables interact and contribute to the decision to admit improperly obtained evidence in a given case. Thus,
because of the relationships between the variables and the dynamic ways in which they interact, it will be impossible to isolate which variable is most significant. However, it will be valuable to observe trends with respect to certain types of evidence. As noted above, one of the most prevalent criticisms of Canadian jurisprudence surrounding s. 24(2) (at least until Grant) is that it creates a “quasi-automatic” exclusionary rule with regard to conscriptive evidence (see Parachin, 2000). This analysis asks: does the OCA’s treatment of conscriptive evidence suggest such a “bright-lines” approach? Whether or not a quasi-automatic rule appears to exist, it is anticipated that conscriptive evidence will be excluded more frequently than non-conscriptive evidence. Additionally, will certain types of conscriptive evidence be more likely to be admitted than others? Will breath samples, for example, be admitted more often than conscriptive evidence generally? The later question is especially interesting in light of the Court’s numerous suggestions that breath evidence should generally be admitted.

Furthermore, with respect to non-conscriptive evidence, it has been noted that the seriousness of the charge can act as both a mitigating and aggravating factor when determining admissibility. In light of this it will be interesting to observe the court’s treatment of certain types of evidence; for example, how frequently will the court admit evidence of a gun since cases involving such evidence usually revolve around relatively serious charges? Will breath samples tend to be admitted due to the societal interest in curbing impaired driving.
These are the types of questions which this model will address. In this model “outcome” (i.e., the admission or exclusion of evidence) will be the dependant variable while the independent variables will consider the effect of type of evidence, category of evidence and section of the Charter violated.

**Model 2: Effect of Precedent on Outcome**

This model is concerned with the effect of Supreme Court precedent on the outcome of OCA cases. Since the inception of the Charter three key Supreme Court decisions have defined and/or refined the test for the exclusion of improperly obtained evidence: *Collins, Stillman* and *Grant*. Based on these decisions and the relevant literature it is anticipated that several ‘eras’ or ‘rule-periods’ may be discernable in the data. For example, because the Supreme Court’s decision in *Stillman* has often been interpreted as creating an ‘automatic’ exclusionary rule it is anticipated that this may have created a ‘pocket’ trend in the s. 24(2) jurisprudence at the OCA level - a trend which may have ended with the Supreme Court’s decision in *Orbanski* (2005) or with the OCA’s decision in *Grant* (2006). Additionally, there has been much debate and speculation over the effect of the Supreme Court’s decision in *Grant* (2009). Recent commentary following the OCA’s 2006 ruling in *Grant* and the Supreme Court’s 2009 decision on the appeal (see Chapter One) suggests that post-*Grant* courts have become more inclined to admit improperly obtained evidence (moving closer to the pre-Charter situation). It is hypothesized that the Supreme Court’s recent reformulation of the exclusionary rule in *Grant* has solidified a recent trend toward the admission of improperly obtained evidence which will be evidenced
in recent decisions of the OCA. Of course, it is entirely possible that no such rule-periods are discernable but this too would be a significant finding given that many commentators assumed that the OCA’s decision in *Grant* was representative of that court’s evidence exclusion generally. This finding (or lack thereof) would also be significant since it is often assumed that the Supreme Court’s decision in *Stillman* created a bright-lines approach (whether intended or not).

This analytical model is important for evaluating the relative explanatory power of various theories of judicial decision-making. If no ‘rule periods’ are discernable in the data this may lend support to perspectives which emphasize the importance of individual preference in judicial decision-making or a strategic approach to judging. Conversely, a finding of several rule periods would bolster support for approaches which explain judicial decision-making by emphasizing the importance of legal doctrine.

**Model 3: Deference to Lower Courts**

This model examines the extent to which the OCA is deferential to the decisions of the trial courts. Under this model a comparison will be undertaken between the data in the current study and Greene et al.’s 1998 study of Canadian provincial appellate courts. For example, the study by Greene et al. (1998) reveals that the appellant, whether he be the accused or the Crown, is generally more likely to lose than win an appeal. This is supported by a textual analysis of the s. 24(2) cases in this sample which reveals that considerable deference is given to the
lower courts. This model will empirically investigate whether this and other larger trends hold true when examining s. 24(2) cases specifically.

While it is anticipated that appellants will be unlikely to be successful upon appeal, it is posited that the Crown will be more successful on appeal when compared to accused persons – perhaps more so in s. 24(2) cases than in general. In other words, this analysis asks: is the OCA more likely to uphold a decision to admit rather than exclude evidence?

It should be noted that because this area of law has produced somewhat confusing and at times conflicting jurisprudence the results produced by this model may be, to some extent, a reflection of confusion surrounding the application of the exclusionary rule rather than deference or lack thereof. However, it is anticipated that the results will be significant enough to draw meaningful conclusions.

**Model 4: Measuring Influences on Judicial Decision-Making**

In the fourth model, OCA decisions regarding s. 24(2) will be analyzed for patterns in judicial decision making based on individual judicial characteristics. Examining patterns in judicial decision-making will be conducted using a framework that appreciates both the importance of individual judge preference and the restraint imposed by institutional rules and norms. At an individual level, this model seeks to understand the effect of political affiliation and gender on the voting behaviour of the judges. In this model “Vote” (as opposed to “Outcome”) will act as the dependant variable. This analysis seeks to understand the effect of political affiliation, gender on the voting behaviour of the judges. Are Conservative judges more likely to vote to
admit improperly obtained evidence than their Liberal or Non-Political colleagues?

Additionally, a study of group dynamics and Supreme Court membership will attempt to capture broader institutional features related to judicial decision-making. For example, are OCA judges more likely to vote unanimously on decisions to admit evidence?

To aid in evaluating the competing philosophies of judicial decision-making this model will include an examination of the impact of Supreme Court membership on doctrinal development. It is curious why it took the Supreme Court twelve years to overturn its highly controversial decision in Stillman. This phenomenon may not be adequately explained by the doctrinal perspective since the Stillman decision appears to be a distortion of the doctrine and was highly criticized by many legal scholars as such. It has been suggested that perhaps this delay could be explained – at least in part – by the fact that Justice McLachlin who dissented in Stillman now leads the Court as Chief Justice. Thus, to further investigate the explanatory power of the attitudinal perspective relative to the doctrinal and pragmatic approaches, this model will include an analysis of the Supreme Court membership from the time of the Stillman decision to the Court’s more recent decision in Grant. It is possible that the fact that Justice McLachlin, who authored a strong dissent in Stillman and later led the Court in overturning that decision as Chief Justice could provide some support for explanatory models which highlight attitudinal or strategic factors in judicial decision-making.
CHAPTER FIVE: RESULTS AND ANALYSIS

The current chapter presents the findings of the present study. Using the OCA exclusion data this analysis draws some preliminary conclusions about the nature of judicial decision-making. For example, if rule-periods are discernable in s.24(2) jurisprudence, this would seem to support approaches that emphasize legal doctrine and contradict approaches that are overly ‘attitudinalist.’ Additionally, this data will allow for an in-depth analysis of the effect of type of evidence, rights violated, category of evidence, deference to lower courts and precedent on outcome. Therefore, the analysis will also allow for empirical evaluation of criticisms of the rule that have been put forth but rarely supported with anything more than anecdotal data.

Initially, logistical regression was run on the variables based on the results of the cross-tabulations. However, the results were inconclusive due to the nature of the sample and the sample size. The sample size and distribution of cases prevents many significant findings from reaching levels of statistical significance due to multicollinearity (i.e., the high correlation between the independent variables). As an alternative, factor analysis was run on the data but these results were also affected by the nature of the sample (i.e., the sample size and the overlap of the independent variables). The factor analysis produced 5 factors which explained approximately 80% of the variance, however, few of the variables had strong loadings on each factor. From the factor analysis, it was concluded that the main factors were all pointing to the same variables: violation of s. 10(b) and evidence of an incriminating statement along with treatment of
lower court decision. In other words, the factor analysis highlighted the conscriptive nature of the evidence as important in explaining the variance in outcome.

Due to the issues associated with employing the statistical methods discussed above, this analysis focuses on descriptive statistics (i.e., frequencies and cross-tabulations) to examine the effect of the variables on outcome in terms of admission or exclusion. Additionally, due to the preliminary findings of the regression and factor analysis, special attention is given to the category of evidence (conscriptive/non-conscriptive). After reviewing the preliminary descriptive statistics, it was obvious there was much to be learned simply from frequencies and crosstabs; given the small sample size, such statistics are the best way to represent the data in this sample.

Table 1 demonstrates the frequency of admission/exclusion of improperly obtained evidence at the OCA from 1982-2010. In approximately 68% of the s. 24(2) cases heard by the OCA, the evidence in question was admitted.

<table>
<thead>
<tr>
<th>Number</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Excluded</td>
<td>38</td>
</tr>
<tr>
<td>Admitted</td>
<td>79</td>
</tr>
<tr>
<td>TOTAL</td>
<td>117</td>
</tr>
</tbody>
</table>

*One case is missing because the outcome was “mixed”.

The following sections will address this ratio/differential by examining various factors which influence the court in making s. 24(2) determinations (e.g., type of evidence, type of rights violated, category of evidence, the effect of precedent, deference to lower courts and factors relating to judicial decision making).
| Table 2: Evidence Characteristics and “Type of Rights Violated” by “Outcome” |
|---------------------------------|-----------------|-----------------|-----------------|
|                                  | Excluded        | Admitted        | Chi-Square      |
| **Outcome**                     |                 |                 | p-value         |
| Type of Evidence                |                 |                 |                 |
| Drug                            |                 |                 |                 |
| Yes                             | 15 (32.6%)      | 31 (67.4%)      | .935            |
| No                              | 23 (33.3%)      | 46 (66.7%)      |                 |
| Weapon                          |                 |                 |                 |
| Yes                             | 3 (16.7%)       | 15 (83.3%)      | .108            |
| No                              | 35 (36.1%)      | 62 (63.9%)      |                 |
| Inculpatory Statement           |                 |                 |                 |
| Yes                             | 18 (60.0%)      | 12 (40.0%)      | .000***         |
| No                              | 20 (23.5%)      | 65 (76.5%)      |                 |
| Bodily Sample                   |                 |                 |                 |
| Yes                             | 10 (38.5%)      | 16 (61.5%)      | .504            |
| No                              | 28 (31.5%)      | 61 (68.5%)      |                 |
| Other                           |                 |                 |                 |
| Yes                             | 5 (20.0%)       | 20 (80.0%)      | .117            |
| No                              | 33 (36.7%)      | 57 (63.3%)      |                 |
| Section of Rights Violated      |                 |                 |                 |
| s. 7 Violated                   |                 |                 |                 |
| Yes                             | 1 (33.3%)       | 2 (66.7%)       | .974            |
| No                              | 37 (32.5%)      | 77 (67.5%)      |                 |
| s. 8 Violated                   |                 |                 |                 |
| Yes                             | 21 (28.4%)      | 53 (71.6%)      | .214            |
| No                              | 17 (39.5%)      | 26 (60.5%)      |                 |
| s. 9 Violated                   |                 |                 |                 |
| Yes                             | 5 (33.3%)       | 10 (66.7%)      | .940            |
| No                              | 33 (32.4%)      | 69 (67.6%)      |                 |
| s. 10(a) Violated               |                 |                 |                 |
| Yes                             | 1 (20.0%)       | 4 (80.0%)       | .543            |
| No                              | 37 (33.0%)      | 75 (67.0%)      |                 |
| s. 10(b)                        |                 |                 |                 |
| Yes                             | 20 (46.5%)      | 23 (53.5%)      | .013*           |
| No                              | 18 (24.3%)      | 56 (75.7%)      |                 |
| Category of Evidence            |                 |                 |                 |
| Non-Conscriptive                | 13 (20.0%)      | 52 (80.0%)      | .002**          |
| Conscriptive                    | 22 (47.8%)      | 24 (52.2%)      |                 |

*p < 0.05;  **p < 0.01;  ***p < 0.001
Model 1: Explaining “Outcome” in Terms of “Rights Violated,” “Type of Evidence” and “Category of Evidence”

This model is concerned with addressing frequency of exclusion. Does the frequency of evidence being admitted vary significantly depending on the type of rights violated and the type or category of evidence being considered? Table 2 demonstrates the frequency of admission of improperly obtained evidence by type of evidence, section of rights violated and category of evidence.

a) Rights Violated:

<table>
<thead>
<tr>
<th>Table 3: Frequencies for “Rights Violated”</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number</td>
</tr>
<tr>
<td>s. 7 Violated</td>
</tr>
<tr>
<td>s. 8 Violated</td>
</tr>
<tr>
<td>s. 9 Violated</td>
</tr>
<tr>
<td>s. 10 (a) Violated</td>
</tr>
<tr>
<td>s. 10(b) Violated</td>
</tr>
<tr>
<td>TOTAL</td>
</tr>
</tbody>
</table>

Among the 118 cases examined in this study there were 143 rights violations, meaning that some cases involved multiple rights violations. The Charter rights most commonly violated in s. 24(2) cases were sections 8, 9 and 10(b). Of the 143 rights violations, 52.4% involved a section 8 violation while 30.1% of violations were s. 10(b) violations. Section 9 violations accounted for 11.2% of rights violations in the sample. The results of the cross-tabulation of ‘section of rights violated’ and ‘outcome’ are presented in Table 2. The cross-tabulations reveal that when an accused’s right to be free from unreasonable search and seizure (s. 8) was violated, the evidence was admitted in 71.6% (53/74) of the cases. When an accused’s right to be free from arbitrary detention
was violated (s. 9), the evidence was admitted in 66.7% (10/15) of the cases. However, when accused’s rights to counsel was violated (s. 10(b)) the evidence was admitted in only 53.5% (23/43) of the cases. The correlation between section 10(b) violations and outcome was significant at p=<0.05. For further comparison, when s. 10(b) was not violated (i.e., a different right was violated), evidence was admitted in 75.7% of the cases and, on average, evidence was admitted in 67.5% of cases overall. In other words, there was a 41.5% increase in admission when the right violated was not s. 10(b).

These results indicate that the court favours admission, regardless of the section of rights found to be violated, unless the right violated is s. 10(b). This is significant considering that the exclusionary rule has often been criticized for elevating s. 10(b) to a “super-right”. This reflects the deeply-entrenched right against self-incrimination, as the basis for ensuring the protection of other rights, and the minimal onus on the police to provide the caution. However, a textual analysis suggests that in many cases s. 10(b) violations are minor and technical in nature – often related to impaired driving cases - which could be seen to mitigate in favour of admission.

Yet, it would be a mistake to draw too many conclusions from these statistics alone. It is likely that the type of right violation interacts with a number of other factors such as the type of evidence and even type of charge to explain admission or exclusion. For example, a look at the frequencies reveals that the majority of s. 10(b) violations produce incriminating statements (rather than
other types of evidence). What is more important: the type of right violated or the evidence produced as a result of that violation? In other words, are section 10(b) violations treated differently when they result in real evidence (such as a breath sample) as opposed to an inculpatory statement? To investigate, those cases wherein s. 10(b) was violated were isolated and then a cross-tabulation of type of evidence (bodily sample or statement) by outcome was run. This revealed that in cases of s. 10(b) violations, evidence of a bodily sample was more likely to be admitted than evidence of an inculpatory statement.

An interesting avenue for future research would be to further explore some of these interaction effects. For example, it would be interesting to examine the impact of multiple rights violations on the admission of evidence. That is, is evidence more likely to be excluded in cases where multiple rights were violated?

b) Type of Evidence:

Certain types of evidence are more common in s. 24(2) cases than other types of evidence. Table 4 demonstrates these frequencies while Table 2 reveals the results of the cross-tabulations of types of evidence and outcome. It is important to take note of both the frequencies and the cross-tabulations since it is possible that the prevalence of a certain type(s) of evidence could skew the overall trends. That is, if the court is reluctant to exclude a certain type of evidence that is present in a large proportion of s. 24(2) cases this could greatly influence the overall trends.

15 Of the 52 cases involving a s. 10(b) violation 20 (38.5%) involved an incriminating statement, 13 (25%) a bodily sample, 10 (19.2%) drug evidence, 6 (11.5%) a weapon, and 3 (5.7%) “other” evidence.
### Table 4: Frequencies for “Type of Evidence”

<table>
<thead>
<tr>
<th></th>
<th>Number*</th>
<th>Percentage within “Case Name”**</th>
</tr>
</thead>
<tbody>
<tr>
<td>Drugs</td>
<td>47</td>
<td>40.5%</td>
</tr>
<tr>
<td>Weapons</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Gun</td>
<td>17</td>
<td>14.7%</td>
</tr>
<tr>
<td>Other (not gun)</td>
<td>1</td>
<td>0.9%</td>
</tr>
<tr>
<td>Incriminating Statement</td>
<td>30</td>
<td>25.9%</td>
</tr>
<tr>
<td>Bodily Sample</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Breath Sample</td>
<td>16</td>
<td>13.8%</td>
</tr>
<tr>
<td>Blood Sample</td>
<td>5</td>
<td>4.3%</td>
</tr>
<tr>
<td>Other</td>
<td>5</td>
<td>4.3%</td>
</tr>
<tr>
<td>Other</td>
<td>25</td>
<td>21.6%</td>
</tr>
</tbody>
</table>

* Based on 116 cases. Two cases were omitted because information on “type of evidence” was unavailable.  
** Percentage of cases which included the various types of evidence.

**Drugs**

Approximately 40% of all of the s. 24(2) cases heard by the OCA involved drug evidence. Where the evidence in question involved drugs, the evidence was admitted 67.4% (31 out of 46) of cases.

**Inculpatory Statements**

Evidence in the form of an inculpatory statement was involved in 25.9% of s. 24(2) cases heard by the Ontario Court of Appeal. Where the evidence in question consisted of an incriminating statement it was admitted in only 40.0% (12 out of 30) of the cases. The correlation between evidence of an incriminating statement and outcome is significant at a confidence level of over 99% (p=<.001). This is consistent with prior findings that s. 10(b) violations (from which improperly obtained inculpatory statements most often result) are the violations most likely to result in exclusion.
Bodily Samples

Bodily samples were involved in 22.4% of s. 24(2) cases. Where the evidence in question consisted of a bodily sample it was admitted in 61.5% of cases. This type of evidence is particularly interesting to examine because cases involving bodily samples (perhaps more so than other types of cases) fall within a wide spectrum in terms of the seriousness of police misconduct. On one side, we often see minor rights violations which can result in, for example, improperly obtained breath samples, while on the other hand, we can see egregious police misconduct in, for example, the collection of DNA or blood evidence in cases such as Stillman.

As Table 5 reveals, breath samples formed the bulk (61.5%) of this type of evidence (i.e., bodily samples). Table 5 presents the cross-tabulation of bodily samples with outcome and demonstrates that breath samples were admitted in 68.8% (11/16) of cases, blood samples were admitted in 60% (3/5) of cases and “other” bodily samples were admitted in only 40% (2/5) of cases.

<table>
<thead>
<tr>
<th>Bodily Sample</th>
<th>Excluded</th>
<th>Admitted</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Breath Sample</td>
<td>5 (31.3%)</td>
<td>11 (68.8%)</td>
<td>16 (100)</td>
</tr>
<tr>
<td>Blood Sample</td>
<td>2 (40%)</td>
<td>3 (60%)</td>
<td>5 (100%)</td>
</tr>
<tr>
<td>Other</td>
<td>3 (60%)</td>
<td>2 (40%)</td>
<td>5 (100%)</td>
</tr>
</tbody>
</table>

A textual analysis of the cases involving bodily samples reveals that of the 26 cases in which the evidence consisted of a bodily sample, 22 (84.6%) revolved around impaired driving charges. The four additional cases which did not involve charges relating to impaired driving comprised four of the five cases involving “other” types of bodily samples. In other words, all of the cases involving blood or...
breath evidence belonged to cases involving impaired driving charges. This (combined with a textual analysis) also indicates that the OCA admitted evidence in the form of bodily samples in approximately 63% of impaired driving cases. See Appendix II for a list of the cases comprising the “other” category (within the bodily sample variable) as well as a list of impaired driving cases.

The results of the cross-tabulations when viewed alongside the textual analysis indicate that the court has tended (slightly) to admit evidence in the form of bodily samples collected in impaired driving cases where an accused’s rights were violated – regardless of whether the evidence consisted of a blood sample or breath sample. In contrast, where an accused’s rights were violated in other types of cases (not related to impaired driving), and the bodily evidence was not in the form of blood or breath samples, the court tended to exclude such evidence.

Initially, it is somewhat surprising to see that the court admitted evidence of bodily samples only slightly less frequently than evidence generally since this type of evidence is usually considered conscriptive and has generally been thought to adversely affect the fairness of the trial and be subject to quasi-automatic exclusion. However, being that such a high proportion of these cases were impaired driving cases, this statistic is surprising for an entirely different reason. Considering the fact that the Court and law makers have acknowledged the there is a substantial public interest served by curbing impaired driving and, knowing that rights violations in such cases tend to be minor or technical in nature, it is surprising that the rate of admission for this type of evidence is not higher. Even in Stillman, where the

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16 In the four cases comprising the “other” category within the “bodily sample” variable, the evidence considered consisted of fingerprints, urine sample and DNA.
Supreme Court created an almost automatic exclusionary rule for conscriptive evidence, the Court noted that some evidence such as breath samples are obtained so routinely and in such an unobtrusive manner as to make them generally admissible (Stillman, para. 90). In the third analytical model this study will investigate the admission of breath samples over time to examine the effect of precedent on the admission. This investigation is particularly important after the Grant decision in which the Court reiterated that breath samples should generally be considered admissible.

**Weapons**

Cases involving evidence of a weapon were relatively rare and comprised only 15.5% of the sample. In 83.3% (15/18) of the cases wherein the evidence in question was a weapon, the evidence was admitted. It should also be noted that in all but one of the cases involving a weapon, the weapon in question was a gun. Table 6 presents the cross-tabulation of the expanded weapon variable with outcome.

<table>
<thead>
<tr>
<th>Weapon</th>
<th>Excluded</th>
<th>Admitted</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Gun</td>
<td>3 (17.6%)</td>
<td>14 (82.4%)</td>
<td>17 (100)</td>
</tr>
<tr>
<td>Other weapon</td>
<td>0 (0%)</td>
<td>1 (100%)</td>
<td>1 (100%)</td>
</tr>
</tbody>
</table>

In 82.4% (14 out of 17) s. 24(2) cases involving evidence of a gun the evidence was admitted. A textual analysis reveals that two of the three cases wherein evidence of a gun was excluded revolved around non-violent crimes (theft and drug cases) – one of which was reversed by the Supreme Court on appeal on the admissibility of the evidence and the outcome. In the third case the
gun was excluded because it was found as a result of an unlawful arrest – the police had been searching for a robbery suspect and based on a vague description had mistakenly arrested the wrong individual. In other words, whenever a gun was used in the commission of the crime and the evidence was reliable, it was always admitted by the Ontario Court of Appeal.

c) Category of Evidence:

The examination of the above variables (“type of evidence” and “section of rights violated”) highlights the importance of the category of evidence. The above examination has revealed that an incriminating statement is the type of evidence most frequently excluded and that the violation of s. 10(b) more frequently triggers the exclusion of evidence than the violation of any other right. Both of these findings point to the importance of the category of evidence since improperly obtained incriminating statements are categorized as conscriptive and evidence collected following a s. 10(b) violation is most often conscriptive in nature (whether it be a bodily sample or an incriminating statement).

Table 2 reveals that in 80% (52/65) of the cases where the evidence was non-conscriptive, the evidence was admitted; conversely, in 52.2% (24/46) of cases where the evidence was conscriptive, the evidence was admitted. In other words, non-conscriptive evidence was significantly more likely to be admitted than conscriptive evidence. The correlation between category of evidence and outcome is highly significant at p=<.01.
In an effort to further highlight the significance of this variable, category of evidence was regressed individually against outcome. Table 7 shows a direct negative correlation between the outcome (admission) and category of evidence (conscriptive evidence). The odds ratio for category of evidence was 0.27 which can be interpreted as meaning the odds of conscriptive evidence (as opposed to non-conscriptive evidence) being admitted as approximately $1/4$. It is important to note that this regression does not control for other variables; however, it is useful in demonstrating directionality and underscoring the importance of the categorical nature of the evidence in question.

<table>
<thead>
<tr>
<th>Table 7: Regression of “Category of Evidence” against “Outcome”</th>
</tr>
</thead>
<tbody>
<tr>
<td>B</td>
</tr>
<tr>
<td>------------------</td>
</tr>
<tr>
<td>Step 1&lt;sup&gt;a&lt;/sup&gt; RECODE_Category</td>
</tr>
<tr>
<td>Constant</td>
</tr>
</tbody>
</table>

<sup>a</sup>Category of Evidence was coded as: 0=Non-Conscriptive 1=Conscriptive; Outcome was coded as: 0=Excluded 1=Admitted.

**Conclusions: Model 1**

It was originally thought that the high proportion of cases involving drugs could perhaps be responsible for the overall trends of admission. That is, because cases involving drugs account for such a high proportion of s. 24(2) cases and because drugs are admitted more frequently than other types of evidence this could skew the overall trends. However, this does not appear to be the case; in fact, with the exception of incriminating statements, more often than not the court ruled to admit all types of improperly obtained evidence. Furthermore, incriminating statements (the type of evidence most likely to be
excluded) were excluded in only 60% of the cases. It is also interesting to observe the rather low admission rate for evidence in impaired driving cases – especially in light of repeated guidance from the Supreme Court that evidence such as breath samples should generally be admitted.

With an overall admission rate of 67.5%, one might conclude that the argument that the OCA is generally reluctant to exclude evidence holds true. However, this generalization is somewhat overstated when the type of evidence is considered. Indeed, with the exception of incriminating statements, the court is more likely to admit rather than exclude improperly obtained evidence. Yet, when conscriptive evidence is viewed alone, the picture changes dramatically. The overall admission rate for non-conscriptive evidence is 80% compared to an admission rate of 52.2% for conscriptive evidence which once again highlights the importance of the category for evidence.

The importance of the categorical nature of evidence in influencing trends of admission will be further examined in Model 2. Chapter One presented an overview of the developments and changes in the judicially created s. 24(2) tests. In light of the significant changes the rule has undergone over time the following model will examine the impact of the doctrinal development on trends in admission over time. This is especially important to examine in light of the differential treatment of conscriptive and non-conscriptive evidence with regard to admission.
Model 2: The Effect of Precedent on Outcome

This model is concerned with the effect of Supreme Court precedent on the outcome of Ontario Court of Appeal cases. Since the enactment of the *Charter* there have been three key cases which have defined and/or refined the test for the exclusion of improperly obtained evidence: *Collins* (decided May, 27\(^{\text{th}}\) 1987), *Stillman* (decided March, 20\(^{\text{th}}\) 1997) and *Grant* (decided July, 17\(^{\text{th}}\) 2009). In an effort to examine the effect of these key cases on OCA jurisprudence, the cases in the sample were sorted into time periods based on these seminal Supreme Court decisions. It was anticipated that several ‘eras’ or ‘rule-periods’ would be discernable in the data.

In addition to these seminal decisions, several rulings of the OCA (e.g., *R. v. Richfield*, [2003] 175 O.C.A. 54 and *R. v. Grant*, [2006] 213 O.A.C. 127) have played a significant role in shaping the current application of the rule. In light of the recent controversy surrounding the OCA and Supreme Court’s decision in *Grant*, an initial project within this model was to examine the effect of *Grant* (both the OCA and Supreme Court decisions) on the admission of evidence. The results reveal a dramatic increase in the admission of evidence following the OCA’s decision in *Grant* (see Table 8).

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Time Period</strong></td>
<td><strong>Outcome</strong></td>
<td><strong>Pearson Chi-Square p-value</strong></td>
</tr>
<tr>
<td></td>
<td><strong>Excluded</strong></td>
<td><strong>Admitted</strong></td>
</tr>
<tr>
<td>Pre-Grant OCA</td>
<td>33 (38.8%)</td>
<td>52 (61.2%)</td>
</tr>
<tr>
<td>Post-Grant OCA</td>
<td>5 (15.6%)</td>
<td>27 (84.4%)</td>
</tr>
</tbody>
</table>

*p < 0.05; **p < 0.01; ***p < 0.001*
Prior to the OCA’s decision in *Grant* (2006), the OCA admitted evidence in 61.2% of s. 24(2) cases. Following the OCA’s decision in *Grant* this proportion increased significantly to 84.4%. Yet, it may be a mistake to attribute the entirety of this difference to the OCA’s decision in *Grant* as the Supreme Court’s ruling in *Orbanski* (only one year earlier) was commonly read as a step away from the ‘bright lines’ approach of *Stillman* and a sign of changes to come (see, Stuart, 2007). Regardless of which case set the precedent for the increase in the rate of admission, it is clear that precedent does impact trends in s. 24(2) decisions.

The next project within this portion of the study was to take a broader look at the effect of precedent. An examination of the admission of evidence over time (from 1982 to 2010) did not immediately show any obvious patterns. However, when the admission of *conscriptive* evidence was viewed over time the effect of precedent became easily apparent. Viewing conscriptive evidence separately is important for a number of reasons. First, because many of the significant variables discussed above (violation of s. 10(b) and evidence in the form of an incriminating statement) can be reduced to the category of the evidence (conscriptive or non-conscriptive), this variable becomes an important focal point of the analysis. Additionally, *Stillman* has often been read as creating a bright-lines approach with regard to the admissibility of conscriptive evidence; yet, whether this is, in fact, the case has never been studied empirically. Figure 1
demonstrates the frequency of admission of conscriptive evidence over time.\textsuperscript{17}

As anticipated, the results of this analysis indicated several distinct ‘rule-periods’ within the data with respect to the admission of conscriptive evidence.

**Figure 1: Admission of Conscriptive Evidence Over Time**

Based on the empirical results displayed above in Figure 1 as well as a textual analysis of the cases, four distinct rule periods have been defined: Immediately Post-Charter (03/29/82 – 05/27/87); Collins-Stillman (05/28/87-03/20/97); Stillman-Grant OCA (03/21/97- 06/01/06); Grant OCA - Present (06/02/06-12/31/2010). Figure 2 presents a condensed output of admission over time. The following presents an examination of each of the four time periods.

\textsuperscript{17} Under this model, which studies conscriptive evidence alone, the “category of evidence” variable (conscriptive/non-conscriptive/mixed) was recoded into two separate binary variables. This recoding made it possible to include the five cases in the sample which involved both conscriptive and non-conscriptive evidence.
a) Immediately Post-Charter

Kelly (1999) asserts that in the two years following the Charter’s entrenchment the Supreme Court took an activist approach in applying new Charter provisions which was short-lived and soon replaced by a more balanced approach which, he argues, has remained over the long-term. Although it is debatable whether this holds true for enforcement of Charter provisions generally, it does appear that, with respect to the admission of conscriptive evidence, there was an initial ‘activist phase’ at the OCA which spanned the five years following the entrenchment of the Charter. Figure 2 demonstrates that from 1982 to 1987 the OCA ruled to exclude conscriptive evidence in 4 of 4 cases. Also, following Collins, it does appear the court returned to a more balanced approach – at least until Stillman. Commentary on other cases from this time period suggests that evidence of an initial activist phase at the OCA is consistent with a larger trend among Canadian courts following the entrenchment of the Charter. For example, in Therens (1985) the Supreme Court ruled to exclude breathalyzer results which were obtained in a manner which was
deemed to violate the accused’s s.10(b) right to counsel. This ruling reversed the pre-
Charter precedent set in Chromiak (1980), effectively adding psychological detention
to s.10(b) of the Charter and demonstrating that the Court would be willing to
overturn pre-Charter precedents if they came into conflict with the Charter (MacIvor,
2006).

It should be noted that these results which suggest somewhat of an
‘activist’ approach post-Charter are tempered by the fact that during this time
period the court admitted evidence in 6/6 cases wherein in evidence was non-
conscriptive\(^\text{18}\). However, if one were to assume that most of the cases wherein
evidence was excluded during this time period would have been decided
differently if heard pre-Charter (as prior to 1982 the Court ruled relevant and
reliable evidence should generally be admitted), these findings still support the
notion of a post-Charter activist phase with respect to the admission of
improperly obtained evidence.

\(b\) Collins-Stillman

Following the Supreme Court’s ruling in Collins (1987), the rates of
admission for conscriptive evidence levelled off, with the evidence admitted in
13/26 or 50 percent of cases. This is likely reflective of the Court’s balanced
approach in formulating the Collins test combined with the flexibility it allowed
judges in making s. 24(2) determinations. Furthermore, during this time period
non-conscriptive evidence was admitted in 14/19 (73.6\%) of cases, which is a

\(^{18}\) Note: two cases were double counted in the conscriptive vs. non-conscriptive counts because they
involved both conscriptive and non-conscriptive evidence.
significant decrease in admission rates from the previous time period\textsuperscript{19}. This further evidences a more balanced approach to improperly obtained evidence.

c) Stillman- Grant OCA

The Supreme Court’s decision in Stillman has generally been interpreted as creating an ‘automatic’ exclusionary rule, yet, whether such an ‘automatic’ rule has actually manifested itself at the appellate court level has never been empirically examined. The results of this analysis reveal that there is indeed a ‘pocket trend’ in s. 24 (2) jurisprudence the OCA level with respect to the treatment of conscriptive evidence.

The results of the model re-affirm the oft stated assumption that the Supreme Court’s decision in Stillman created a bright-lines approach in the treatment of conscriptive evidence. Figure 1 demonstrates that in the years following Stillman, the OCA ruled to exclude conscriptive evidence in 5/8 cases. A list of the 5 cases wherein the court ruled to exclude is provided in Table 9. The two cases in 2003 wherein the court ruled to admit evidence are both unusual and can be considered outliers. In United States v. Yousef [2003] 174 O.A.C. 286 the accused, while being held in a Canadian jail, was questioned by American detectives and a prosecutor who provided him the Miranda warning but not the s. 10(b) warning. Their questioning resulted in Yousef making a full confession to first-degree murder. The Ontario Court of Appeal, assuming (but not deciding) that the accused’s s. 10(b) rights had been violated held that the evidence was properly admitted in the extradition hearing, which was currently

\textsuperscript{19} Note: one case was counted in both the conscriptive and non-conscriptive counts because the case involved both conscriptive and non-conscriptive evidence.
on appeal. In the second outlier case, *R. v. Morey* [2003] 171 O.A.C. 36, the
court upheld a ruling to admit wiretap evidence against an accused charged with
several narcotics offences. The court decided that even if the appellant’s s. 8
rights were violated by a semantic error in the application for the wiretap, the
evidence would still be admissible under s. 24(2). The OCA did not refer to or
consider *Stillman* in either of these two decisions. Due to the unusual nature of
these cases, the frequency of exclusion in the time period following *Stillman* is
perhaps better viewed as 5/6.

The cases within this time-period revolve around a number of different
charges which provides further support for the notion that it was the indeed the
precedent set in *Stillman* rather than the specifics of each case which is responsible
for the high level of exclusion during this time period. Table 9 provides a summary
of the cases in this time period wherein the OCA ruled to exclude conscriptive
evidence.

<table>
<thead>
<tr>
<th>Case</th>
<th>Summary</th>
</tr>
</thead>
</table>
Evidence: Urine sample, cocaine, and incriminating statement
Outcome: Excluded |
Evidence: Incriminating statement
Outcome: Excluded |
| *R. v. Flintoff* [1998] 111 O.A.C. 305 | Re: Impaired driving
Evidence: Breathalyser
Outcome: Excluded |
| *R. v. McIntosh* [1999] 128 O.A.C. 69 | Re: First degree murder
Evidence: Incriminating statement (confession)
Outcome: Excluded |
Evidence: Incriminating statement
Outcome: Excluded |
A review of the cases in this time period wherein the OCA ruled to exclude evidence leads one to wonder if these cases would be decided the same way if heard today. In particular, the cases of Monney (1997) and McIntosh (1999) stand out as questionable precedents; if decided under today’s Grant framework they would likely have resulted in admission. In fact, Monney was one of the few s. 24(2) OCA decisions that included a dissenting opinion.

d) Grant OCA - Present (December 31st, 2010)

The ‘pocket-trend’ regarding treatment of conscriptive evidence created by Stillman ended with the OCA’s decision in Grant (2006). In Grant the OCA ruled to admit conscriptive real evidence that was derivative of a s. 9 violation. The precedent set by this case appears to have dramatically altered the treatment of conscriptive evidence. Following Grant (2006), the OCA ruled to admit conscriptive evidence in 10/13 (76.9%) of cases (including Grant (2006)) - an increase of over 100% from the previous time period.

That said, it may be misleading to attribute the entirety of this trend to Grant. It is also possible that the OCA’s decision in R v. Richfield (2003) 175 O.A.C. 54 could have contributed to this pocket trend since there the OCA noted that there are exceptions to the automatic Stillman rule in some instances (e.g., certain minimal breaches in obtaining breath samples). Additionally, in Richfield (at para. 18) the OCA observed that the Supreme Court seemed to be preparing to re-examine the automatic Stillman approach. Furthermore, the Supreme Court’s ruling in Orbanski (2005) was generally interpreted as a sign that the
Court was taking a step away from *Stillman* and its more absolutist approach. In fact, the OCA, in *Grant*, referenced *Orbanski* to reinforce their position that an absolutist approach to the admissibility of conscriptive evidence was at odds with the requirements of s. 24(2). That said, the decision to define this time period as starting with the OCA’s decision in *Grant* is justified as the *Grant* decision was more well-known (at the time) and discussed in the mainstream media as well as among legal commentators, likely due to the seriousness of the charges involved and the type of physical evidence at issue. Also, the s. 24(2) issue was more central to the case in *Grant* compared to *Orbanski* which focussed to a large degree on scope of s. 10(b) rights.

In 2009 the Supreme Court ruled to uphold the OCA’s ruling in *Grant* and provided clarification on the rules of admission for conscriptive evidence; the Court also as updated the test for assisting judges in determining admissibility. Although relatively few s. 24(2) cases have been heard following the Supreme Court’s decision in *Grant*, it appears as though this decision has solidified the trend toward the admission of improperly obtained evidence that began with the OCA’s 2006 ruling in the case. The few cases heard following the Supreme Court’s ruling in *Grant* which are available for analysis support this notion. Looking at the admission of evidence generally (both conscriptive and non-conscriptive evidence), post-*Grant* (2009) the OCA ruled to admit evidence in 9/9 cases. That is, every s. 24(2) case heard by the OCA following the Supreme Court’s ruling in *Grant* – those involving both conscriptive and/or non-
conscriptive evidence – has resulted in a decision to admit the evidence in question.

Conclusions: Model 2

The existence of ‘rule-periods’ in the data lends support for the notion that legal doctrine has an important role in constraining judicial decision-making. Additionally, the results suggest that when judges are provided with a more flexible test for exclusion (e.g., Grant), evidence is admitted more frequently. Thus, it may be that OCA judges would prefer to admit evidence in most cases but are constrained, to an extent, by precedent. More generally, it suggests that the seminal cases – ones which re-shape legal doctrines, are matched by changes in admission rates. Absent other factors, this evidence supports the notion that doctrine ‘matters’ (at least to some extent).

Model 3: Deference to Lower Courts

This model examines the extent to which the OCA is deferential to the decisions of the trial courts in s. 24(2) cases. In their study of Canadian appellate courts, Greene et al. (1998) examine the frequency with which appellants won substantive criminal appeals\textsuperscript{20}. Their aggregate data reveals that the appellant won (or won in part) in approximately 33% of substantive criminal appeals heard by provincial courts of appeal (Greene et al., 1998, p. 175)\textsuperscript{21}. Thus, the decision of the lower court was overturned in approx. 33% of cases. It was anticipated that the reversal rate for s. 24(2) cases would be higher than the general rate due, in large part,

\textsuperscript{20} Greene et al. (1998) examine data collected from 1988 to 1992.
\textsuperscript{21} Substantive criminal appeals were defined by Green et al. (1998) as appeals which could influence guilt (i.e., they excluded appeals of, for example, sentence).
to confusion surrounding the application of the exclusionary rule. Appellate courts may only hear cases in which there has been an error of law or an overriding mistake of fact – courts of appeal do not re-try cases but rather focus on specific issues raised by the appellants regarding the law or its application. Therefore, because this area of law has produced somewhat confusing, and at times conflicting jurisprudence, it is possible that results produced in this model may simply be a result of confusion rather than deference or lack thereof.

The results of the current study reveal that the OCA overturned the decision of the lower court 43.2% (51/117) of s. 24(2) cases. This could indicate that there is more disagreement among judges regarding s. 24(2) issues when compared with all issues brought on appeal, and could also be a reflection of confusion surrounding the application of the rule.

Table 10: Cross-tabulation of “Treatment of Lower Court Decision” by “Outcome”

<table>
<thead>
<tr>
<th>Treatment of Lower Court Decision</th>
<th>Outcome</th>
<th>Pearson Chi-Square p-value</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Excluded</td>
<td>Admitted</td>
</tr>
<tr>
<td>Overturned</td>
<td>26 (51.0%)</td>
<td>25 (49.0%)</td>
</tr>
<tr>
<td>Upheld</td>
<td>12 (18.2%)</td>
<td>54 (81.8%)</td>
</tr>
</tbody>
</table>

*p < 0.05; **p < 0.01; ***p < 0.001

The cross-tabulation of treatment of lower court decision and outcome demonstrated a highly significant relationship between the two variables. Table 10 demonstrates that in 51.0% of the cases where the lower court decision was overturned, the evidence in question was excluded by the OCA. Conversely, in only 18.2% of cases where the lower court decision was upheld was the evidence
excluded. This can be interpreted as evidence that the OCA is more likely to uphold
a decision to admit evidence. The correlation between the outcome of a case and the
treatment of the lower court decision is highly significant (p=<.001). This might
mean that the OCA exhibits a downward pressure on lower courts to admit evidence.

To examine this relationship further, the treatment of the lower court
decision was regressed individually against outcome. Although this analysis
does not control for other variables it is useful in demonstrating directionality
and probabilities. Table 11 demonstrates a direct positive correlation between
outcome (whether evidence was admitted or excluded) and the treatment of the
lower court decision. The odds ratio for the treatment of the lower court decision
variable was 4.68, and can be interpreted as the odds for evidence being
admitted as approximately 4.68 times higher when the treatment of the lower
court decision is upheld compared to when the treatment of the lower court
decision is overturned. In other words, the OCA is approximately 5 times more
likely to uphold a lower court decision to admit evidence (when compared to a
decision to exclude evidence). This finding is highly significant at p=<.001.

<table>
<thead>
<tr>
<th>Step 1a</th>
<th>Treatment_of_lower_crt_decision</th>
<th>B</th>
<th>S.E.</th>
<th>Wald</th>
<th>df</th>
<th>Sig.</th>
<th>Exp(B)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Constant</td>
<td>-.039</td>
<td>.280</td>
<td>.020</td>
<td>1</td>
<td>.889</td>
<td>.962</td>
</tr>
</tbody>
</table>

*Step 1a Treatment of lower Court Decision was coded as: 0=Overturned 1=Upheld; Outcome was coded as: 0=Excluded 1=Admitted.

This analysis perhaps indicates: a) that a proper application of the rule
generally favours admission, and b) that the lower courts support a more broad
interpretation of rights or a more robust exclusionary rule than the OCA. Such a
finding could potentially have significant practical implications. For example, it
could be that, moving forward, lower court judges concerned about having their
rulings reversed upon appeal may be more likely to err on the side of admission
in borderline cases. The suggestion that lower courts may interpret the
exclusionary rule more broadly, if true, would be consistent with work by
Madden (2010), who examined the first 100 cases decided under Grant. Madden
(2010) found that provincial appellate courts are the courts least likely to
exclude improperly obtained evidence (relative to trial courts, summary
conviction appeal courts and the Supreme Court).

From this analysis it can be inferred that the Crown is substantially more
likely to be successful upon appeal than the accused in s. 24(2) cases. This fits
with findings of Greene et al. (1998) which demonstrated that accused persons
are less likely to be successful on appeal compared to the Crown. In fact, a
comparison across provinces revealed that accused persons were least likely to
be successful upon appeal in Ontario (second only to New Brunswick) with
accused persons having won only 24% of appeals and the Crown having won
77% of appeals (Greene et al., 1998, p. 178). These findings do not necessarily
imply a bias in favour of the Crown. As Greene et al. (1998) note, this is likely
explained (at least to a large degree) by the fact that the Crown is more selective
in the cases it chooses to appeal due to time and resource constraints. In the
same vein, the selectiveness of the Crown could aid in explaining the treatment
of lower court decisions. As Greene et al. wonder, perhaps if the Crown is more
likely to win (because they choose more meritorious cases to appeal), judges
could come to view Crown appeals as more meritorious, creating somewhat of a bias. Yet, the selectiveness of the Crown in deciding which cases to appeal is unlikely to explain the totality of the difference in success rates since, as mentioned before, the appellant - whether he be the accused or the Crown - is substantially more likely to lose than win an appeal.

Conclusions: Model 3

Overall, this model has demonstrated that the OCA is generally deferential to lower courts as evidenced by the fact that appellants are significantly more likely to lose rather than win an appeal. One of the most interesting findings reveals that the OCA was approximately five times more likely to uphold a lower court’s decision to admit evidence compared to a decision to exclude evidence.

Model 4: Measuring Influences On Judicial Decision-Making

| Table 12: Cross-tabulation of “Gender” and “Political Affiliation” by “Vote” |
|-----------------------------|---------------|---------------|----------------|
|                             | Exclude       | Admit         | Pearson Chi-Square p-value |
| Individual Characteristics  |               |               |                            |
| Gender                      |               |               |                            |
| Male                        | 33 (31.7%)    | 70 (67.3%)    | .632                       |
| Female                      | 5 (45.5%)     | 6 (54.5%)     |                            |
| Politics                    |               |               |                            |
| Liberal                     | 6 (33.3%)     | 12 (66.7%)    | .901                       |
| Conservative                | 8 (30.8%)     | 18 (69.2%)    | .769                       |
| Non-Political               | 6 (50.0%)     | 6 (50.0%)     | .459                       |

*p < 0.05; **p < 0.01; ***p < .001
Gender and Political Affiliation

This model is concerned with understanding the impact (if any) of gender and political affiliation on the voting preference of judges. As demonstrated in Table 12, male judges voted to admit evidence slightly more frequently than female judges (67.3% and 54.5% respectively)\textsuperscript{22}. However, the vast majority of judges participating in s. 24(2) decisions are male - only 9.6% of judges participating in s. 24(2) decisions were female which makes comparison difficult.

With regard to political affiliation, Conservative judges voted to admit evidence only slightly more frequently than Liberal judges (see Table 12) with both Conservative and Liberal judges placing more votes to admit rather than exclude evidence. Those judges with no political affiliation voted to exclude evidence in 50% of the cases – slightly less often than their politically affiliated colleagues. It is perhaps possible to surmise that simply being affiliated with any political party makes one more likely to vote to admit improperly obtained evidence to appease the electorate but this is best left to future research. Overall, the results of this model indicate that neither gender nor political affiliation has a significant effect on the voting preferences of OCA judges with respect to s. 24(2) motions.

These results fail to provide support for overly attitudinal approaches to judicial decision-making (at least in s. 24(2) cases) which emphasize the importance of such individual factors as a proxy for judicial preference.

\textsuperscript{22} Note: In the cross-tabulation of variables related to individual judicial characteristics some judges are counted multiple times as they appeared on multiple panels. Furthermore, it was not possible to determine the political affiliation of many of the OCA judges.
However, because the lack of data regarding the political affiliation of many of the OCA judges, the results of this model must be taken as more suggestive than substantive. Because an extensive examination of the political affiliation is not possible with this data set, a secondary project under this model sought to further investigate the merits of the attitudinal approach to understanding judicial decision making by exploring the overturning of the Stillman precedent in Grant which has sometimes been partly attributed to Justice McLachlin’s leadership of the Court.

*Stillman “Majority Decay”*

Chapter One described how we have come full-circle in terms of the test for determining the admissibility of improperly obtained evidence. In Grant, the Court effectively overturned its much criticized ruling handed down over a decade earlier in Stillman by doing away with the quasi-automatic categorical approach and deciding that trial fairness alone should not be considered determinative. Because the Stillman ruling, in which Justice McLachlin (as she then was) dissented, was not overturned until McLachlin became Chief Justice it was hypothesized that this delay may have been a result of bench personnel, with the possibility that ideological or attitudinal preferences were playing a part despite the statistical insignificance of political affiliation. Were this to be true it would provide support for a strategic (or perhaps attitudinal) approach to understanding judicial decision-making. Thus, an additional project under this analytical model was to explain why the Supreme Court waited twelve years to overturn their widely criticized quasi-automatic categorical approach mandated
by Stillman. To investigate, this portion of the study examined the voting coalitions in the 1998 Stillman decision and tracked the membership of the Court in each of the following 12 years, until the Grant decision in 2009.

The results of this analysis reveal what can be described as a slow “majority decay”. That is, between 1997 and 2009 the judges in the Stillman majority retired from the Court and were replaced by judges who might have dissented in Stillman. For judges who joined the Court after Stillman, their votes in Stillman are projected based upon their votes in Grant; thus, it is assumed that judges who joined the majority in Grant would have dissented in Stillman. To explain further, Table 13 shows the voting coalitions in Stillman (1997) and Grant (2009). The year in brackets following the name of each justice refers to the year they left the court (for those participating in the Stillman decision) or the year they joined the court (for those participating in the Grant decision).

<table>
<thead>
<tr>
<th>Table 13: Voting Coalitions in Stillman and Grant</th>
</tr>
</thead>
<tbody>
<tr>
<td>Majority</td>
</tr>
<tr>
<td>Major (2005)</td>
</tr>
</tbody>
</table>

Note: The year in brackets following the name of each justice refers to the year they left the court (for those participating in Stillman) or the year they joined the court (for those participating in Grant).

23 It is also possible that the new judges were not always opposed to the categorical Stillman approach but were influenced by the vast amounts of commentary in law journals critical of Stillman, and thus decided a reformulation of the rule was in order. It is also conceivable that Stillman would have been overturned even if several of the former justices remained on the Court; perhaps judges in the Stillman majority could have been persuaded by the critical commentary and other members of the Court to join the majority in Grant. Nevertheless, the Court had several opportunities to overturn Stillman before Grant and yet they did not which can perhaps be interpreted as support for the significance of Court membership.
Table 14 presents a look at the Court’s membership in each year from 1997 to 2009 and demonstrates why it took the Court 12 years to overturn the Stillman decision. The two categories (“majority” and “minority”) refer to the presumed coalitions if Stillman were to have been decided by that year’s court (once again, the presumed placement of a justice as participating in the majority or minority was based on their decision in either Stillman or Grant). The bracketed numbers distinguish between actual members of the Stillman coalition and presumed members, respectively (based on their vote in Grant).

<table>
<thead>
<tr>
<th>Year</th>
<th>Majority</th>
<th>Minority</th>
</tr>
</thead>
<tbody>
<tr>
<td>1997</td>
<td>6</td>
<td>3</td>
</tr>
<tr>
<td>1998</td>
<td>5 (4+1)</td>
<td>3</td>
</tr>
<tr>
<td>1999</td>
<td>4 (3+1)</td>
<td>3</td>
</tr>
<tr>
<td>2000</td>
<td>3 (2+1)</td>
<td>4</td>
</tr>
<tr>
<td>2001</td>
<td>3 (2+1)</td>
<td>4</td>
</tr>
<tr>
<td>2002</td>
<td>4 (2+2)</td>
<td>3</td>
</tr>
<tr>
<td>2003</td>
<td>4 (2+2)</td>
<td>3</td>
</tr>
<tr>
<td>2004</td>
<td>3 (1+2)</td>
<td>5</td>
</tr>
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<td>2005</td>
<td>+2</td>
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<td>2007</td>
<td>+2</td>
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</tr>
<tr>
<td>2008</td>
<td>+2</td>
<td>5</td>
</tr>
<tr>
<td>2009</td>
<td>+2</td>
<td>5</td>
</tr>
</tbody>
</table>
As the above table indicates, it is not until 2004 or 2005 that the Court’s composition is such that a strong majority of the Court would have sided with the minority in *Stillman*. The delay from 2005 to the Court’s eventual ruling in *Grant* in 2009 might be explained by the time it takes for such a jurisprudential shift to occur. In fact, it was in 2005 that the Court began to take a step back from *Stillman* with their ruling in *Orbanski* (2005) by reminding jurists that, despite popular opinion, the exclusionary rule was not automatic (see *Orbanski*, para. 93) and was heralded by many as retrenchment of the exclusionary rule or a step back from *Stillman* (see Stuart, 2007). Subsequently, the OCA in *Grant* (2006) further backed away from the automatic *Stillman* approach; the Supreme Court then heard *Grant*’s appeal in April of 2008. It took over a year for the Court to hand down its decision in *Grant*.

The results of this portion of the study demonstrate a possible correlation between the membership of the Court and the divergent precedents. Such a connection could be interpreted as support for a strategic or attitudinal understanding of judicial decision-making. One must be mindful, however, that these personnel changes are not necessarily exclusive of doctrinal reasons (they do not, for example, tell us whether it is simply Justice McLachlin’s *preference* to overturn *Stillman* or her sincere view of the correct doctrinal result, which she may have continued to hold regardless of the views of her colleagues). In addition, one must also recall that the Court was extremely divided in *Stillman* and that *Stillman* was aberrant in terms of its facts. And, while it stands to reason that *Stillman* would not be overturned before most of those who voted in its majority left the Court, the ‘majority decay’ suggests that doctrinal claims must accommodate the
notion that non-legal factors (e.g., personnel turnover) account for some of the jurisprudential developments.

*Group Dynamics:*

Although the analysis of the data in this sample seemed to indicate that judicial characteristics did not influence judges’ decisions in s. 24(2) cases, there remains something to be said about the effect of group dynamics. Approximately 93% of the s. 24(2) decisions delivered by the OCA were unanimous. This is consistent with the study by Greene, et al. (1998), which noted that dissents in decisions of provincial appeal courts have become increasingly rare. Greene et al. (1998) found that from 1972-1992 an average of only 9.08% of provincial appeal cases involved dissents. Furthermore, Ostberg and Wetstein, (2007) have shown that from 1984-2003, only 24% of all cases decided by the Supreme Court of Canada were non-unanimous.

Interestingly, the cross-tabulation of “decision type” (either unanimous or split) with “outcome” reveals that the decision of the court was more likely to be unanimous when the ruling was in favour of admission (see Table 15). This is consistent with the results above which suggest that, generally, judges are more likely to vote to admit rather exclude evidence.

<table>
<thead>
<tr>
<th>Table 15: Cross-tabulation of “Decision Type” by “Outcome”</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Vote</strong></td>
</tr>
<tr>
<td>---</td>
</tr>
<tr>
<td><strong>Decision Type</strong></td>
</tr>
<tr>
<td>Unanimous</td>
</tr>
<tr>
<td>Split</td>
</tr>
</tbody>
</table>

*p < 0.05; **p < 0.01; ***p < .001*
Conclusions: Model 4

The examination of individual characteristics (i.e., gender and political affiliation) demonstrated similar voting tendencies among judges of various political affiliations and among the genders. The results failed to provide support for an attitudinal explanation for judicial decision making at the OCA, but due to a lack of information on the political affiliation of many of the judges and the overrepresentation of male judges in the sample these results alone can not be conclusive. However, the fact that the vast majority (i.e., 93.2% ) of OCA rulings on s. 24(2) were unanimous means that judges of diverse ideological inclinations most often decide in the same way. In light of the contentious nature of the exclusionary rule and the confusion surrounding its application one would think that if judicial decision-making were largely attitudinal there would be a significantly higher number of split decisions in s. 24(2) cases. The fact that 93.2% of OCA decisions in s. 24(2) cases were unanimous further supports the notion that judicial decision-making is too dynamic a process to be explained to a significant degree by the attitudinal model.

Conclusion

The results of this study indicate that, overall, the OCA admits more evidence than it excludes. Furthermore, the data evidences a dramatic increase in the admission of improperly obtained conscriptive evidence beginning with the OCA’s decision in Grant (2006) and following the Supreme Court’s 2009 decision on the appeal. Reluctance on the part of the OCA to exclude improperly obtained evidence is further demonstrated by the fact that the court was approximately five times more likely to
uphold a trial court’s decision to admit evidence (compared to a lower court’s
decision to exclude).

Some of the most significant findings of this study reveal “pocket trends” in s.
24(2) jurisprudence based on Supreme Court precedent which lends support to an
understanding of judicial decision-making which is rooted in doctrine and/or
constrained by precedent. Additionally, although the study of individual judicial
characteristics has failed to provide support for an attitudinal understanding of
judicial decision-making, the examination of the membership of the Court from
Stillman to Grant evidences the way in which Court membership can impact
decisions.

The implications of the results of this study will be addressed in greater detail
in the following chapter.
CHAPTER SIX:
DISCUSSION

The application of the exclusionary rule has a very real effect on the lives of all Canadians. Its application not only affects those accused of crimes, it affects all citizens by shaping the scope of our civil liberties and the limits of police power. In a more abstract sense, the application of the rule has a profound effect on the intangible measure that is the repute of the justice system.

This study has examined the jurisprudential development of the exclusionary rule from the entrenchment of the Charter to present day to reveal and highlight trends in the admission of improperly obtained evidence in an effort to shed light upon the factors which influence judicial decision-making in this area of discrete criminal law.

The results of this study have furthered a number of theoretical debates and highlighted the practical effect of judicial doctrine. From a theoretical perspective, the trends in admission over time, which highlight the significance of seminal precedents, tend to support a doctrinal or pragmatic view of judicial decision-making which is both consequentialist and constrained - as opposed to perspectives which are overly “attitudinalist”. From a practical perspective, the findings of this study, which suggest that the OCA is reluctant to exclude improperly obtained evidence, may, as proponents of a broad interpretation of the rule suggest, diminish incentive for police to comply with suspects’ Charter rights. Furthermore, this could potentially be construed as tacit judicial support for unconstitutional measures.
This chapter will address some of the most significant findings of the current study and their implications. Additionally, this chapter will make suggestions for future research in this field of study.

**Reconciling Posner’s Pragmatism and Dworkin’s Doctrinal approach: “Built-In Pragmatism”**

As many scholars have observed (see in particular Knopff & Morton, 1992), the advent of the *Charter* has bestowed increased power upon the courts and made them an important part of the political process. Due to the expanded role of the courts it has become ever more important to understand how justices reach their decisions and decide what are in many cases issues of public policy.

As noted in Chapter Three, there are several schools of thought which attempt to explain judicial decision-making. A doctrinal approach emphasizes the importance of doctrine in guiding judicial decision-making while an attitudinal approach suggests that judicial decision-making is better explained by the individual or ideological characteristics/positions of judges. Finally, a pragmatic approach combines aspects of both aforementioned explanatory models and emphasizes factors which constrain and influence judicial decision-making and is characterized by a consequentialist approach. The results of the current study highlight the importance of doctrine in guiding judicial decision-making. This is most clearly demonstrated by the examination of the OCA’s treatment of conscriptive evidence over time, which revealed four distinct time periods based on key developments in the jurisprudence. Those who contend that judicial decision-making is more attitudinal in nature may ask how one could assert the importance of doctrine in judicial decision-making when the test governing admission has been altered three times over the last three decades.
In response, it must be noted that doctrine is not dogmatism and thus evolves over time as a result of judicial pragmatism. In fact, the exclusionary rule (i.e., the doctrine) was drafted in such a way as to encourage the judiciary to be somewhat pragmatic in their decision-making. The Court has gone to great lengths to adhere to the intent and purpose of the doctrine, which in the case of the exclusionary rule is inherently pragmatic. The Supreme Court’s decision in *Grant* can perhaps be characterized as a pragmatic response to the vast amount of criticism levelled against *Stillman* in the law reviews which were rooted in doctrinal concerns. Additionally, it could be that courts (both the OCA and the Supreme Court) were responsive to public sentiment, as indicated by the greater success of the ‘law and order’ Conservative party beginning around 2004, in an effort to maintain institutional legitimacy. The trends in admission over time that point to the significance of precedent, support a pragmatic view of judicial decision-making that is both consequentialist (i.e., concerned with the impact of decisions) and constrained (by the purpose of the remedial provision). Moreover, the significance of the time period finding is that the existence of key precedents, which have a demonstrable effect on admission/exclusion rates, supports the view that jurisprudence provides some restraint on naked judicial preference. Absent other factors, judges adhere to the prevailing test in each era, something that would not be predicted by non-doctrinal models.

Of course, no single perspective can fully explain the complex and dynamic process of judicial decision-making; however, some models have more explanatory value than others. It was suggested in Chapter Three that the
attitudinal model was an overly simplistic account of judicial behaviour. Although the current study was unable to adequately explore individual characteristics in such a way as to convincingly disprove attitudinal claims, the findings lend little support to such a perspective. Furthermore, the fact that the vast majority of OCA cases, heard by various combinations of OCA judges, were decided unanimously suggests that, at best, attitudinal factors play a minimal role in judicial decision-making. That said, it has been noted that the higher the level of the court the more discretion is given to judges. When the membership of the Supreme Court from the time of *Stillman* to *Grant* was examined the results suggested that Court membership did contribute to the delay in overturning the Court’s highly criticized decision in the former case. This could potentially be interpreted as support for an attitudinal or strategic model of understanding judicial decision-making at the High Court level. However, because the Court was so divided in *Stillman* and that case was clearly aberrant it would be dangerous to draw too much from these findings alone. As Sutton (2008) notes, although it is perhaps fair to wonder what may influence judges’ decision making in the most complex and difficult cases, most cases are not “hard” cases. Sutton (2008) implies that to make sweeping statements about the nature of judicial decision making based on aberrant cases not only belies the reality of “day-to-day” judging but endangers the repute of the justice system. The findings of the current study, which examine the “day-to-day” judging in s. 24(2) cases at the OCA, fail to evidence attitudinal decision-making.

At this point it seems reasonable to dismiss the attitudinal model as an over-simplified approach, the value of which as an explanatory model is
dependant on a characterization of judicial decision-making which does not generally hold at the Canadian provincial appellate level. This is not to say that judges never make decisions based on ideology; rather, this is to say that the complex and dynamic process of judicial decision-making cannot be reduced to ideology alone. Perhaps the attitudinal model is best viewed as a radical approach which is useful in a limited number of aberrant cases.

Although the strategic approach provides a more robust model than its predecessor, such an understanding is also encompassed in a pragmatic understanding of judicial decision-making. Essentially, in the search for the best explanatory model for understanding judicial decision-making one is left with the doctrinal and pragmatic models, which are perhaps best understood as ideal types. It would appear that none of the models hold absolutely true in the real world. Undoubtedly, some judges have made and continue to make decisions based in large part on ideology and personal career goals; however, at the same time the majority (if not all) judges hold respect for the law and the institution which they represent and are additionally both consequentialist and constrained in their decision-making by institutional factors. The variance in the explanatory factors relating to judicial decision-making in any given case is explained not only by the variation between the individuals sitting on the bench but also by factors relating to the specific case. That is, judges do not employ the same type of reasoning for every case. As Posner (2008, p. 231) notes:

… judges of either inclination [legalists or pragmatists] encounter cases in which neither set of techniques work – the legalist techniques run out but the consequences of the decisions are unknown; or perhaps a strong moral or emotional reaction… overrides both a legalistic response and a concern with consequences.
To suggest that judges make decisions based on policy preference alone is both dangerous and misleading, while suggesting that judges always (or should always) decide cases on doctrine is almost equally deceptive.

**Coming Full-Circle**

The results of the current study support the view that we have now come full-circle in terms of the test for determining the admissibility of improperly obtained evidence as well as the rates of admission for conscriptive evidence. Ten years after the Supreme Court first elucidated the proper test for exclusion in *Collins*, the Court revisited the s. 24(2) inquiry in *Stillman* by elaborating on the proper approach to assessing factors relating to trial fairness. In *Stillman*, the Court created an almost automatic exclusionary rule in deciding that non-discoverable conscriptive evidence would almost always affect the fairness of the trial and, as such, should generally be excluded without consideration of the other Collin’s factors. In short, the flexibility of the Court’s *Collins* test was replaced by the quasi-automatic *Stillman* test which perverted the test s. 24(2) analysis for over a decade. Twelve years after *Stillman*, the Court in *Grant* effectively overturned their earlier decision by doing away with the quasi-automatic rule for non-discoverable conscriptive evidence and ruling that trial fairness should not be considered determinative in the s. 24(2) inquiry. The Supreme Court’s recent decision in *Grant* has now reintroduced flexibility and balance in the application of the exclusionary rule by creating a *Collins*-like approach for determining admissibility thus bringing us full circle.

While old debates and new developments deal largely with the treatment of conscriptive evidence, the argument that we have now come full-circle goes beyond
the differential treatment of conscriptive evidence. That is, it would be an
oversimplification of the issues to attribute this phenomenon to the differential
treatment of conscriptive evidence alone. Another significant doctrinal development
regards the re-statement of the exclusionary rule social remedy rather and an
individual remedy. Chapter One discussed how, in Collins, the Court essentially
insulated the s. 24(2) inquiry from the will of the public by referring to the
“reasonable man”. The Court defined this “reasonable man’s” views as the views of
the public when the public was being ‘reasonable’; thus, the “reasonable man” test
would have been better characterized as the “reasonable judge” test. As Mahoney
(1999) points out, the wording of s. 24(2) does not suggest that parliament intended
the application of this remedial provision be shielded from the tyranny of the masses;
but rather that the repute of the administration was to be viewed in light of the
sentiment of society in general. This intent is further evidenced in the process by
which s. 24(2) was drafted into the Charter as discussed in Chapter One. Thus, in this
light, the Court in Collins conflated that which was intended to be a social remedy
with an individual remedy. Subsequently, under Stillman, the Court revoked the
discretion of both the “reasonable man” and “reasonable judge” by creating a quasi-
automatic rule which characterized trial fairness as a determinative factor rather than
a mitigating factor when assessing admissibility. In this way the distinction between

24 When speaking on the issue of detention in Grant (2009) the Court reaffirms that constitutional
guarantees should be given purposive and generous interpretation. Yet, quoting Peter Hogg (2007, pp.
36-30 and 36-41) the Court holds “the purpose of a right must always be the dominant concern in its
interpretation; generosity of interpretation is subordinate to and constrained by that purpose” (Grant,
para. 17). Additionally, the Court notes, “… an overly generous approach risks expanding its
protection beyond its intended purpose” (Grant, para. 17).
the exclusionary rule as a social remedy as opposed to an individual remedy was further conflated.

The Supreme Court in *Grant* has reformulated the test for exclusion and gone to great lengths to provide comprehensive guidance on the application of the exclusionary rule. The purposive approach adopted by the Court cuts through many misguided assumptions and confused jurisprudence to remind jurists of the intent of the s. 24(2) provision and to facilitate the consideration of “all the circumstances” as required by the *Charter*. Perhaps most importantly, the third set of factors to be considered in a s. 24(2) analysis requires courts to consider the interest of the public in deciding the case on its merits. By restating the rule as a social remedy – as opposed to an individual remedy – the Court has formulated a test which speaks to the intent of the Framers in drafting s. 24(2) of the *Charter*.

In this light, perhaps we have circled back even further than *Collins* to an approach more akin to pre-*Charter* days. The results presented in Chapter Five indicate that we are seeing an even greater proportion of evidence admitted (at least at the OCA) under the current *Grant* test than was evidenced under *Collins*. This is likely due to the third prong of the *Grant* test which, again, requires consideration of the public’s interest in having the case decided on its merits. In the eyes of the public the repute of the justice system will generally be best served by admitting reliable evidence. Justice Zubar writing in *Duguay* (1985) (as cited in Mahoney (1999, p. 450)) noted that in pre-*Charter* days Canadians did not lament the routine admission of improperly obtained evidence. Thus, this third prong would almost always seem to mitigate in favour of admission. In this way, the current *Grant* test is more akin to the
Court’s pre-Charter approach to improperly obtained evidence as demonstrated in *Wray* and *Hogan* which emphasized the importance of reliability and encouraged consideration of the effect of exclusion of the repute on the administration of justice\textsuperscript{25}.

Despite these results, it would be incorrect to characterize *Grant* as beginning a revolution in terms of the outcome of s. 24(2) analyses. Because the Supreme Court and lower courts have been challenging *Stillman* for some time, in the wake of *Grant*, an increase in admission is perhaps better seen as a continuation of a pre-existing trend toward admission rather than a revolution. Indeed, the results of the present study indicated an increase in the admission of conscriptive evidence, as well as in increase in admission rates overall, following the OCA’s 2006 ruling in *Grant* approximately five years ago. If one accepts that *Grant* is not a “new” development, suggestions that the Court’s decisions will, for example, result in police officers demonstrating “less concern about the constitutional legality of their behaviour knowing that the Supreme Court of Canada has essentially endorsed a policy of ‘the ends justify the means’” (Prutschi, 2009) seem exaggerated.

In fact, there are those who interpret *Grant* as strengthening the exclusionary as opposed to narrowing its use (as this study would suggest). Some interpret the Court’s ruling in *Grant* as a sort of a one time “free-pass”. Justice McLachlin, writing for the majority, states that conduct similar to that of the officers in *Grant* will be, “less justifiable moving forward” (*Grant*, para. 133); that is, the court admitted evidence this time due to ambiguity and confusion but will not in the future. The

\textsuperscript{25} In *Wray* the Court held that “evidence which is relevant is admissible no matter how it is obtained” (*R. v. Wray* [1970] 4 C.C.C. 1, p. 673)
Court’s decision in *Harrison* (released along with *Grant* and decided under the *Grant* framework) which mandated the exclusion of 35 kilograms of cocaine which was obtained through relatively minor police misconduct and an arguably minor infringement of the accused’s rights would seem to support this notion. Additionally, Stuart (2010) suggests that a trend at the Ontario Court of Justice points to an increased willingness to exclude evidence post-*Grant*.

Nevertheless, considering the results of the current study it would seem that, as anticipated, courts (at least the OCA) are increasingly admitting evidence (conscriptive evidence in particular) post-*Grant*. These findings are consistent with general consensus and a smaller scale study conducted by Radcliffe (2010) which examined the application of the *Grant* test in the first 100 cases following the Supreme Court’s ruling. *Grant* might therefore be an instance where the Supreme Court has effectively used pro-rights rhetoric while simultaneously diminishing the strength of the rule. In this way the Court has been able to appease those on both sides of the debate – a formidable task.

**Projects for Further Study**

The current study has raised a number of questions that would benefit from further study. First, it would be valuable to expand the sample of the current study to include cases from other provincial appellate courts. Expanding the data set would allow for the use of regression analysis and would permit a comparative component in the analysis. We are still in the early days following *Grant*; while most have suggested *Grant* will lead to an increase in the admission of improperly obtained evidence others have interpreted this decision (along with its companion cases) as
guiding courts to be more wary of admitting evidence in cases following this clarification. This study has evidenced a clear trend toward the admission of improperly obtained evidence at the OCA - a trend which has increased dramatically following the Supreme Court’s decision in *Grant*. It would be particularly interesting to observe whether other provincial appellate courts have responded similarly. It would also be interesting to undertake a comparative examination of recent Canadian and American cases on the exclusionary rule.

Additionally, it would be valuable to empirically examine the application of the rule at the trial court level. An examination of decisions at the lower court level would provide an indication of the impact of higher court precedent. In the same vein, it would be valuable to study the frequency of s. 24(2) motions at the lower court level over time to assess the impact of recent legal rights jurisprudence. Several recent decision of the Supreme Court would seem to limit the applicability of the exclusionary rule by narrowly defining rights and raising the bar for police misconduct. For example, in *R. v. Singh*, [2007] 3 S.C.R. 405 the Court held that those in police custody who have asserted their s. 7 rights to silence, do not consequently have the right to be free from questioning - that is, there is no burden on the police to stop questioning, although the suspect need not reply. More recently, in *R. v. Sinclair*, [2010] 2 S.C.R. 310, the Court ruled that suspects in police custody do not have the right to have a lawyer present thoughtout the entire interrogation process. Thus, it may be that the number of s. 24(2) applications will decrease following the aforementioned rulings which limit rights as lawyers may view their chances of success on such motions less favourably.
Finally, an interesting project for future research would be to observe the impact of exclusion on the overall outcome of the case (i.e., conviction or acquittal). Perhaps courts are more likely to exclude reliable evidence of guilt under s. 24(2) if they believe that it will not impact the overall outcome of the case in a new trial; that is, if they believe that the accused will still be convicted of their crimes based on other properly obtained evidence. For example, in *R. v. McIntosh*, [1999] 128 O.A.C. 69 the OCA ruled to exclude evidence of a confession to first degree murder. This decision to exclude stood out as questionable based on the facts of the case; however, while the court excluded the confession at issue, the accused’s original confession was still held admissible in the new trial which was ordered by the court. Additionally, in *Stillman*, although much of the evidence was excluded by the Court, DNA from the tissue was still admitted. In both cases, despite the decision to exclude part of the evidence, the accused was still likely to be convicted in a new trial. In fact, both McIntosh and Stillman were convicted of their crimes based on allowable evidence.
CONCLUSION

Balancing the rights of the accused against the interests of society in convicting the guilty is exceedingly difficult to achieve in theory and certainly in practice. While the rhetoric of the Supreme Court of Canada often seems to favour upholding the rights of the accused over police powers of search or interrogation, this pro-rights language often belies the practical reality of the precedent their decisions set.

Courts must strive to achieve balance between protecting the rights of the accused and serving the interests of the public by pursuing truth and prosecuting the guilty. On one hand, the Court seems to have learned from its past mistakes: the precedent set in *Collins* has demonstrated the problem with insulating the s. 24(2) inquiry, which was intended as a social remedy, from the will of the public. In turn, *Stillman* evidences the key problem associated with overly formulated tests; while strict tests have the benefit of predictability they can adversely affect justice by removing the judicial discretion necessary to decide each case on its own merits. Furthermore, strict test could potentially lead judges to narrowly define rights to subvert such rules thus undermining the rights they were designed to protect.

The Court in *Grant* has finally achieved a fair and balanced test for admissibility; yet, other decisions of the Court which have limited the legal rights of the accused (e.g., *Singh* and *Sinclair*) may have rendered this new test moot in many circumstances. Where certain police tactics may have once triggered a s. 24(2) application, they may no longer. If the threshold for finding a rights violation is set too high then the exclusionary rule will be rendered powerless except in cases of
egregious police misconduct. By sanctioning boarderline police tactics and limiting
the right to counsel the Court may be placing oversight of the police behaviour
beyond the perview of the courts. If the courts will not police the police, who will?

Viewed in light of the results of the current study which demonstrate
relatively low rates of exclusion at the OCA (especially following Grant), such new
developments paint a picture of modern Canadian courts as being reluctant to get in
the way of police work which produces reliable evidence through reasonable or
borderline investigative practices.
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*Chromiak v. The Queen [1980] 1 S.C.R. 471*
*Craig v. Boren, 429 U.S. 190 (1976)*
*Herring v. United States, 555 U.S. 1 (2009)*
*Hill v. Hamilton-Wentworth Regional Police Services Board, [2007] 3 S.C.R.129*
*Hogan v. R., [1975] 2 S.C.R. 574*
*Mapp v. Ohio, 367 U.S. 643 (1961)*
*Nix v. Williams, 467 U.S. 431 (1984)*
*R. v. Beaulieu, 2010 SCC 7*
*R. v. Blake, 2010 ONCA 1*
*R. v. Feeney, [1997] 2 S.C.R. 13*
*R v. Grant, [2006] 213 O.A.C. 127*
*R. v. Harrison, 2008 ONCA 85*
*R. v. Harrison, 2009 SCC 34*
*R. v. Hebert, [1990] 2 S.C.R. 151*
*R. v. L. B. 2007 ONCA 596*
*R. v. McIntosh, [1999] 128 O.A.C. 69*
*R. v. Mann, [2004] 3 S.C.R. 59*
*R. v. Morey [2003] 171 O.A.C. 36*
*R. v. Orbanski, [2005] 2 S.C.R. 3*
*R. v. Richfield, [2003] 175 O.C.A. 54*
*R. v. Shepherd, 2009 SCC 35*
*R. v. Suberu, 2009 SCC 33*
*R. v. Therens, [1985] 1 S.C.R. 613*
*United States v. Yousef [2003] 174 O.A.C. 286*
*Weeks v. United States, 232 U.S. 383 (1914)*
APPENDIX I:
LIST OF CASES IN SAMPLE (n=118)

R. v. Traicheff, 2010 ONCA 851
R. v. Du 2010, ONCA 703
R. v. Ramage, 2010 ONCA 488
R. v. Nguyen, 2010 ONCA 526
R. v. Davis-Harriot, 2010 ONCA 161
R. v. Blake, 2010 ONCA 1
R. v. Kyriakopoulos, 2009 ONCA 803
R v. Rosenfeld, 2009 ONCA 307
R. v. Hong, 2009 ONCA 238
R. v. Aselford, 2009 ONCA 28
R. v. Rajkumar, 2009 ONCA 47
R. v. Mihalkov, 2008 ONCA 849
R. v. Filli, 2008 ONCA 649
R. v. Khan, 2008 ONCA 496
R. v. Kemper, 2008 ONCA 341
R. v. Renshaw, 2008 ONCA 379
R. v. Smith, 2008 ONCA 127
R. v. Nguyen, 2008 ONCA 49
R. v. Wilding, 2007 ONCA 853
R. v. Li, 2007 ONCA 645
R. v. Harris, 2007 ONCA 574
R. v. Thomas, [2005] 201 O.C.A. 266
R. v. Calderon, 2004 CarswellOnt 3405
R. v. Brooks, 2003 CarswellOnt 3683
R. v. Sutherland, [2000] 139 O.A.C. 53
R. v. McIntosh, [1999] 128 O.A.C. 69
R. v. Monney, [1997] 105 O.A.C. 1
R. v. Calder, [1994] 74 O.A.C. 1
R. v. DaGloria, 1994, 74 O.A.C. 147
R. v. Wills, [1992] 52 O.A.C. 321
R. v. Ferguson, [1990] 41 O.A.C. 149
R. v. Ladouceur, [1987] 20 O.A.C. 1
List of “If, Then” Cases:

R. v. Dene, 2010 ONCA 796
R. v. Wade, 2010 ONCA 208
R. v. Wint, 2009 ONCA 52
R. v. Sterling, 2009 ONCA 65
R. v. Gundy, 2008 ONCA 284
R. v. B. (L.), 2007 ONCA 596
R. v. Lotozky, [2006] 212 O.A.C. 3
R. v. Burke, [2006] 212 O.A.C. 243,
R. v. Pabani, [1994], 70 O.A.C. 118
R. v. E. (G.A.), [1992], 77 C.C.C. (3d) 60
R. v. Babinski, [1991], 50 O.A.C. 341,
R. v. Colarusso, [1991], 44 O.A.C. 241
R. v. Tessier, [1990], 52 O.A.C. 126
R. v. Gimson, [1990], 37 O.A.C. 243
R. v. Collins, [1989], 32 O.A.C. 296,
R. v. J. (J.), 1988, 29 O.A.C. 104
R. v. Debot, [1986], 17 O.A.C. 141,
R. v. Benz, [1986], 14 O.A.C. 297
R. v. Simmons, [1984], 3 O.A.C. 1
APPENDIX II

Impaired Driving Cases:


“Other” cases within the “Bodily Sample” variable (i.e., “other” types of bodily samples):

<table>
<thead>
<tr>
<th>Case</th>
<th>Type of Evidence</th>
</tr>
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<tbody>
<tr>
<td><em>R. v. Ramage</em>, 2010 ONCA 488</td>
<td>Urine sample</td>
</tr>
</tbody>
</table>